SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2024 0117

SUKHVINDER SINGH — First Applicant

and

RUPINDER KAUR — Second Applicant

v

OZZIE HOMES BUILDING & CONSTRUCTION PTY LTD (ACN 130 154 906) — Respondent

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JUDGES:	McLEISH, LYONS JJA and NICHOLS AJA
WHERE HELD:	Melbourne
DATE OF HEARING:	13 October 2025
DATE OF JUDGMENT:	27 February 2026
MEDIUM NEUTRAL CITATION:	[2026] VSCA 25
JUDGMENT APPEALED FROM:	[2024] VCC 1337 (Judge Burchell)

CONTRACT – Major domestic building contract – Claim for progress payment – Contract containing divisible obligations of performance in respect of each construction stage – Relevance of defects to completion of intermediate construction stage – Whether lock-up stage complete – Plyboard barrier in place of door or temporary door – Lock-up stage not complete – Builder not entitled to progress payment – Neither party effectively rescinded contract – Mutual abandonment of contract – Builder failed to establish claim for quantum meruit – Appeal against dismissal of counterclaim partly allowed – Owners entitled to liquidated damages – Leave to appeal granted – Appeal allowed.

Domestic Building Contracts Act 1995, s 40; *Building Act 1993*, s 106.

Cardona v Brown (2012) 35 VR 538, considered; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, *Foran v Wright* (1989) 168 CLR 385, *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, applied.

PRACTICE AND PROCEDURE – Application to adduce further evidence – Leave to adduce further evidence denied but for two documents.

Supreme Court (General Civil Procedure) Rules 2025, r 64.13.

Carroll v Goff [2021] VSCA 267, *Foody v Horewood* [2007] VSCA 130, applied.

Counsel

Applicants:	Mr R Andrew KC with Mr BJ Murphy
Respondent:	Mr LP Wirth with Ms L Mills

Solicitors

Applicants:	Daniel Legal Group
Respondent:	Eastend Lawyers Pty Ltd

McLEISH JA
LYONS JA
NICHOLS AJA:

Introduction

1 On 12 January 2021 the applicants, Sukhvinder Singh and Rupinder Kaur ('owners') and the respondent, Ozzie Homes Building & Construction Pty Ltd ('builder') entered into a contract by which the builder agreed to construct a new dwelling at 41 Andaman Drive, Craigieburn ('contract'). The contract allowed the builder to claim, and required the owner to pay, progress payments upon completion of defined stages of the building works. On 1 May 2022, the builder issued an invoice for $169,750 for work said to represent completion of the lock-up stage. The owners refused to pay the invoice on the ground that those works were not complete. On 8 August 2022, the builder served a notice terminating the contract on the ground that the owners were in substantial breach, having failed to pay the invoice. The builder subsequently issued proceedings in the County Court seeking payment of the sum claimed in the lock-up stage invoice, or alternatively payment on a quantum meruit. The owners denied that lock-up stage was complete and said that the builder was not entitled to terminate the contract. By counterclaim the owners alleged that the builder had repudiated the contract, which they said they had accepted, and claimed delay and other damages.

2 The judge gave judgment for the builder and dismissed the counterclaim.

3 The owners seek leave to appeal on the grounds that the judge erred in:

(a) finding that the builder was entitled to payment for the lock-up stage (ground 1);

(b) finding that the builder validly terminated the contract (ground 2);

(c) finding in the alternative that the parties mutually abandoned the contract or agreed to its termination, or that the builder accepted the owners' offer to terminate the contract (ground 2A(a));

(d) finding that the builder was entitled to payment on a quantum meruit (ground 2A(b));

(e) failing to award damages to the owners (ground 3).

4 The owners applied under r 64.13 of the *Supreme Court (General Civil Procedure) Rules 2025* ('the Rules') for leave to adduce evidence on this application (and on appeal if leave were granted) which largely went to a new basis for finding that the builder was not entitled to payment on a quantum meruit.

5 For the reasons that follow, we would grant leave to appeal. We will allow the appeal on grounds 1, 2, 2A(b) and part of ground 3. We dismiss the appeal on ground 2A(a) and the rest of ground 3.

6 In summary, we have found that lock-up stage was not reached, because the front door and the garage roller door had not been installed and there were no temporary doors in their place. In our view, the judge was in error in finding that lock-up stage had nonetheless been reached because plyboard had been installed in place of doors, having the effect of lock-up stage and achieving the statutory purpose of providing for payment at lock-up stage. The judge was also in error in holding, in the alternative, that lock-up stage was reached because lock-up was 95 per cent complete, the remaining 5 per cent being a 'trivial' amount.

7 In the circumstances, the owners were entitled to refuse payment for the lock-up stage. However, we have found that neither party effectively rescinded the contract. Instead, it is to be inferred from their conduct that they abandoned it, without reaching any agreement in respect of payment for the work that had been done towards lock-up stage. The builder claimed in quantum meruit for that work. We have found that the builder was not prevented from completing the works and being paid under the contract by the actions of the owners, and the builder has failed to establish that it would be unconscionable for the owners to retain the benefit of the unfinished work without paying for it.

8 The owners claimed three categories of loss in their counterclaim. We have found that the judge erred in failing to award liquidated damages for delay from the scheduled date of completion (15 November 2021) until the time the contract was abandoned. However, the judge was right to reject the other two categories of damages claimed in the counterclaim.

9 We would dismiss the application under r 64.13 of the Rules, save in respect of two documents, being a letter from the builder to the owners dated 19 February 2021, and a letter from Emperial Homes Pty Ltd ('Emperial Homes') to the owners dated 21 February 2021.

Contractual terms

10 The contract was a major domestic building contract under the *Domestic Building Contracts Act 1995* ('Act') in the standard Victorian 'New Homes Contract' form.

11 Clause 12 of the contract required that the owners pay the builder the contract price of $485,000.

12 The contractual terms for progress payments adopted the relevant parts of s 40 of the Act. Section 40(2) of the Act provides that under a major domestic building contract to build all stages, a builder must not demand, recover or retain more than the

percentages of the contract price set out in that section at the completion of each of the nominated stages (base, frame, lock-up and fixing).[1]

13 'Progress payment' was defined in the contract as 'a payment that the builder may claim on the completion of a construction stage as detailed in Schedule 3'. Schedule 3 relevantly provided:

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;
'Lockup' 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);
'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.

[1] Under s 40(4) of the Act, contracting parties may agree that ss 40(2) and (3) do not apply, but the parties in this case did not do so.

TABLE

COLUMN 1 Type of Contract	COLUMN 2 Percentage of Contract Price	COLUMN 3 Stage
…	…	…
Contract to build all stages	10%	Base stage
	15%	Frame stage
	35%	Lock-up stage
	25%	Fixing stage

14 The definition of lock-up stage in sch 3 was as provided in s 40(1) of the Act.

15 The final construction stage was 'Completion' which was defined to mean that 'the building works to be carried out under the contract have been completed in accordance with the plans and specifications set out in the contract'. 'Plans' and 'specifications' were defined respectively as 'the drawings showing the layout and design details of the building works with dimensions and elevations, including engineer's design', and 'the contract document that shows the full detail of the building works and includes the details of the materials to be supplied'.

16 By cl 29, the builder was required to 'give the owner a written claim for each progress payment when each stage has been completed, as set out in Schedule 3'. Clause 30.0 provided:

> The owner must pay the amount of a progress payment set out in Schedule 3 within the number of days set out in Item 7 of Schedule 1 after both:
>
> - the stage has been completed; and
> - the owner has received a written claim for the progress payment.

17 Clause 35.0 provided that the builder 'may suspend the building works if the owner does not make a progress payment that is due within 7 days after it becomes due; or is in breach of this contract'. By cl 35.1, upon suspension the builder was required to give immediate written notice by registered post to the owner, the owner was required to remedy the breach within seven days after receiving the notice, and the builder was required to recommence works within 21 days after the owner remedied the breach and gave notice to the builder.

18 By cl 36, the builder was to notify the owner when the builder considered 'that the building works have reached Completion', after provision was made under cls 37–8 for a joint inspection, a list of 'known defects and incomplete work', for the builder to carry out any incomplete work and rectify any defects, for the payment of the final claim upon the builder giving notice that the required work had been done, and for the handover of possession of the land to the owner upon the owner paying the final claim.

19 By cl 39, the builder was required to 'fix any additional defects in the building works that the owner notifies in writing' within three months of taking possession.

20 The contract did not define the expression 'defects'.

21 The 'building period' allowed was 270 days (sch 1). Under cl 40 the owner was entitled to agreed damages in the sum of $250 per week if the building works had not reached Completion by the end of the building period.

22 Clause 42 concerned the builder's right to end the contract in circumstances where the owner was in 'substantial breach' of the contract. 'Substantial breach' was not defined, but by cl 42.1 it expressly included the owner failing to pay a progress payment as required by cl 30. Clauses 42.2 and 42.3 provided:

> [42.2] If the owner is in substantial breach of this contract the builder may give the owner a written notice to remedy the breach:
>
> - Specifying the substantial breach;
> - Requiring the substantial breach to be remedied within 10 days after the notice is received by the owner; and
> - Stating that if the substantial breach is not remedied as required, the builder intends to end the contract;
>
> [42.3] If the owner does not remedy the substantial breach stated in the notice to remedy the breach within 10 days of receiving that notice, the builder may end this contract by giving a further written notice to that effect.

23 Clause 42.4 provided that the 'builder is not entitled to end this contract under this clause when the builder is in substantial breach of this contract'. Clause 42.0 provided that 'If the owner breaches (including repudiates) this contract, nothing in this clause prejudices the right of the builder to recover damages or exercise any other right or remedy'.

24 Under cl 43, the owner had substantively identical rights to terminate the contract in circumstances where the builder was in substantial breach of the contract. 'Substantial breach' by the builder was defined to include the builder suspending the carrying out of the building works otherwise than in accordance with cl 35.

25 Clause 45 allowed that the builder may subcontract any part of the building works but such subcontracting did not relieve the builder from its obligations under the contract.

Chronology of events

26 The parties entered into the contract on 12 January 2021. The builder subcontracted the work to Emperial Homes Pty Ltd pursuant to an undocumented agreement.[2] Work commenced in early 2021.[3]

27 The owners paid invoices for the base and frame stages of construction, issued in April and July 2021 respectively.

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2 Reasons, [46].

3 The date of commencement was in dispute. It is considered below in the context of ground 3.

28 During March 2021, Sukhvinder Singh ('Sukhvinder') complained to the builder about lack of progress at the site.[4] By text message to Ikbal Singh, the builder's site supervisor ('Ikbal'), he said 'I am telling you that Emperial Homes is responsible for wasting my time and money (interest) and I will be charge from you'.[5] The judge found that 'the delay and loss of interest' was a growing concern for Sukhvinder.[6]

29 On 31 July 2021, Sukhvinder asked Ikbal by text how much longer until construction would be finished.

30 On 3 August 2021, the builder wrote to the owners relevantly stating:

> As per the contract Construction period to build this house is 270 days after obtaining the building permit which is ending on 11th November 2021.
>
> Due to Covid 19 there is a shortage of building materials supply specially framing timber that's why construction of this house won't complete by 11/11/2021.
>
> Ozzie Homes Building & Construction Pty Ltd confirms here that any extra time which will be taken to complete this house after 11/11/2021 the builder will compensate the owner by paying their bank loan interest which will arise as an extra expense due to delay in the construction for this house until the completion of this construction. The construction period will end by obtaining the Occupancy permit.

31 By 4 August 2021, Sukhvinder wrote to the builder that he was 'now under a defaulter's list according to the bank because of Ikbal'.[7]

32 On or about 22 September 2021, Ikbal told Sukhvinder by text that there was a 'COVID restriction of two weeks', after which they would start back, finish the brickwork and start the first-floor rendering. Sukhvinder replied that brickwork had started on 1 September and after 21 days 'not even half the work had been done'.[8]

33 On 14 December 2021, Sukhvinder sent a text message to Ozcan Oztas, director of Ozzie Homes ('Ozcan'), complaining that little work had been done on the project and asking 'pls advise me what to do'. Ozcan responded that the house would be finished in the first week of April 2022.

34 On 13 January 2022, the registered building surveyor for the project ('RBS') issued a building notice under s 106 of the *Building Act 1993* ('Building Act') on behalf of the Victorian Building Authority ('VBA') alleging a failure to comply with a direction to fix building work.

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4 Reasons, [161].
5 Reasons, [161].
6 Reasons, [162].
7 Reasons, [162].
8 Reasons, [163].

35 On 2 February 2022, the builder issued an invoice to the owners for lock-up stage with a covering email threatening to stop work if the invoice was not paid.[9]

36 On 6 February 2022, the owners lodged a Domestic Building Dispute Resolution Victoria ('DBDRV') complaint against the builder, Emperial Homes and Ikbal.[10]

37 On 7 February 2022, Ozcan sent a text message to the owners demanding payment of the lock-up invoice, saying 'Works will stop until payment is received and i will seek legal action'.

38 On 11 February 2022, Sukhvinder sent a text message to Ikbal asking him to 'please let me know you paying my compensation by cash or I need to send you my bank account number'. Sukhvinder's evidence was that he had discussed payment of compensation with Ikbal.[11] Ikbal responded saying relevantly that 'all compensation for the delay in construction work are calculated in the end and settled before final handover'.

39 On 15 February 2022, Ozcan sent a text message to Sukhvinder stating, 'Your house is now fully locked up and all inspection by surveyor is complete and passed', and threatening to issue a stop work notice if payment was not received. On 16 February 2022, Ikbal told Sukhvinder that lock-up was complete and asked him to process the invoice.[12]

40 On 21 February 2022, Sukhvinder sent a text message to Ikbal, complaining about incomplete and defective work, saying that the invoice would not be paid until five demands were met.[13] The first was a surveyor and owner's inspector report stating lock-up was fully passed and locked in with the original front door. The second was a complete selection sheet. The third was a declaration from Ikbal and Ozzie Homes that they agreed to provide him with all 'interior and exterior' items written in the selection sheet. The fourth was a construction finishing time of the first week of April 2022. The fifth was paying the owners' bank loan interest for the past three and a half months in the sum of $8,800 and 'a rental house' from the following month 'because I need to sell my house, bridging loan time is finished'. Sukhvinder's evidence about that message was that it was the owners' right to ask the builder for those things, they would not pay the invoice until the owners were paid what they were 'entitled to' and they would 'hold onto the money until Ikbal made things right by them'.[14]

41 On 23 February 2022, the owners' solicitors wrote to the builder's solicitors requesting a response to the 'delays and defective and unfinished work', to which no reply was received.[15]

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9 Reasons, [170].
10 Reasons, [171].
11 Reasons, [172].
12 Reasons, [175].
13 Reasons, [176].
14 Reasons, [177].
15 Reasons, [178].

42 On 16 March 2022, Paul Laycock, a registered builder and carpenter, conducted an inspection of the works for the owners and subsequently prepared a report ('March Laycock Report') identifying 'defects and safety hazards' and opining that lock-up stage was not complete and that all items described in the report had to be completed to reach lock-up stage. On 21 March 2022, the owners' solicitors sent the March Laycock Report to the builder's solicitors.[16]

43 On 6 April 2022, Jaswinder Singh of Jim's Building Inspections, a building inspector and registered building practitioner, inspected the works for the builder. Mr Singh saw that a door from the garage to the house was missing at the time of the inspection. He asked Ikbal to install the door. Upon receiving a photograph of the installed door, he completed a report ('Jim's Inspection Report') opining that lock-up stage had been completed.[17]

44 On 1 April 2022, the RBS issued a written direction to fix building work, including adding noggings to the garage wall and other areas, remedying the lack of fall protection for the stair void and deteriorated window frames, and adding gang nails to angled walls.

45 On 9 April 2022, the RBS issued a building notice under s 106 of the Building Act on behalf of the VBA relating to non-compliant items, including a step down in the brickwork on the north elevation and the installation of an incorrectly sized laundry door.[18]

46 Shortly after 9 April 2022, Ikbal met Sukhvinder on site to talk about the laundry door problem. Ikbal's evidence was that he told Sukhvinder that he would install a 1400 mm door instead of a 1500 mm door (because the larger door could not fit in the cavity provided for, whilst maintaining compliance with relevant standards), and that Sukhvinder said he was not happy about this change and that as compensation he wanted upgrades to other small items without charge. One request was to include a cavity door on the first floor which was later installed between the master walk-in wardrobe and the ensuite.[19]

47 On 20 April 2022, the parties attended a conciliation conducted by DBDRV.

48 On 1 May 2022, the builder issued a second tax invoice and progress claim for lock-up stage in the amount of $169,750, re-issuing the February 2022 invoice in the same amount. This was the progress claim upon which the builder relied in the proceedings.[20]

49 On 2 May 2022, the builder's solicitors sent a letter of demand to the owners' solicitors with a copy of the Jim's Inspection Report.

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16 Reasons, [178].
17 Reasons, [290].
18 Other building notices and orders were issued but they are not material to the determination of this application.
19 Reasons, [116].
20 Reasons, [65].

50 On 5 May 2022, the RBS issued another building notice under s 106 of the Building Act on behalf of the VBA alleging a failure to comply with a direction to fix building work.

51 On 17 May 2022, a dispute resolution officer at DBDRV emailed Sukhvinder to say that she would communicate to the builder the owners' proposed terms to resolve the dispute and issue a certificate of conciliation. The officer emailed both parties that day, stating that the parties were encouraged to contact each other directly to continue to try to resolve the dispute. The email set out the owners' terms 'for the resolution of the dispute' which stated that the owners had lost trust in the builder 'due to no communication for weeks and months', that they required 'confirmation of construction time frame' and that they sought the items that were subsequently re-stated in the owners' solicitor's letter of 25 May 2022 (below).

52 A certificate of conciliation was issued on 17 May 2022, stating that the dispute was not resolved by conciliation.

53 On 25 May 2022, the owners' solicitors wrote to the builder's solicitors, referring to the proposal the owners had made, saying:

> Our client had proposed a split Payment options with 50% of invoice to be paid after they receive all the compensation, completed selection sheet and defects fixed issued in both reports by surveyor and our clients building inspector. Loan repayment Compensation to be paid in advance is average $2550 pm from 11/11/21 until may-22 total =$15300 & + ongoing when the house construction is completed.
>
> Plus Construction delay:
>
> $250 P/week pay in advance as contract a builder compensation from 11/11/21 until May 22 total =$7350 + ongoing when the house construction is completed.
>
> Compensation for our client's ongoing stress $10,000.00
>
> The remaining 50% will be paid after the plaster is completed and our client will monitor the progress for the next 2 weeks after the plaster. In the event, there is no progress then our client will not proceed further.
>
> …
>
> If the above is unacceptable to your client then, we believe that DBDRV has issued the certificate and our client retains their rights in relation to the issues mentioned above. Please reply to our offer by 6/6/22 or else our client may have to employ other builders to finish the construction.[21]

54 On 31 May 2022, the RBS issued a VBA building order to the effect that 'By 5:00 pm on 30th June 2022, owner MUST carry out building work to bring work into compliance in accordance with endorsed plans'.

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[21] Reasons, [185].

55 On 6 June 2022, the builder's solicitors wrote to the owners' solicitors again stating that the works had reached lock-up stage and that the owners were required to pay the lock-up stage invoice. They said that the builder was entitled to interest on the progress claim payment but that if the invoice was paid by 9 June 2022, the builder would forego the interest.[22]

56 On 7 June 2022, the RBS issued a VBA building order to the effect that 'By 5:00 pm on 7th July 2022, owner MUST carry out building work to bring work into compliance in accordance with written directions to fix dated 01/04/2022'.

57 On 22 June 2022, the builder's solicitors wrote to the owners' solicitor, responding to the items set out in the 25 May 2022 letter, saying that full payment for the lock-up stage invoice was due, that the owners were not entitled to make any deduction from the payment and the owners' demands for compensation were 'outrageous'. The letter stated that the owners were in substantial breach of their obligations under the Act and had repudiated the contract. The builder's position was that the contract remained on foot but the builder would be entitled to terminate.[23]

58 On 28 June 2022, Mr Laycock again attended the site for the owners and issued a report ('June Laycock Report') opining that lock-up stage had not been reached.

59 On 26 July 2022, the builder's solicitors sent to the owners a notice of intention to terminate the contract,[24] stating that the owners were in substantial breach of cls 12, 30 and 42 of the contract by failing to pay the lock-up stage payment in the sum of $169,750 issued on 1 May 2022 and due for payment within seven days. The notice demanded payment for lock-up stage within 10 days.

60 On 2 August 2022, Sukhvinder emailed the builder's solicitor, saying:

> We clearly mentioned to you, Ikbal and Ozcan in our first communication in Feb 2022, we aren't paying the invoice for the incomplete lock up stage to your builder until we will get all the answers, compensation and a guarantor who will take the responsibility of our house completion.
>
> But you all just ignoring us and don't value your customers and have disturbed our mental health & financial lost [*scil, loss*].
>
> Your client – builder has stopped the site work since Feb and issued an invoice on 02/02/2022 demanding for the lock up stage … when the lock up stage wasn't finished but our bank repayments hasn't stopped and I don't have any more money to pay our mortgage to Bank. …
>
> They don't have any workmanship, after I paid them $169750 they will run away, one partner Ikbal is already disappear & shut his office, so I don't have anymore trust left on them and we aren't paying the invoice this time until :

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22 Reasons, [70].
23 Reasons, [189].
24 Reasons, [71].

- complete all the works reported in inspection report by our inspector and surveyor's report

- pay us the compensation in advance which is due from 11/11/2021, contracted & provided letter of bank loan interest until now +$2000 for site cleanup +$700 for temporary fence.

- complete all the queries for selection sheet asked in our previous emails,

- provide me the time frame of construction completion on statutory declaration.,

- provide customer service and progress in work (if they want payment from us) then we will think about if we can go ahead with you.

FYI: we are not breaching any clause (builder) ur clients are breaching the law and Not complying to surveyor's reports 1. Written directions. 2.building notice. 3.building order, they keep ignoring. 4.they claiming for lockup but they leave my property insecure without temporary fence for so many weeks & I arranged from another company. 5.they leave the site so messy with his rubbish since they start work, I cleaned from my pocket. Which is builder responsibility to maintain under the contract.

I am offering them for the last time to arrange a time with me. Otherwise, I don't care if wants to terminate the contract.

Due to all these issues and wrong brick work on my house, I am not progressing the payments and would like to hear from you about (When they want to answer me).

61 The builder did not reply to that email and nor did its solicitor.[25]

62 On 8 August 2022, the builder sent the owners a notice of termination of contract, stating that the contract was terminated under cl 42 or alternatively that the builder accepted the owners' repudiation and determined the building contract 'at common law'.[26]

63 Soon afterwards, the owners retained Kotam Projects to complete the work, which was commenced in January 2023. An occupancy permit was issued in August 2023.

Ground 1 — Failure to complete lock-up stage

Evidence at trial

64 The builder relied upon the evidence of Jaswinder Singh, whose opinion was stated in the Jim's Inspection Report. The substance of the report comprised a conclusionary statement that lock-up stage was completed, as the external wall cladding had been

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25 Reasons, [74].

26 The notice referred to cl 43 but it is clear that cl 42 was intended.

completed, the roof was covered with tiles, the external windows and doors had been installed, and the slab on the ground and first floor and chipboard flooring had been installed.

65 In oral evidence, Jaswinder Singh said that at the time of his inspection 'there was a missing door entry by the garage'. He asked Ikbal, who had engaged him, to install the door and after it was installed he completed his report. Ikbal's evidence was that he took a photograph of the door 'from the garage to the house' once it was installed, for 'the building inspector', who we infer was Jaswinder Singh. Mr Singh agreed with the question put by the builder's counsel that 'without a door you can't say it's completed lock up stage'. The inspection report included a photograph of the front of the house which showed the main entranceway to the garage at the front of the house without a door in place (i.e. where door 'D02' should have been installed, as shown on the plans). Mr Singh did not address the absence of the main garage door in his report.

66 The owners called evidence from Paul Laycock, who opined in each of his reports that lock-up stage was not complete.

67 Mr Laycock identified items he said did not conform with the construction plans. He said that all identified items had to be completed to achieve lock-up stage, although several of the identified items appeared to have no relationship to lock-up stage as defined in the contract. On this appeal the owners rely on nine particulars of incomplete or deficient work.[27] Mr Laycock's evidence concerning those items (insofar as they were addressed) was as follows:[28]

(a) Both of Mr Laycock's reports reproduced a photograph taken from the inside of the house depicting a doorway boarded up with plywood with the description 'Doors (Temporary) Does Not Conform With Plans'. The reports also reproduced a photograph of the front entranceway to the house boarded up with plywood. In oral evidence-in-chief, Mr Laycock was shown an unidentified photograph[29] and was asked what problem the photograph revealed. His answer was, 'No front door or no temporary front door'. He said that it was usual practice at lock-up stage to put in place the 'actual doorframe' with a temporary door. He said that in the photograph no frame was shown. It was not disputed before this Court that the door to which Mr Laycock referred in his evidence was the front door to the house (door 'D01' on the plans).

(b) A photograph in each report showed the main entranceway to the garage at the front of the house without a door in place. The reports did not otherwise describe or refer to the main garage entranceway or door (D02).

(c) An 'alfresco' sliding door was installed incorrectly. In oral evidence, Mr Laycock said that the door was loose and hanging, flapping in the breeze and leaning into the building unsecured.

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27 The particulars are set out below. They comprise eight items of work and reliance on the opinion of the single joint expert that lock-up stage was not reached.

28 The March and June Laycock Reports were substantially the same but not identical.

29 It was not possible to tell from the transcript of evidence what he was being shown.

(d) The laundry door was not the correct size.

(e) The reports stated 'Brickwork Does Not Conform With Plans', meaning relevantly that the 'stepdown on the North elevation' was not in accordance with the plans and that the wrong bricks were used on the garage and north elevation. The photos showed various gaps and chips in brickwork.

(f) It was put to Mr Laycock in cross-examination that 'the floors were there'. He agreed, adding, 'The stuff that was there, that was meant to be there was defective, a lot of it'.

68 Neither Mr Singh (for the builder) nor Mr Laycock (for the owners) was called as an independent expert.

69 Benjamin Wood was appointed as a single joint expert and provided a report as an independent witness ('SJE Report'). The building works were complete at the time of Mr Wood's inspection and he relied upon the documents provided to him in order to form his opinion, which included the March and June Laycock Reports, the Jim's Inspection Report, the building notices and orders issued by the VBA ('primary materials').[30] He was asked whether in his opinion the items of alleged defective work identified in the primary materials were in fact defective or incomplete work; whether by reference to defects he identified that the frame stage and lock-up stage were completed; and whether lock-up stage was completed by 1 May 2022. Mr Wood's evidence was as follows:

(a) He acknowledged the contractual definition of lock-up stage. He said that lock-up works typically include the installation of all claddings, external doors and windows (permanent or temporary) 'excluding the garage door but including the garage pedestrian door/s' and the completion of roofing. He did not elaborate on why the garage door was to be excluded from the external doors required to be fixed as part of the lock-up stage. He was not instructed to assume that the garage was not part of the house.[31] The report did not otherwise mention the main garage door (DO2).

(b) Mr Wood then described and made observations about the items said in each of the primary materials to have been incomplete or deficient.

(c) By reference to the March Laycock Report[32] Mr Wood identified seven items that were 'incomplete works from the lock-up stage', namely: brickwork that did not conform with plans; incomplete flashings; missing bricks to brick piers; temporary door not in accordance with plans; missing roof tiles; walls not straightened, plumbed and wall junctions not nailed; and noggings missing.[33]

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30 The VBA building notices were dated 13 January 2022, 9 April 2022 and 5 May 2022; and the VBA building orders were dated 31 May 2022 and 7 June 2022.

31 It was not contended that the garage did not form part of the house.

32 Which was noted to have drawn the same conclusions as the June Laycock Report.

33 Four of the items taken from the Laycock Reports were also the subject of the 9 April 2022 building notice, including 'brick work at north elevation has a step down in lieu of straight'; 'Front Brick Piers

(d) Mr Wood also listed several groups of items from that report that he said were defective or incomplete but not part of lock-up stage works.

(e) By way of conclusion, he said that the March Laycock Report was accurate in that the lock-up stage works remained incomplete in October 2022 and it followed that 'the comments in the Jim's report would be incorrect'.

(f) By way of summary, Mr Wood said that the primary materials identified that 'the works had progressed to approximately 95% through the lock-up stage with some roofing, masonry cladding, and doors to be completed'. He concluded, 'The lock-up stage was not achieved, but was approximately 95% completed'.

70 Cross-examined on behalf of the owners, Mr Wood was asked whether defective work 'would be part of the lock-up stage'. His answer was that:

> From my experience, if the works have been completed, but been completed incorrectly, they'd be considered completed … and defects would be rectified throughout the course of building work. I don't know …
>
> …
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> I'm not quite sure whether or how to answer this, because my opinion on this is that if the works are completed and completed incorrectly, they're completed nonetheless, and if they need to be rectified, then they would be rectified and brought back into compliance. When that happens, I'm — I'm not too sure how that impacts a contract or — and I don't know, your Honour, if I'm the right person to answer that question.

71 The builder called lay evidence from Ozcan who supervised Ikbal's work and prepared documentation including progress claims.[34] His evidence was that:

(a) In late January 2022, he formed the opinion that lock-up stage had been reached. External cladding had been installed, the roof covering was installed, the flooring was laid and external doors and windows had been supplied and fixed, with the exception of the front door and garage roller door.

(b) The garage roller door was impossible to install until after the plaster had been done, which occurred at lock-up stage. There was no elaboration on this statement.

(c) It was not practical to install the front doors which were a solid timber system, expensive, heavy and liable to be damaged if fixed into position before fixing stage had been completed. Installing the door jamb prior to fixing would leave it exposed to being damaged by workers coming and going, and the door's hinges would be at risk of being damaged. The 'final doors' needed to be

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is at finished floor level of the balcony in lieu of above baluster height'; 'laundry door is 1400mm in lieu of 1500mm'; and garage wall rendered in lieu of brick.

34 Reasons, [48], [65].

levelled, which is a time-consuming process. When the plastering is done, the lock-up fixer levels the jamb and fixes it in place permanently, then puts on architraves and skirting around the doors. Therefore, instead of fixing the permanent doors at the end of lock-up stage, a piece of plyboard was fixed to the entryway by nails to the timber from the house from the inside. It is more secure than a temporary swinging door in a door jamb. To gain entry from the outside, it would need to be destroyed. To remove it without damaging the plyboard, it would need to be removed from the inside. All other entries to the house were locked by either fixed doors or fixed windows. Entry into the building for the purposes of the fixing stage was via a sliding door to the alfresco area.

72 Ikbal's evidence was that:

(a) By 2 February 2022 (when the first lock-up stage invoice was issued) the windows were in, the cladding was done and the roof was in, but 'we did not have a front door because it was not practical to install it (which was to be a large solid timber double-door system); it would only have been damaged if it had been installed'.

(b) As to the render on the garage wall, during the construction of that wall Sukhvinder called Ikbal to say some of the bricks were facing the wrong way. Ikbal called the bricklayer and told him to stop. He inspected the site when Sukhvinder was present. The bricklayer agreed he had made a mistake. Ikbal asked him to remove the bricks and start again. Sukhvinder asked if the wall could be rendered instead of fixing the issue. Ikbal then had the garage wall rendered. He did not ask or cause the builder to issue a variation for the render.

(c) The building notice stated that the brickwork on the north elevation 'had a step down in lieu of being straight'. This occurred because of an error in the drawings. The only way to make the brickwork match the height of the parapet wall was to add two or three courses of bricks to the ground floor brickwork, which continued in a straight line until it met the study window after which it had a 'step down' to go underneath the window.[35]

73 In cross-examination, Ikbal was asked whether he acted on the 1 April 2022 building notice. He said that no physical work was done to rectify those items because they would be fixed 'before we do the plastering', and that 'we didn't carry out the work because we knew that it will be carried out in the next stage if we continue the work'.

74 In re-examination he was shown a photograph apparently dated 6 April 2022. He described it as 'a photo of a door from the garage to the house', saying that he took the photograph for the building inspector in order to confirm that lock-up stage was complete.

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35 The 9 April 2022 building notice also addressed the laundry door and brick piers.

Reasons of the judge

75 The judge concluded that lock-up stage was completed (with the result that the builder was entitled to the lock-up stage payment), on the following basis:

(a) Whether lock-up stage has been completed turns on the facts and requires consideration of the language of s 40(1) of the Act.[36]

(b) Defective works are not a relevant consideration in determining whether works have reached lock-up stage.[37] For this conclusion, the judge relied on the opinion of Mr Wood, whose evidence as summarised by the judge was that 'in lock up stage if it is defective work, [the work is] considered completed and defects are rectified during the course of the work'.[38]

(c) The owners accepted in closing submissions that 'defective works are not part of lock up items'.[39] The owners pleaded and opened their case relying on the March and June Laycock Reports but in closing submissions confined their case to the seven matters set out in the SJE Report.[40]

(d) The items identified in the March and June Laycock reports were 'trivial in nature and do not constitute a breach, and do not disentitle the Builder from issuing the invoice for lock-up stage'.[41]

(e) The judge then addressed several items said to be incomplete or defective by reference to the SJE Report:

(i) As to the front door, the judge accepted the evidence of Ozcan and Ikbal that 'the front doors were a solid timber double-door system' that were 'expensive, heavy and liable to be damaged if fixed into position before fixing stage'. Instead of fixing the permanent doors at the end of lock-up stage a piece of plywood was fixed to the entryway by way of nails to the timber frame, which is 'more secure than a temporary swinging door'.[42] The judge concluded that the front door entry system was not installed because it was impractical to do so. The judge concluded that instead the front door 'had plywood in situ which gives the effect that the house is locked up which is the statutory purpose of that stage'.[43] The judge referred to this Court's observation in *Cardona v Brown*[44] that the reference in the definition of lock-up stage in s 40 of the Act to 'temporary doors or windows' suggests that there may be a need for interim works to ensure the house is completely closed.

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36 Reasons, [279].
37 Reasons, [281].
38 Reasons, [148]. Mr Wood's evidence was further that defects need to be completed 'at some stage' but he did not know when.
39 Reasons, [269].
40 Reasons, [248], [269].
41 Reasons, [280].
42 Reasons, [289].
43 Reasons, [292].
44 (2012) 35 VR 538 ('*Cardona*').

(ii) As to the garage door, the judge accepted the unchallenged evidence of Ozcan that it was 'not possible to install the garage door until the plaster had been done'.[45] As with the front door, the judge found that the garage door had plywood in situ which satisfied the statutory purpose of the stage.[46]

(iii) The issue of whether the frame stage was completed was irrelevant on the owners' amended pleadings.[47]

76 The judge then concluded that:

> In any event, I accept the Builder's position that even at its highest, Mr Wood maintained that, taken altogether, the incomplete items amounted to 5% of lock-up stage. In my view, 5% is a trivial amount and it does not preclude effective and satisfactory completion of the stage.[48]

Parties' cases

77 By ground 1, the owners said that the judge erred in finding that the builder was entitled to payment for the lock-up stage when the builder had not achieved completion of the stage, for nine reasons:

(i) the garage external doors had not been installed;

(ii) parts of the external brick veneer walls had been constructed using the wrong bricks, which the builder failed to rectify despite the relevant building surveyor issuing a Building Notice and a Building Order;

(iii) the brickwork on the north elevation was incorrectly constructed, which the builder failed to rectify despite the relevant building surveyor issuing a Building Notice and a Building Order;

(iv) the brickwork had various defects including cracks, chips and poorly laid bricks, and gaps;

(v) the external laundry door was only 1400 mm wide, instead of 1500 mm wide, which the builder failed to rectify despite the relevant building surveyor issuing a Building Notice and a Building Order;

(vi) the Court ordered Single Joint Expert, Mr Wood, concluded in his report that the lock-up stage was not achieved;

(vii) the front door had not been installed;

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45 Reasons, [289].

46 Reasons, [292].

47 Reasons, [247]. The judge also dealt with flashings, missing roof tiles and incomplete construction of brickwork on the pillars supporting the balcony, concluding they were not incomplete works for the purpose of lock-up stage. Those findings were not challenged.

48 Reasons, [294].

(viii) the alfresco door was loose and hanging, the door frame had not been installed correctly and the door was flapping in the breeze, it was not fixed in place, and it was leaning into the building unsecured and could have been easily pushed in; and

(ix) the previous stage, Frame Stage, had not been effectively and satisfactorily completed and was the subject of a Building Notice and Building Order which the builder failed to comply with.

78 The owners relied on the conclusion of the single joint expert that lock-up stage was not achieved, but was approximately 95 per cent complete. They submitted that the builder must achieve completion of each stage in order to be entitled to claim a progress payment. The contractual provisions governing progress claims do not countenance 'practical completion' of a stage with an allowance for incomplete works. The works in this case might have been close to complete for lock-up stage but did not in fact reach completion. As to other items on which they relied, the owners submitted:

(a) The garage external doors were not installed.[49] That suffices to establish that lock-up stage was not complete. The garage was part of the house and external doors had to be fixed to complete lock-up. The contractual definition of lock-up stage at least required a temporary door. The evidence of Ozcan Oztas, that it was not possible to install the garage roller door until after the plastering was done, did not address the absence of a temporary door. The fact that the evidence was not challenged was irrelevant. The builder bore the onus of establishing lock-up; it was not for the owner to prove what the builder ought to have done. The judge's finding that the garage roller door had 'plywood in situ' was erroneous.[50] In closing submissions the owners' counsel referred to a photograph of the boarded-up front door, mistakenly saying it was the garage. That he did so is of no moment because it was for the builder to discharge the onus of proving that a door (whether temporary or permanent) was fixed. The mistaken reference was corrected by the builder's counsel in closing. The missing garage doors were the front roller (panel) door (D02 on the plans) and the door from the garage to the garden (D03 on the plans).

(b) Neither a permanent nor a temporary front door was installed where door D01 was shown on the plans. The front doorway was boarded up with plywood, and no door frame was installed. Plywood is not a temporary door. The single joint expert concluded that this item was an incomplete work required for lock-up.

(c) The alfresco door was not fixed in place, and it was leaning into the building, loose and flapping in the breeze, according to the evidence of Mr Laycock which was based on his inspection and was not challenged. It was not 'fixed', as required by the contractual definition. The single joint expert estimated a cost of $2,000 for rectification.

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49 It was not contested that the garage roller panel door was not installed. Ozcan accepted that fact in his evidence.

50 Reasons, [292].

(d) The fact that part of the external walls were constructed with the wrong brick was raised in the 9 April 2022 building notice, with which the builder did not comply.

(e) The brickwork on the north elevation was incorrectly constructed as raised in the 9 April 2022 building notice, with which the builder did not comply. The single joint expert estimated a cost of $11,152.57 for rectification.

(f) The single joint expert reported on numerous defects in the brickwork including gaps due to the windows having been incorrectly placed without reasonable care. The effective and satisfactory completion of the brick walls was required to complete lock-up stage.

(g) The external laundry door was specified as 1500 mm wide but was constructed at 1400 mm. The single joint expert opined that this arose because an incorrect window was placed without reasonable care and estimated a cost of $6,056.05 for rectification.

(h) The owners relied on the frame defects in the building order of 7 June 2022 as evidence that the frame stage was not completed.

79 On the question of the scope of their case the owners submitted that they had not confined their case to the seven items referred to in the SJE Report as incomplete works from the lock-up stage. In closing submissions the owners' counsel had told the judge that they relied on the SJE Report, but in doing so he was not limiting the case to the findings in that report and he made clear that he was relying on *Cardona* for the proposition that the external doors, in particular the garage roller door, had to be fixed. The garage door was not addressed in the SJE Report. Trial counsel also referred in closing to the 'overall opinion' in the evidence supporting a conclusion that lock-up stage had not been reached, referring to the building notice and orders, the March and June Laycock Reports and the SJE Report. The owners further submitted that they did not concede before the judge that defective works were not relevant to the ascertainment of whether lock-up stage had been reached.

80 The builder submitted that:

(a) Most of the matters raised by the owners were not raised or pressed before the judge. A party is bound by the conduct of its case[51] and except in the most exceptional circumstances will not be allowed to raise a new argument that it failed to put to the lower court after a case has been decided against it.[52] The owners relied on matters in the March and June Laycock Reports in their

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51 Citing *Abedini v Commissioner of Australian Federal Police* [2024] VSCA 230, [75] (McLeish, Lyons and Kaye JJA).

52 Citing *University of Wollongong v Metwally [No 2]* (1985) 60 ALR 68, 71 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Coulton v Holcombe* (1986) 162 CLR 1, 7–8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *Geelong Building Society v Encel* [1996] 1 VR 594, 595 (Tadgell J, Ormiston J agreeing at 609, Ashley J agreeing at 613).

pleadings and opening,[53] but in closing confined their argument to seven matters set out in the single joint expert.

(b) The owners accepted that defects were not part of lock-up items and accepted the evidence of the single joint expert that milestone stages of works do not need to be defect-free.[54] They should not be permitted to resile from this concession.

(c) Furthermore, for completion of a stage 'the items must be there'; lock-up is an interim stage and works comprising the stage need not be defect-free. For lock-up stage, items must be 'fixed' in order to fulfil the statutory purpose of the stage discussed in *Cardona*, which is to afford some security to the dwelling.

(d) In any event, each of the matters relied on by the owners were trivial failures or minor failures caused by impracticalities that do not preclude the completion of lock-up stage.

81 In relation to the owners' items the builder submitted:

(a) The installation of the garage roller (panel) door was in issue below. In closing, the owners submitted that the garage door did not comply with the definition of lock-up stage, but the owners' counsel mistakenly described the front door that was boarded up with plywood, rather than the garage door. It was not put to the builder's witnesses that it may be possible or practical to install plyboard as a temporary garage roller door. The unchallenged evidence of Ozcan was that it was impossible to install the garage roller door before plastering that occurred at fixing stage. According to *Cardona*, failures borne of impracticality do not prevent completion of a stage.

(b) The door between the garage and the garden (D03) was not raised below in any submissions or expert report. No witness or expert identified that this door was missing. The evidence to which the owners referred on this appeal does not clearly show a missing door.

(c) As to the front door (D01 of the plans), the judge accepted the evidence of Ozcan and Ikbal that the doors (a double-door system) were liable to be damaged if fixed into position before the fixing stage, and that instead of fixing permanent doors, a piece of plywood was fixed to the entryway by way of nails to the timber frame, which was more secure than a temporary swinging door.[55] Those findings were not challenged. That temporary work enclosed the home and does not preclude the completion of lock-up stage.

(d) The fixing of the alfresco door could have been rectified by repositioning the windows and that work would have required two carpenters for a day. This item is a triviality or is irrelevant to the question of completion.

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53 Reasons, [248], [252].
54 Citing Reasons, [281], [269].
55 Reasons, [289].

(e) The construction of the garage wall with the wrong bricks was not one of the seven items relied upon at trial. In any event, the evidence was that Sukhvinder requested that the wall be rendered instead of re-building it with the correct bricks. The owners do not challenge the finding to that effect.[56]

(f) Incorrect construction on the north elevation was not one of the seven items relied upon at trial. The 'step down in lieu of being straight' was a result of an error in inconsistent drawings,[57] which the single joint expert concluded was a discrepancy in the contract documents.

(g) Defects in the brickwork, such as gaps and chips, were not within the seven items relied upon at trial. It is unknown how many bricks were cracked and only one brick was identified as chipped. According to the single joint expert, rectification would have required a bricklayer for a small project call-out. Rectification of gaps in the brickwork would have taken two carpenters a day to fix. These were trivial items.

(h) The construction of the laundry door at 1400 mm instead of 1500 mm wide was not one of the seven items relied upon at trial. There is no suggestion that the wrong dimensions meant that the external doors to the house were not fixed.

(i) The owners conceded the frame issue and amended their pleadings accordingly prior to trial, as the judge recorded.[58] The issue was not relevant on the pleadings and the judge did not determine it. The owners cannot rely upon it on appeal.

(j) Whether lock-up stage was complete was a legal and factual matter for the judge to determine. The judge considered each of the uncompleted works and determined that they did not preclude completion of lock-up stage. That the single joint expert concluded that the works were only 95 per cent complete did not preclude the judge from reaching her own view.

Principles — completion of lock-up stage

82 The question in dispute is whether by reason of certain items that were said to have been absent, incomplete or deficient, lock-up stage was not completed when the 1 May 2022 progress claim was issued.

83 Both parties submitted that the issue was governed by the decision of this Court in *Cardona* but they drew conflicting implications from the decision.

84 *Cardona* concerned the construction of a home under a contract in the same form as the contract in this case. There, the builders had installed neither the garage roller doors specified in the plans nor temporary doors to the garage, which was part of the home. It was held that the failure to do so left the home in a state where its external

56 Reasons, [111].
57 Reasons, [114].
58 Reasons, [242].

doors were not fixed and the dwelling did not satisfy the definition of lock-up stage in the contract.[59] In the course of considering whether the frame stage was completed (which was held to be necessary before lock-up stage could occur),[60] Tate JA (with whom Bongiorno and Osborn JJA agreed) said:

> It is necessary for there to be 'effective and satisfactory completion of the required stage … [as] a condition of any instalment payment' and while trivial failures, or failures borne of impracticalities, do not preclude effective and satisfactory completion, it is noteworthy that the dispute in relation to the trusses was not resolved until the first day of the hearing before VCAT. That resolution involved work being done on the trusses to strengthen them in accordance with the recommendations of the consultant engineer.[61]

85 On the question of deficiencies, then, the Court distinguished between failures characterised as trivial or 'borne of impracticalities' on the one hand, and failures that were of such significance that it could not be said that the relevant stage was complete on the other. The Court in *Cardona* was not, however, concerned with a failure that was said to have been trivial or 'borne of impracticalities'. The Court held that the frame stage was not complete for one of two reasons: either because the contractual definition of 'frame stage' was not satisfied (the definition required that the frame be approved by a building surveyor and no approval was obtained) or because there were deficiencies in the roof trusses which were a major structural component of the home.[62]

86 Returning to the present case, by cl 30 of the contract a stage must be completed before the owner is obliged to make a progress payment. It will be noticed that neither cl 30 nor the contractual definition of lock-up stage refers to deficiencies or defects. The relevant question in this context is accordingly not whether the work is 'defect-free' but whether the stage has been completed. The expression 'completed' in cl 30 is not defined and bears its ordinary meaning. Depending on its context, 'completed' may mean finished, ended or concluded on the one hand, or perfected on the other.[63] In this context — the completion of construction stages — it bears the first meaning. The expression 'defect', which appears neither in cl 30 nor in the definition of 'lock-up stage', is also not defined. For the purposes of this case it is not necessary to fix upon a definition. The issue in contest is whether the fact that works did not conform to the requirements of the contract precluded the completion of the stage.

87 Whilst the contractual question is whether the work is complete according to the definition of the relevant stage, as a matter of construction, applying the reasoning in

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59 *Cardona* (2012) 35 VR 538, 539 [7], 559–8 [82] (Tate JA, Bongiorno JA agreeing at 540 [1], R Osborn JA agreeing at 562 [102]).

60 Tate JA said at [72] that the regime for progress payments in s 40 of the Act (and adopted by the contract) was premised on an expectation that lock-up stage would not occur before the frame stage had been completed.

61 *Cardona* (2012) 35 VR 538, 556 [74] (citations omitted). The reference to 'effective and satisfactory completion' in that passage of the Court's reasons was a quotation from Wallace, *Hudson's Building and Engineering Contracts*, 12th ed, (2010), [3–076].

62 *Cardona* (2012) 35 VR 538, 556 [73]–[75].

63 Macquarie dictionary online.

Cardona, the language of cl 30 and the framing of the definition of lock-up stage in that way does not mean that deficiencies in the work are to be overlooked when considering whether the stage has been completed. A construction stage might be incomplete because an item specified in the description of the stage is absent (as in the garage door for lock-up stage or the surveyor's approval for frame stage in *Cardona*) or because deficiencies in the work are of such significance that the work comprising the stage cannot be objectively described as complete. Conversely, a stage may be complete even though some of the work is defective. Determining whether a construction stage is complete may entail assessments of degree.[64] In that exercise, regard must be had to the contractual definition of the relevant stage and to the state of the works. Regard must also be had to the specifications of the building contract because they define the work that must be performed under the contract.

88 Lock-up is an intermediate construction stage. The final stage, 'Completion', is defined to mean that the building works are complete in accordance with the contract documents.[65] Under part E of the contract, the builder notifying the owner that the builder considers that the works have reached Completion and presenting a final claim, triggers a process for compilation of a list of defects by the owner, fixing those defects, payment, handover and a further period in which the builder must fix defects notified by the owner after handover.[66] That process allows the contract to be concluded and the owner to take possession of the land, although it does not exclude any rights that the parties otherwise have in relation to defects or incomplete works.[67] The fact that the contract addresses defects in that way confirms that a contractual stage may be complete even though some of the work is incomplete or defective.

89 Further, the reference by the Court in *Cardona* to 'failures borne of impracticalities' does not imply that the contractual definition of a construction stage can be read down so as to allow a builder to complete only those elements of the stage that the builder regards as practicable or preferable to complete at the relevant time. The significance of a failure borne of impracticality must be assessed like any deficiency, by reference to the contractual definition, the state of the works and the specifications of the contract, and may involve questions of degree. As we have said, the Court in *Cardona* distinguished between trivial failures or failures borne of impracticalities on the one hand, and deficiencies that mean that a stage is incomplete on the other. The Court did not decide that all trivial failures, or failures borne of impracticalities, are to be put to one side in determining whether a defined stage of construction has been completed. That question did not arise in *Cardona*.

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64 See *AMO Rifat Holdings Pty Ltd v Dib (Building and Property)* [2024] VCAT 419, [38]–[41] (Woodward P).

65 Schedule 3; cl 1.0.

66 Cls 36–39.

67 Cl 37.5.

Consideration of ground 1

90 It follows that the judge's reasoning that 'defective works are not a relevant consideration in determining whether works have reached lock-up stage'[68] was erroneous.

91 Separately, the judge concluded that lock-up stage had been reached because (among other reasons) the plywood in lieu of the front door had the effect that the house was locked up which was 'the statutory purpose of that stage', citing the reasoning in *Cardona*.[69] The Court in *Cardona* observed that the expression 'lock-up stage' conveyed the achievement of some degree of security,[70] but in doing so the Court was not proposing the achievement of a degree of security as an alternative test for the completion of lock-up stage. The contract, consistently with s 40 of the Act, requires completion of the stage by reference to its elements and not merely by the achievement of a purpose implicit in the contractual description of the stage. By the progress regime that they adopted, the parties plainly intended, and the Act required, that the builder's entitlement to progress payments would depend upon the completion of the relevant works in accordance with the contractual definition of each construction stage.[71]

92 For the reasons that follow, ground 1 is established by the absence of a door (whether temporary or permanent) to the main garage entranceway and separately, by the absence of a door to the front entrance to the house. The judge ought to have found that the works did not comply with the contractual requirement for lock-up stage on those grounds. Those items suffice to establish ground 1, but we will also consider other parts of the owners' case.

The garage roller door

93 When the lock-up stage progress claim was issued, no door was in place in the main entranceway to the garage where door D02 was shown on the plans. That meant that the works did not conform with the contractual definition of lock-up stage, which required external doors (even if temporary) to be fixed.

94 The judge proceeded on an incorrect factual basis (that 'the garage roller door had plywood in situ'). The error may have been induced by the owners' counsel, although the builder's counsel told the judge in closing that no temporary garage door was in fact in place.

95 The conclusion that lock-up stage was not reached is not affected by the evidence that it was 'impossible' to fix the garage roller door until after plastering occurred. That evidence was concerned with the fact that the door required by the contractual specifications was not constructed. It was not addressed to the absence of a temporary door. The definition of lock-up stage allows that temporary external doors may be

68 Reasons, [281].
69 Reasons, [292].
70 *Cardona* (2012) 35 VR 538, 559 [85].
71 *Cardona* (2012) 35 VR 538, 558–9 [82]–[85].

fixed, but requires doors nonetheless. It is not possible to construe the words 'doors … even if those doors … are only temporary' in the Act and the contract as including a fixed barrier preventing access to, or egress from, the interior of the building. A door is, according to ordinary usage, a movable barrier of wood or other material, commonly turning on hinges or sliding in a groove, for closing and opening a passage or opening into a building or room.[72] A door, unlike a fixed barrier, is capable of being opened and closed (and, in the case of an external door, being locked and unlocked, as the term 'lock-up' suggests).

96 We reject the builder's submission that, because the owners did not put to the builder's witnesses that it may be possible or practical to install a temporary garage door, it was not open to rely on this point in this appeal. As we have said, the requirements of lock-up stage are not to be read down to require only that which can be shown to be practicable at the time. The builder bore the onus of establishing that lock-up stage had been reached and its evidence did not do so. The practicality or otherwise of fixing a temporary door was not an element of the owners' case for the owners to put to the builder's witnesses. While the proceeding below was conducted on the basis of the issues in contention between the parties on their pleadings and evidence, the owners had squarely put in contention the fact that no temporary door was fixed in place of door D02, and submitted that plywood was not a temporary door. The builder was not misled as to the facts or taken by surprise.

97 The contention that the door between the garage and the garden (door D03) was missing does not appear to have been the subject of evidence or submissions before the judge. It was not open to raise this issue, which could have been the subject of evidence at trial, on appeal.

The front door

98 The front doorway (door 01) was boarded up with plywood. There was no evidence that the door frame was installed. The contract required the fixing of at least temporary external doors. The reference to temporary doors is itself a concession as to practicality, but doors are required nonetheless. The contract required a door and not just that the entrances to the house be secured in some fashion. Boarding the entranceway with plywood did not amount to fixing a temporary door. Again, the definition of 'lock-up stage' in the Act and the contract requires a door or a temporary door, not a mere fixed barrier. The single joint expert and Mr Laycock each considered that the front door was incomplete for the purposes of lock-up stage.

99 The judge accepted evidence that a piece of plywood fixed with nails to the entranceway was 'more secure than a temporary swinging door' and that the plywood gave the effect that the house was locked up, which was 'the statutory purpose of the stage'. In our view, it was not open to the builder to substitute the contractual requirements for something else on the premise that what was substituted was 'more secure'. The judge erred in finding that lock-up stage was concluded on the basis that

72 *Macquarie Dictionary* (online at 19 December 2025) 'door'.

the installation of plywood appeared to achieve the purpose implicit in the contractual description of the stage.

The approach to 'trivial' failures

100 Our conclusions above suffice to make good the first proposed ground of appeal. For the sake of completeness, we will briefly address the other items in issue. The judge considered individual items that were said to be incomplete, reaching a view about each of them. The judge also reached an overarching conclusion based on the evidence of the single joint expert that the incomplete items together amounted to 5 per cent of lock-up stage, saying, '5% is a trivial amount and does not preclude effective and satisfactory completion of the stage'.[73] It will be recalled that Mr Wood's opinion was that the lock-up stage works were about 95 per cent complete.

101 Having decided that lock-up stage is reached when the work is complete, not when the 'purpose' of the lock-up stage provisions is achieved, the next question is whether the work is complete if only 'trivial' matters are outstanding. The judge proceeded on the basis that a failure to achieve completion of lock-up stage could be overlooked if the failure could be described as 'trivial'. For the reasons set out above, in doing so, the judge erred. Lock-up stage was either completed or not, and the contract required that it be completed before payment was due. That is not to say, however, that the significance of the matters not completed is irrelevant. As explained above, determining whether a construction stage is complete may entail assessments of degree, having regard to the contractual definition and the specifications, and the state of the work. In that context, as we have said, a construction stage may be complete even though there are defects in the work, which the contract contemplates will be remedied at a later date.

102 The question whether a contract or an obligation is entire, or whether it admits of part performance, is one of construction. Unless a contract or obligation admits of part performance, nothing becomes due until the contractor has done everything the contract requires to entitle him to receive payment.[74] In *Mann v Paterson Constructions Pty Ltd*,[75] the High Court considered a major domestic building contract under the Act. Nettle, Gordon and Edelman JJ explained that 'Generally speaking, a construction contract which is divided into stages, and under which the total contract price is apportioned between the stages by means of specified progress payments payable at the completion of each stage, is viewed as containing divisible obligations of performance',[76] such that when the contract is terminated, the contractor will have accrued rights under the contract for those stages that have been completed, but

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73 Reasons, [294].

74 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 164–165 [702]–[706]; *Tan Hung Nguyen v Luxury Design Homes Pty Ltd* (2005) 21 BCL 46, 50 [24]; 52 [39] (McColl JA); 57 [73] (Einstein J), Hodgson JA agreeing, 47 [1].

75 (2019) 267 CLR 560 ('*Mann v Paterson*').

76 *Mann v Paterson* (2019) 267 CLR 560, 630–1 [176] (Nettle, Gordon and Edelman JJ).

nothing will be due under the contract for uncompleted stages.[77] The present contract is of that kind. Clauses 29 and 30 of the contract (the obligations to make and pay a progress payment when a stage has been completed) and cl 42 (by which a failure by the owners to pay a progress payment is a substantial breach which may entitle the builder to terminate) make clear that each stage of the contract is entire and that the obligation to complete a stage does not admit of part performance.

Other items

103 It is not open to the owners to rely on deficiencies in the completion of the frame stage. The owners filed an amended defence and counterclaim on 20 June 2024 in which they abandoned allegations that the frame state was incomplete, as the judge correctly recorded.

104 It is also not open to the owners to rely on the rendering of part of the external brick wall in lieu of constructing the wall with the specified bricks. The owners did not challenge the evidence that Sukhvinder requested that the wall be rendered instead of re-building it with the correct bricks, and did not challenge the finding to that effect.[78]

105 The remaining items (the door between the garage and the garden (D03), incorrect construction on the north elevation, defects in brickwork and the laundry door) were said by the builder to have been excluded from the scope of the owners' case in their closing submissions before the judge. Those submissions were ambiguous. In parts, the owners' counsel appeared to say that the case rested on the seven items that the single joint expert described as incomplete items from the lock-up stage. Despite that, it was made clear that the owners relied on the absence of the garage door (door D02) which was not discussed by the single joint expert. The owners' counsel referred generally to the building orders and notices and the March Laycock Report as supporting the conclusion that lock-up stage was not reached. On balance, however, we are not persuaded that the owners' case went beyond the seven matters in the SJE Report, together with the absence of the garage roller door.

106 Given the conclusions we have reached regarding the garage roller door and the front door, it is unnecessary to address the judge's finding that the owners conceded that defects were not relevant to lock-up stage.

Grounds 2 and 2A

107 By ground 2, the owners contend that the judge erred in finding that the builder validly terminated the contract on 8 August 2022.[79] By proposed ground 2A (subject to leave to amend their grounds of appeal) the owners contend that the judge erred in

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77 *Mann v Paterson* (2019) 267 CLR 560, 629–30 [174] (Nettle, Gordon and Edelman JJ). See also *Maples Winterview Pty Ltd v Liu* [2015] ACTSC 58, [82] in which Mossop AsJ construed a similar but not identical contract as requiring the completion of each stage as a condition precedent to an entitlement to progress payments.

78 Reasons, [111]–[112].

79 Reasons, [64], [322]. The Reasons refer to 9 August 2022 but the parties agreed that the date of issue of the notice of termination was 8 August 2022.

finding in the alternative that: (a) the parties mutually abandoned the contract or agreed to its termination, or that the builder accepted the owners' offer to terminate the contract; and (b) that the builder was entitled to payment on a quantum meruit.

108 The issues addressed by grounds 2 and 2A are concerned with whether the builder was entitled to payment on a quantum meruit, on the assumption that it was not entitled to a contractual payment for completion of lock-up stage.[80]

109 The judge concluded that if the lock-up stage invoice did not fall due under the contract, the owners were nevertheless liable to pay for work done at their request, capped at the price of stage payment, reasoning as follows:[81]

(a) The builder was an innocent party who was entitled to terminate the contract and was entitled, as an alternative to damages, to claim a quantum meruit for work done for an incomplete stage, applying the principles discussed in *Mann v Paterson*.[82]

(b) The builder was entitled to terminate the contract 'on the grounds of the owners' repudiation of the contract'. By their 2 August 2022 email, the owners unequivocally evinced an intention to no longer be bound by the contract. They made plain that they were not willing to perform the contract in accordance with its terms by stating that they would not pay the builder's invoice until each of the other terms they imposed would be met.[83] There was no contractual basis for that position. In cross-examination, Sukhvinder 'doubled down on his position', saying that even if the builder had satisfied all the items in the March and June Laycock Reports, the owners would still not pay the invoice.[84] The builders were entitled to terminate on grounds different to those advanced in their notice of termination.[85]

(c) Quantum meruit is available 'independently of the basis of termination' and has its genesis in restitution based on the concept of unjust enrichment. The owners have obtained a benefit in the builder conducting works to construct a partly built house for the owners. The cost of the building works was for the goods supplied as set out in the invoices for the sum claimed. There was nothing to suggest that that sum did not represent a fair and reasonable price.[86]

(d) The builder relied in the alternative on the contention that it may be inferred that the parties abandoned the contract or agreed to its termination. The inference may be drawn from the builder's legally ineffective termination (assuming its notice of termination of 8 August 2022 was invalid) and the absence of any termination by the owners. In effect, the builders said that they

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80 The issues were dealt with by the judge under the heading 'Issue 2 — is the builder entitled to payment of some other sum assessed as on a quantum meruit?', at Reasons, [296]–[326].

81 Reasons, [306].

82 Reasons, [301].

83 Reasons, [311].

84 Reasons, [312].

85 Reasons, [308]–[309].

86 Reasons, [313]–[317].

would not do any further work and the owners did not say anything in response. Alternatively, Sukhvinder offered in the 2 August 2022 email that the builder could either meet the owners' demands or accept their offer to terminate the contract. The builder accepted that offer by its notice of termination of 8 August 2022.[87] The judge did not address what implications flowed from the parties abandoning the contract but concluded by saying that there had been substantial performance of the lock-up stage and the contract price may be recovered by the builder for the work done.[88]

Submissions

110 The owners submitted that:

(a) Because the builder did not reach lock-up stage, its purported termination under cl 42 of the contract was ineffective.

(b) The builder had suspended works on the site for months without ever serving a notice of termination as required by cl 35 of the contract, which amounted to a substantial breach of the contract under cl 43.1 and a repudiation of the contract, entitling the owners to terminate the contract at common law. Furthermore, the builder threatened to stop work on 2 February 2022 and 4 March 2022 but did not give notice of its suspension of works, as required by cl 35.1 of the contract. Suspending the works without serving a notice under cl 35 was itself a substantial breach of the contract.[89] The builder was not entitled to terminate the contract under cl 42, being in substantial breach itself. The owners accepted the builder's repudiation and terminated the contract at common law when they engaged a new builder to complete the works.

(c) The owners did not repudiate the contract by seeking to resolve their dispute with the builder on terms that went beyond the contract. The parties had been in conciliation, which had failed. Then, having received a notice of intention to terminate, the owners offered to resolve the dispute by their 2 August 2022 email to the builder. The email, written by a layperson, is a desperate attempt by the owners to engage with the builder to resolve the matter as an alternative to paying the lock-up invoice in full, where the owners did not accept that the work was complete.

(d) The builder is not entitled to quantum meruit; there is no basis for restitution. The builder was not entitled to a contractual payment and was not an innocent party who accepted the repudiation of the other party as the only available course of action.

(e) The parties did not abandon the contract or agree to its termination. Alternatively, if they did, no agreement that the builder was entitled to payment for partly completed works can be implied in circumstances where the owners

87 Reasons, [318]–[326].
88 Reasons, [326].
89 Citing *Cardona* (2012) 35 VR 538, 559 [87], 561 [98].

made clear that they were refusing to pay the disputed lock-up stage invoice. Unjust enrichment is not itself a cause of action; a basis for payment in quantum meruit has not been established.

111 The builder submitted that if, contrary to its primary case, lock-up stage was not completed:

(a) The evidence did not establish that the builder suspended the works.

(b) In characterising the end of the parties' contractual relationship, there were only four possibilities: the owners terminated the contract; the builder terminated it; the parties abandoned it; or it remained on foot until the issue of proceedings by counterclaim.

(c) The owners did not terminate the contract by accepting the builder's repudiation. A contract is on foot until terminated even where one party has engaged in repudiatory conduct. A party must communicate that it accepts the other party's repudiation. The owners have not established that they communicated their acceptance of the builder's repudiation. To the contrary, the owners repudiated the contract by evincing an intention not to be bound by it. Their intention was expressed in their 2 August 2022 email. Sukhvinder maintained when cross-examined that he would not have paid even if the work was completed.

(d) The builder was entitled to accept the owners' repudiation and terminate the contract. The builder accepted the owners' termination by serving its notice of termination on 8 August 2022. The builder had served a notice of intention to terminate on the grounds of non-payment of the lock-up stage invoice. However, a termination that is invalid on one ground (non-payment of a progress claim that was not in fact due for payment) may be supported by another ground (accepting the other party's repudiation), whether or not the terminating party had knowledge of it.[90] In those circumstances, where the owners were the defaulting party (having repudiated the contract) the builder was entitled to payment on a quantum meruit. The builder accepted that if, contrary to its submission, it was properly to be regarded as the defaulting party and the contract was terminated on the basis of that default, quantum meruit was precluded.

(e) It is not tenable to regard the contract as having been on foot until the owners issued a counterclaim. The owners plainly regarded the contract as being 'completely off' at least when they appointed a new builder.

(f) If neither party validly terminated the contract, it must have been abandoned. It is open to characterise the parties' communications in this way: the builder conveyed to the owners that it was not going to perform any more work, which meant that the builder could not do the remaining work to accrue its entitlement to payment at the conclusion of the lock-up stage. The owners communicated

90 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359, 370–1 (Rich J).

in response that they were not going to insist on the builder finishing that stage. In those circumstances the builder could recover payment on one of two bases. First, the parties ought be regarded as having tacitly agreed to mutually discharge one another from their prospective obligations and to have agreed that the owners would pay the builder a reasonable amount for the work in fact performed. Alternatively, the builder was entitled to payment in restitution on a quantum meruit on the basis that the work was done for and at the request of the owners and it would be unjust or unreasonable for the owners to retain the benefit of the work without paying for it.

Consideration: ground 2 — termination by the builder

112 It is necessary to consider the status of the contract and the parties' communications about it to determine whether the builder is entitled to payment on a quantum meruit or on the grounds of an implied agreement arising out of the parties' mutual abandonment of the contract.

113 The owners relied principally upon the builder's suspension of the works as conduct in breach of the contract, disentitling the builder to terminate,[91] and the builder relied principally upon the owners' email of 2 August 2022 as a repudiation of the contract.

114 The evidence concerning suspension of the building works was as follows.

115 Ikbal's evidence-in-chief was that he was told by Ozzie Homes in 'about May 2022' that the owners had not paid the lock-up stage invoice, and that apart from some minor internal carpentry he did not have any further work carried out 'following non-payment of the lock-up stage claim', adding that 'had the [owners] paid that claim and asked me to continue carrying out the works I would have been willing and able to do that'. When asked in cross-examination when he had stopped working on the site, he said he could not recall in which month work had stopped, but work ceased after they had done some carpentry work inside the house 'straightening walls, waiting for plasterwork'. Asked whether he discussed with the builder (we infer, Ozcan) whether they would suspend works on site, he said that they did have discussions and once no payment had come through 'we decided we need to pause the work' and couldn't recall quite when that decision was made. When asked when was the last he did any building work on the site he said, 'We didn't stop in February but I can't recall the exact dates'. When taken in cross-examination to the building notice of 1 April 2022, his evidence was that he had not acted on it because 'the work had already stopped onsite' and also that the items addressed by the notice would be fixed before the plasterwork was done (i.e. in the next construction stage).

116 Ozcan's evidence was that he passed on the 1 April 2022 direction to fix building work to Ikbal and was satisfied that the works required by the notice were done. Having dealt with the notice, he decided to re-issue the lock-up stage claim which had not been paid. Observing that the re-issued claim was not paid, he said that 'Had the

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91 The owners also relied in a submission put in general terms, on the builder's delays and 'defective work'. It is unnecessary, in light of the conclusions we have otherwise reached, to address that submission.

[owners] paid the lock-up stage invoice, Ozzie Homes was ready, willing and able to continue carrying out the balance of the works'.

117 In summary, on the evidence-in-chief of Ikbal, some minor work occurred after the issue of the May 2022 lock-up stage invoice, but work stopped thereafter. On his evidence given in cross-examination, work had stopped by the time he received the 1 April 2022 building notice from Ozcan, which we infer was in early April 2022. In cross-examination, and in answer to a direct question about when he last worked on the site, he could say only that work did not stop in February 2022. Ozcan did not specifically address the date on which work stopped but his evidence (like that of Ikbal) did establish that the builder stopped work and decided only to recommence works on payment of the lock-up stage invoice. On the best case for the builder, it suspended work by early May 2022, after the issue of the 1 May 2022 progress claim, and was prepared to recommence work only if the progress claim was paid. Although it is strictly unnecessary to resolve the conflicts in the evidence concerning the date on which work stopped, in our view it is likely on the whole of the evidence, and particularly given Ikbal's evidence in cross-examination, that the builder suspended work for non-payment of the lock-up stage claim in early April 2022.

118 The builder was entitled under the contract to suspend the building works in accordance with cl 35. Clause 35.1 specified that the builder was entitled to suspend the building works if the owner did not make a progress payment that was due within seven days after it became due, or was otherwise in breach of the contract. Clause 35.2 required the builder to immediately give notice of the suspension in writing by registered post to the owner, after which time the owner was required to remedy the breach within seven days, and after the owner had remedied the breach and given notice of that fact to the builder, the builder was obliged to recommence the building works within 21 days. It follows from our conclusion in respect of ground 1 that the builder was not entitled to suspend works for non-payment of the lock-up stage progress claim. Because lock-up stage was not complete, the builder was not entitled to make the progress claim, the owners were not obliged to pay it and they were not in breach of the contract by failing to pay the claim. Further, the builder did not comply with the process stipulated by cl 35.2.[92]

119 Clause 43.1 of the contract provided that 'The builder is in substantial breach of this contract if the builder suspends the carrying out of the building works other than in accordance with clause 35'. In *Cardona,* Tate JA (with whom Bongiorno and Osborn JJA agreed) said of contractual provisions that were identical to those in the present case:

> The suspension of building works is a significant step for a builder to take. A suspension carried out other than in conformity with cl 35 is treated by the contract as having the same level of seriousness as the cancellation or

92 The parties agreed that the builder 'threatened to stop work' in an email covering the first issue of its lock-up stage claim on 2 February 2022. They were in dispute about whether there was evidence of a subsequent demand on 4 March 2022 that if payment was not received by 11 March 2022, the builder would suspend works in accordance with its contractual rights; the builder contended that the 4 March 2022 demand was not in evidence at trial. The builder did not contend that it had complied with cl 35.1 of the contract.

suspension of a builder's licence.

…

So too, cl 43.1 treats as significant the requirement to issue a notice of suspension of works immediately. The notice has several important functions, one of which is to trigger the commencement of a time period of seven days during which the owner has an opportunity, and an obligation, to remedy the breach that prompted the suspension of the works.[93]

120 By application of cl 43.1, the builder was in substantial breach of the contract by reason of its suspension of the work otherwise than in accordance with cl 35 (and regardless of whether it suspended work in April 2022 or in May 2022).

121 One implication of the builder being in substantial breach of the contract was that the builder was not entitled to terminate the contract for breach by the owners.

122 The builder was expressly precluded by cl 42.4 from ending the contract under cl 42, where the builder was itself in substantial breach. Whilst cl 42 did not purport to exclusively govern the builder's rights arising upon breach of the contract by the owners,[94] the consequences of this particular breach by the builder were the same at common law, by application of the principle that, when a party claims to be entitled to rescind a contract on account of the other party's repudiation, the first party must show its own readiness and willingness up to the time of rescission to perform its essential obligations under the contract.[95] By designating a suspension of the works other than in accordance with cl 35 as 'substantial' (with the consequence that the party in substantial breach could not rely on its contractual rights to terminate the contract for breach by the other party) the parties made plain their intention that the builder's obligation to continue the works (not to suspend them other than as expressly provided) was an essential term of the agreement. That the parties so intended was consistent with the commercial purpose of the agreement, which was to achieve the construction of a home within the building period. Confining the builder's ability to suspend the works, by treating the strictures on suspension by the builder as an essential term, facilitated that purpose.[96]

123 The works remained suspended when the builder issued a notice of termination of contract on 8 August 2022. The consequence was that, even if by their 2 August 2022 email the owners evinced an intention not to perform the contract according to its terms, the builder was, on account of its own default, not entitled to terminate the contract, and its purported termination was legally ineffective.

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93 *Cardona* (2012) 35 VR 538, 560 [90]–[91].

94 Clause 42.4 provided that 'the builder is not entitled to end this contract under this clause when the builder is in substantial breach of this contract'. Clause 42.0 preserved the builder's exercise of 'any other right or remedy' available to it if the owner breached the contract including by repudiation.

95 *Foran v Wright* (1989) 168 CLR 385, 397 (Mason CJ), 424 (Brennan J), 451 (Dawson J).

96 See *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 138 [48] (Gleeson CJ, Gummow, Heydon, Crennan JJ).

124 By ground 2, the owners contend that the judge erred in finding that the builder validly terminated the contract on 8 August 2022.[97] We would grant leave to appeal and allow the appeal on that ground.

Consideration: ground 2A(a) — mutual abandonment

125 For the purpose of considering proposed ground 2A(a) (mutual abandonment or termination), it is necessary to consider the owners' position under the contract in and after August 2022.

126 The owners had engaged solicitors (at least for earlier correspondence) but the 2 August 2022 email, which was the owners' final communication with the builder, was written by Sukhvinder. The owners made several points in the email:

(a) They reiterated that the builder had stopped work on site and had demanded payment for lock-up stage when the works were not complete.

(b) They said that they would not pay the lock-up stage invoice until several conditions were met: completion of all works reported in the owners' inspection report (which we take to mean the March and June Laycock Reports); payment of 'compensation', which we infer relied upon the builder's email of 3 August 2021, plus payment of $2,000 for site cleanup and $700 for the provision of a temporary fence; the completion of 'all the queries for the selection sheets asked in our previous emails'; a statutory declaration from the builder stating the time for completion; 'provide customer service and progress in work' and 'a guarantor who will take responsibility for our house completion'.

(c) On the subject of the contract they said:

> …. provide customer service and progress in work (if they want payment from us) then we *will think about if we can go ahead with you*.
>
> …
>
> FYI: *we are not breaching any clause* (builder) ur (*scil your*) clients are breaching the law and Not complying to surveyor's reports
>
> …
>
> *I am offering them for the last time to arrange a time with me. Otherwise, I don't care if wants to terminate the contract*.[98]

127 In submissions, the owners characterised the email as an attempt to engage with the builder to resolve the parties' dispute, putting a position in the alternative to paying the lock-up invoice in full. The builder characterised the position taken in the email as repudiatory. The email was in parts ambiguous. Several things may be said about it.

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97 Reasons, [64], [322]. The parties agreed that the date of issue of the notice of termination was 8 August 2022.

98 Emphasis added.

128 First, noting that it was written by a lay person, the email did not with any clarity attempt to give notice of an intention to terminate the contract by accepting a repudiation by the builder. The owners did not submit that it should be so construed. Rather than calling an end to the contract at that point, the owners sought a meeting with the builder.

129 Second, the request for a meeting was put as a final offer, followed by the statement, 'otherwise I don't care if wants to terminate the contract'. That sentence was incomplete but read in context, 'if wants to terminate' was a reference to the builder's notice of intention to terminate, which had been served several days earlier. 'Otherwise' referred to the alternative to accepting the offer 'for the last time to arrange a time with me'.

130 Third, the owners' position that they would not pay the lock-up stage invoice until several conditions were met went well beyond the contractual requirements for a progress payment, which rested only on the completion of the relevant stage works and the making of a claim.

131 Taken by itself without context, the owners' insistence that they would not pay the lock-up stage claim until those conditions were met could be characterised as repudiatory because taking such a position would convey to a reasonable person in the situation of the builder, the renunciation of a fundamental obligation.[99] The contractual obligation to make payments of progress claims once the conditions for demanding payment were satisfied was expressed by the parties in terms that made clear the obligation was an essential term.[100]

132 However, as the chronology shows, the owners' 2 August 2022 email came after months of disputation, a failed conciliation, and the making of post-conciliation offers which were not accepted,[101] and was sent in response to the builder's notice of intention to terminate the contract for non-payment of the lock-up stage claim. In our view, read contextually, the owners were by the email attempting to engage with the builder one final time to resolve their dispute. What they sought and what they put as a 'final offer' was a meeting with the builder by which they were seeking a final opportunity to negotiate. In doing so they made clear that what they would not do was pay the lock-up stage claim. That position was taken in response to the builder pressing for payment when the works were not, in the owners' assessment, complete, and where the builder had stopped work. Recalling that the basis for the builder's notice of termination was non-payment of the lock-up stage claim, the statement, 'otherwise I don't care if wants to terminate the contract', conveyed the owners' acceptance of the fact that unless the builder was prepared to negotiate, the builder may pursue its proposed termination and the relationship would be at an end.

133 We would add that the judge and the builder on this appeal emphasised the evidence of Sukhvinder about his state of mind towards the builder, in concluding that the

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99 See *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 135–8 [44]–[48] (Gleeson CJ, Gummow, Heydon, Crennan JJ).

100 Contract, cls 30, 35, 42.

101 See the emails of 17 May 2022 and 25 May 2022 in the chronology above.

owners repudiated the contract. However, as this Court said in *Sopov v Kane Constructions*, '[a]xiomatically, the repudiator's state of mind is irrelevant. What matters is the character of the repudiator's conduct. The touchstone is conduct, not state of mind'.[102]

134 The builder served a notice of termination of contract on 8 August 2022, beyond which there was no evidence of any further communication between the parties. The owners subsequently appointed a new builder.[103]

135 As to the status of the contract, the owners submitted that they accepted the builder's repudiation and terminated the contract at common law when they engaged a new builder to complete the works. The builder submitted that if its attempted termination was of no effect, then the parties mutually abandoned the contract.

136 Breach or repudiation of a contract by one party does not of itself operate to rescind the contract but puts the other party to his election to treat the contract as at an end or as still subsisting. Unless rescinded, the contract remains on foot for the benefit of both parties.[104] The innocent party rescinds if he treats the contract as at an end, declining to perform his part and declining to accept performance from the other party.[105] An election takes place when the conduct of the other party is such that it would be justifiable only if an election had been made one way or the other.[106] Nevertheless, whilst an express or formal communication of rescission is not strictly necessary and may occur by conduct and indirectly,[107] essential to the making of an election to rescind is communication of that decision to the party affected. This requirement serves the interests of certainty and fairness between the parties.[108]

137 The judge found that 'shortly after' the builder's notice of termination, the owners appointed a new builder who commenced work in January 2023, and referred to Sukhvinder's evidence that he signed a new building contract with a different builder in December 2022.[109] Having conveyed to the builder by their email of 2 August 2022 that they sought a final opportunity to negotiate but that they would not pay the lock-up invoice as demanded (while acknowledging that the builder might otherwise terminate the contract), the appointment of a new builder was sufficient to constitute an election to terminate the contract. The appointment might have come to the attention of the builder (who had, several months earlier, stopped work on the site), but the owners pointed to no evidence whatsoever about whether, when and how that

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102 *Sopov v Kane Constructions* (2007) 20 VR 127, 130 [10]–[11] (Maxwell P and Kellam JA).

103 There was no evidence of the date on which that occurred.

104 *Foran v Wight* (1989) 168 CLR 385, 395 (Mason CJ), 416–17 (Brennan J), 442 (Dawson J).

105 *Poort v Development Underwriting (Vic) Pty Ltd (No. 2)* [1977] VR 454, 459 [20] (Starke, Lush and Kaye JJ).

106 *Sargent v ASL Developments Ltd; Turnbull v ASL Developments Ltd* (1974) 131 CLR 634, 655–6 (Mason J) (citations omitted).

107 *Poort v Development Underwriting (Vic) Pty Ltd (No. 2)* [1977] VR 454, 459 [20] (Starke, Lush and Kaye JJ); *Actrol Parts Pty Ltd v Coppi (No 2)* [2015] VSC 694, [51] (Bell J), and the cases there cited.

108 *Sargent v ASL Developments Ltd; Turnbull v ASL Developments Ltd* (1974) 131 CLR 634, 656 (Mason J).

109 Reasons, [31], [197].

fact was conveyed to the builder. The owners accordingly did not establish that they terminated the contract with legal effect.

138 The result is that neither party effectively rescinded the contract.

139 However, where it is plain from the conduct of parties to a contract that neither intends that the contract should be further performed, the parties will be regarded as having so conducted themselves as to abandon or abrogate the contract.[110] By the time the builder served its notice of termination it was plain, objectively speaking, that neither party regarded the contract as being on foot or intended that it should be further performed. As far as the owners were concerned, that conclusion could be drawn from the terms of its 2 August 2022 email, viewed in light of the builder's response, which was to purport to terminate the contract rather than to negotiate. In those circumstances, the parties must be regarded as having 'conducted themselves so as to abandon or abrogate the contract'.

140 Although it is common to refer to 'abandonment' as a distinct doctrine, the preferable view is that the contract has been discharged by inferred agreement of the parties.[111] Here, the fact that the parties abandoned the contract may be inferred from their conduct, but there is no basis on which to infer an agreement that (as the builder put it) the builder would be paid a reasonable amount for the work performed. The builder accepted that the ascertainment of a term regarding payment must satisfy the requirements discussed in *Realestate.com.au v Hardingham*.[112] Where the terms of an agreement have not been articulated they must be ascertained by reference to the parties' words and conduct. 'The ultimate question is what reasonable people with knowledge of the background circumstances then known to both parties would be taken by their words and conduct to have agreed.'[113] An agreement requires a meeting of minds. In this case the builder was seeking payment, but agreeing to make payment notwithstanding the builder's failure to complete the works would have been contrary to the owners' consistently and strongly stated position. Reasonable people with relevant knowledge of this background would not have been taken to have agreed that the builder would be paid for the work done.

Consideration: ground 2A(b) — quantum meruit

141 We return to the builder's claim for payment on a quantum meruit.

142 The builder's primary claim assumed that the owners had repudiated the contract and the builder had been prevented from exercising its right to complete performance to earn the contract price. On that basis, the builder relied on the decision of a majority

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110 *DTR Nominees v Mona Homes Pty Ltd* (1978) 138 CLR 423, 434 (Stephen, Mason, Jacobs JJ, Aickin J agreeing at 437, Murphy J dissenting at 435–7).

111 *Jafari v 23 Developments Pty Ltd* [2019] VSCA 201, [192] (Whelan and Niall JJA and Sifris AJA); *Técnicas Reunidas SA v Andrew* [2018] NSWCA 192, [51] (Leeming JA, Bathurst CJ agreeing at [1], White JA agreeing at [86]); *Woolworths Group Ltd v Gazcorp Pty Ltd* [2022] NSWCA 19, [93] (Bell P, Bathurst CJ agreeing at [1], Meagher JA agreeing at [231]).

112 *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115 ('*Hardingham*').

113 *Hardingham* (2022) 277 CLR 115, 126 [15] (Kiefel CJ and Gageler J). See also Gordon J at 133 [45]; Edelman and Steward JJ at 147 [83]; 156 [117], 158 [123].

of the High Court in *Mann v Paterson*.[114] The builder conceded that if it was in fact the defaulting party 'and the contract was terminated for that cause', quantum meruit was precluded.

143 The builder advanced an alternative argument that if each party had been disabled from exercising the right to terminate the contract by its own conduct and the parties were to be regarded as having abandoned the contract, the builder should be entitled to payment on a quantum meruit on the ground that it had undertaken work for, and at the request of, the owners and it would be unjust or unreasonable for the owners to retain the benefit of that work without paying for it. The builder said that no authority directly governed the issue but referred to the High Court's decision in *Lumbers* v *W Cook Builders Pty Ltd (in liq)*[115] for the proposition that it would be unjust for the owners to retain the benefit of work done at their request. The argument was skeletal but appeared to rely on the proposition that where both parties regarded the contract as at an end and neither party was 'innocent', to allow the consequences of the builder failing to establish a contractual basis for payment of its lock-up claim to fall on the builder alone, would be inequitable.

144 A claim on a quantum meruit of the kind made in this case rests not on implied contract but on a claim to restitution based on unjust enrichment.[116] In *Lumbers*, the plurality said, by reference to the High Court's earlier decision in *Pavey & Matthews*:

> ... unjust enrichment was identified [in *Pavey & Matthews*] as a legal *concept* unifying 'a variety of distinct categories of case'. It was *not* identified as a principle which can be taken as a sufficient premise for direct application in particular cases. Rather, as Deane J emphasised in *Pavey & Matthews*, it is necessary to proceed by 'the ordinary processes of legal reasoning' and by reference to existing categories of cases in which an obligation to pay compensation has been imposed. 'To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate'. On the contrary, what the recognition of the unifying concept does is to *assist* in the determination, by ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a *new or developing category of case*'.[117]

145 In cases concerning claims to restitution-based receipt of a benefit, it has been consistently affirmed that the bare fact of conferral of a benefit or the provision of a service does not suffice to establish an entitlement to recovery.[118] In *Lumbers* the position was complicated by a subcontract, but the following passage in the judgment of Gummow, Hayne, Crennan and Kiefel JJ indicates that something more than the retention of a benefit by the owners was required in the present case:

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114 *Mann v Paterson* (2019) 267 CLR 560, 629–30 [174] (Nettle, Gordon and Edelman JJ).

115 (2008) 232 CLR 635 ('*Lumbers*').

116 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 227 (Mason and Wilson JJ), 256–7 (Deane J) ('*Pavey & Matthews*').

117 *Lumbers* (2008) 232 CLR 635, 665 [85] (Gummow, Hayne, Crennan and Kiefel JJ) emphasis in original, citations omitted.

118 *Lumbers* (2008) 232 CLR 635, 656 [51]–[52] (Gleeson CJ), 663 [80] (Gummow, Hayne, Crennan and Kiefel JJ); *Steele v Tardiani* (1946) 72 CLR 386, 402 (Dixon J, McTiernan J agreeing at 408).

> In *Steele v Tardiani*, ... Dixon J explained the problems of identifying, for the purpose of a quantum meruit claim not based on the contract, a 'benefit' conferred on a building owner by the performance of work otherwise than in accordance with the contract. He accepted that, where building work is done outside the contract, and the benefit of the work is taken, there may arise an obligation to pay for the work. He went on to refer, however, to 'the dilemma in which a building owner is placed'. He quoted Collins LJ who said, in *Sumpter v Hedges*:
>
> > Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract ... The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference.
>
> The reference to an 'inference of a new contract' may reflect an approach since overtaken by *Pavey & Matthews Pty Ltd v Paul*, but the problem involved in identifying a conferring or accepting of a benefit remains.[119]

146 Gummow, Hayne, Crennan and Keifel JJ went on to say that in this context much will turn on the features said to make the retention of a benefit 'unconscionable'.[120] Furthermore, 'an essential step in considering a claim in quantum meruit (or money paid) is to ask whether and how that claim fits with any particular contract the parties have made, because … serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract'.[121]

147 In *Mann v Paterson*, the High Court considered a major domestic building contract as defined under the Act. It was not in dispute that the builder had terminated by accepting the owners' repudiation and was for relevant purposes the innocent party.[122] Nettle, Gordon and Edelman JJ held that upon termination for repudiation of an uncompleted contract containing an entire obligation or divisible stages for work and labour done, the innocent party may sue for damages for breach of contract or, at the innocent party's election, for restitution in respect of the value of services rendered under the contract.[123] More specifically,[124]

> Where a contractor is only entitled to receive remuneration if the contract is wholly carried into effect, and the other party's wrongful repudiation of the contract has the effect of preventing the contractor from

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119 *Lumbers* (2008) 232 CLR 635, 656 [51]–[52] (citations omitted).

120 *Lumbers* (2008) 232 CLR 635, 661 [75] (Gummow, Hayne, Crennan and Kiefel JJ).

121 *Lumbers* (2008) 232 CLR 635, 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ) (citations omitted); cf *Mann v Paterson* (2019) 267 CLR 560, 599 [83] (Gageler J).

122 *Mann v Paterson* (2019) 267 CLR 560, 607 [109] (Nettle, Gordon and Edelman JJ, Gageler J agreeing at 607 [108], Kiefel CJ, Bell and Keane JJ dissenting).

123 *Mann v Paterson* (2019) 267 CLR 560, 626 [166] (Nettle, Gordon and Edelman JJ, Gageler J agreeing at 591–2 [61], Kiefel CJ, Bell and Keane JJ dissenting). The dissentients would not have allowed recovery in restitution at all.

124 *Mann v Paterson* (2019) 267 CLR 560, 628 [170] (Nettle, Gordon and Edelman JJ).

> becoming entitled to receive remuneration for services already rendered, the contractor may, after electing to treat the contract as at an end, maintain an action to recover restitution as upon a quantum meruit for those services, instead of suing for damages.

148 In that context, their Honours reasoned that the 'qualifying or vitiating' factor giving rise to a prima facie obligation on the part of the enriched party to make restitution is a total failure of consideration or of a severable part of consideration.[125]

149 Gageler J agreed with the result reached by Nettle, Gordon and Edelman JJ on the facts of the case, but by a narrower path of reasoning,[126] emphasising that it was the very fact that the contract became unenforceable that provided the occasion for, and part of the circumstances giving rise to, the imposition by the law of the obligation to make restitution. The innocent party had rendered services in part performance of the totality of the services necessary to be performed in order for it to accrue a contractual entitlement to payment in the future. The defaulting party correspondingly had had the benefit of services rendered in part performance, for which that party had not incurred and would not incur any contractual obligation to pay.[127] Gageler J mentioned, without needing to address, the 'more difficult' category of case where it is the defaulting party who seeks to recover the value of services rendered to the innocent party.[128] As already noted, the other members of the Court would not have allowed recovery on a quantum meruit at all.

150 The present contract contained divisible obligations of performance in respect of each construction stage, and the builder had not accrued a contractual right to payment for the works comprising the uncompleted lock-up stage when the contract came to an end. The builder conceded that, if it was in fact the defaulting party, it was not entitled to recover the value of the services rendered to the owners. However, on the premise that the parties abandoned the contract, the builder's argument fastened on the injustice of allowing the owners to retain the benefit of the work without payment, where neither party could be regarded as 'innocent'.

151 Our conclusion that neither party effectively terminated the agreement does not support a further conclusion that the builder's inability to satisfy the contractual basis for payment of the lock-up stage works was attributable to both parties. The builder suspended work of its own accord on the basis that it had not been paid for the lock-up stage claim. It did so in breach of the contract. It is likely that it did so in early April 2022 or on its own evidence in early May 2022. In either case, it ceased work well before the owners responded by their 2 August 2022 email to the builder's notice of proposed termination, and well before the owners appointed a new builder. The

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125 *Mann v Paterson* (2019) 267 CLR 560, 627 [168] (Nettle, Gordon and Edelman JJ). That point was elaborated at 630–1 [176], Nettle, Gordon and Edelman saying that 'if there are any uncompleted stages, there will be a total failure of consideration in respect of those stages due to the failure of the builder's right to complete the performance and earn the price. In that event there will be nothing due under the contract in relation to those stages, and restitution upon a *quantum meruit* will lie in respect of work and labour done towards those uncompleted stages'.

126 *Mann v Paterson* (2019) 267 CLR 560, 591–2 [61], 597 [76] (Gageler J).

127 *Mann v Paterson* (2019) 267 CLR 560, 596–7 [75] (Gageler J).

128 *Mann v Paterson* (2019) 267 CLR 560, 598–9 [81] (Gageler J).

owners have failed to establish on the evidence that they met the legal requirements for terminating the contract by appointing a new builder, but the owners' conduct (whether in appointing a new builder or otherwise) did not disable the builder from completing the works. The owners have received the benefit of the works which were carried out under the contract on the basis that, and in the mutual expectation that, each stage of the works would be completed before payment was due.

152 As a result of the builder ceasing the works and purporting to end the contract, the owners were left with a partly completed home, for which they paid for the first two completed stages but did not pay for the third, uncompleted stage. They neither prevented performance of the contract by the builder, nor acquiesced in the builder delivering the works in an incomplete state. In the language endorsed in *Lumbers*, the owners were in possession of that which they could not help keeping. In those circumstances, there is (without more) nothing unjust or unconscionable in the owners retaining the benefit of the work without payment for its value.

153 In *Pavey & Matthews,* Deane J said that a quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will arise only where there is no genuine agreement, or where such an agreement is frustrated, avoided or unenforceable.[129] We accept that conceptually, the abandonment of a contract may present an occasion for the awarding of compensation for unjust enrichment where the abandoned contract has been partly performed, depending on the circumstances. This case does not present such an occasion, for the reasons we have given. Instead, the case recalls the warning in *Lumbers* against 'expand[ing] the law of restitution to redistribute risks for which provision has been made under an applicable contract' (and, we would add, an applicable statute).[130]

154 By proposed ground 2A the owners contend that the judge erred in finding in the alternative that: (a) the parties mutually abandoned the contract or agreed to its termination or that the builder accepted the owners' offer to terminate the contract; and (b) that the builder was entitled to payment on a quantum meruit. We would grant leave to the owners to amend their notice of appeal to add ground 2A. The builder identified no relevant prejudice that it would suffer from a grant of leave. Ground 2A raised real issues that required determination in order to resolve the substance of the dispute. For the reasons given, we would allow the appeal on ground 2A(b).

Ground 3 — counterclaim for damages

155 By ground 3 the owners contend that the judge erred in failing to award damages to the owners. The owners claimed liquidated damages for delay under cl 40 of the contract in the sum of $12,750, the sum of $67,542.25 for 'bank interest' and the sum of $20,511.92 for the costs of rectifying defects.

156 The judge held that:

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129 *Pavey & Matthews* (1987) 162 CLR 221, 256 (Deane J).

130 Cf *Mann v Paterson* (2019) 267 CLR 560, 599 [83] (Gageler J).

(a) In light of the finding that the builder completed lock-up stage and effectively terminated the contract, the counterclaim must fail.[131]

(b) In any event, the owners failed to prove their loss. As to delay damages, the owners led no evidence of the start date of construction (although they referred to the date of 18 February 2021 in their particulars and in opening submissions). Without evidence of that date, loss cannot be quantified.

(c) As to the mortgage interest claim, the owners did not plead or prove a separate agreement. As to the alleged agreement, they did not establish why the amount claimed over and above contractual delay damages ought be granted, noting that delay damages are intended to be a genuine pre-estimate of the costs the owner will incur if the project is not completed by the date for practical completion.[132] They did not prove that they were obliged to pay interest under a loan agreement. There was no evidence that they paid interest on their mortgage repayments in the sum claimed ($67,542.25).

Submissions

157 The owners submitted that:

(a) The judge's finding that the counterclaim must fail because the builder terminated the claim was in error because accrued contractual rights survive termination.

(b) They were entitled to 55 weeks of liquidated damages for delay from 11 November 2021 to 17 December 2022 when they terminated the contract, amounting to $13,750. The claim was squarely pleaded.

(c) As to the date of commencement of construction, a letter 'to whom it may concern' from Ozzie Homes signed by Ozcan dated 19 February 2021 stated 'we confirm through this letter that the construction work is started on 18 February 2021'. A letter from Emperial Homes to the owners dated 21 February 2021 stated 'construction … is started'. Those letters were in the court book at trial but by oversight were not tendered. No relevant prejudice arises from their being allowed in evidence on this appeal. That evidence is consistent with the inference available from the builder's letter to the owners of 3 August 2021, which was in evidence. The 3 August letter states that, under the contract, the construction period is 270 days after obtaining the building permit which period ends on 11 November 2021. Working back from the end dates produces a start date of 15 February 2021. The judge's finding that no evidence was led as to the actual date of commencement was in error.

(d) Pursuant to the builder's letter of 3 August 2021, the builder agreed to pay the owners for their bank interest. The judge was wrong to conclude that no separate agreement was pleaded or proved by the owners and no evidence was

131 Reasons, [343].
132 Reasons, [348].

before the court on which to calculate the loss.[133] The owners alleged the agreement, and advanced that claim by its counter-claim, and tendered bank statements showing the interest paid on 'home loan transactions'. The owners had been very critical of the builder since at least October 2020. It may be inferred that the builder's promise to pay bank interest was given in exchange for the owners forbearing from exercising their rights against the builder in relation to their complaints about delays. The payment by the owners of interest to their bank for the loan in respect of the property was evidenced by their bank statements that were in evidence.

158 The builder submitted:

(a) As to the claim for delay damages, the owners did not plead the commencement date. That had the result that no evidence was led to prove the date of commencement of construction. Without that evidence, the loss could not be quantified. Had that date been alleged, the builder in turn would have pleaded delays due to COVID-related restrictions and that time would have been extended under cl 34 of the contract for delays beyond the builder's control.

(b) As to the bank loan interest claim: there was no loan agreement before the court to establish interest charges; the owners did not establish how any additional interest charges arose from a breach of contract; the agreement was not supported by consideration and any claim for delay-related damages is precluded by the express provision under the contract for liquidated damages.[134]

(c) The owners did not counterclaim for defects at trial. The claim should not be allowed on appeal. In any event, the obligation for the work to be free of defects had not yet arrived.

(d) To the extent that the owners succeed and are entitled to damages they must give credit for the value of the builder's work.

Effect of termination

159 Upon termination of a contract, accrued rights subsist for the benefit of each party; they are not discharged.[135] To the extent that the judge reasoned that termination of the contract was a complete answer to the counterclaim, this was in error. Termination would be relevant, however, in so far as the counterclaim sought to rely on rights that were yet to accrue at the point of termination. This is important in the context of agreed damages for delay under the contract.

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133 Reasons, [348].

134 Citing *Hacer Group Pty Ltd v Euro Façade Tech Export Sdn Bhd* [2022] VSC 373 (Stynes J), [179].

135 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476–7 (Dixon J, McTiernan J agreeing at 486); *Mann v Paterson* (2019) 267 CLR 560, 625 [165] (Nettle, Gordon and Edelman JJ).

Agreed damages

160 Clause 40.0 of the contract provided:

> If the building works have not reached Completion by the end of the building period the owner is entitled to agreed damages in the sum set out in item 9 of schedule 1 for each week after the end of the building period to and including the earlier of:
>
> - the date the building works reach Completion;
> - the date this contract is ended; and
> - the date the owner takes possession of the land or any part of the land.

161 The amount allowed by item 9 was $250 per week.

162 By paragraph 10(a) of their amended counterclaim dated 14 August 2024, the owners relevantly alleged:

> The plaintiffs are entitled to be compensated a total of $22,500 in delay damages in accordance with clause 40 of the contract.

Particulars

(i) Clause 40 of the Contract states that if the building works have not reached completion by the end of the building period, the owner is entitled to agreed damages in the sum set out in Item 9 of Schedule 1 for each week after the end of the building period to and including the earlier of the date of the building works reach completion, the date the contract is ended, and the date the owner takes possession of the land or any part of the land. A copy of the Building Contract is included in the Court Book (pages 447- 493).

(ii) The building work commenced on 18 February 2021. And according to Clause 1 in Schedule 1 of the Contract, the building work should have reached full completion by 15 November 2021. A copy of the commencement letter dated 19 February 2021 is included in the Court Book (page 533).

(iii) Due to the fact that the Defendant unlawfully terminated the Contract Defendant's repudiation of the Contract which the Plaintiffs accepted it, it took the Plaintiffs four months to find another builder who was willing to complete the building works. A copy of the new builder's letter confirming the taking over of the building project is included in the Court Book (page 1059).

(iv) On 17 December 2022, the Plaintiffs signed a new building contract with Kotam Projects Pty Ltd to complete the Lock-Up stage and finalise the building project. The building works commenced in about mid January 2023. A copy of the new building contract is included in the Court Book (pages 1062-1119).

(v) On 7 August 2023, the occupancy permit was issued. A copy of the occupancy permit is included in the Court Book (pages 1128–1129).

(vi) Between 15 November 2021 and 7 August 2023, there were 90 weeks which is the delay period. $250 x 90 weeks = $22,500.

163 The builder by way of reply denied the allegations in that paragraph.

164 We reject the builder's submission that the claim for liquidated damages did not put it on notice of the case. The pleading was sufficient to put the builder on notice of the contractual basis of the claim, the alleged date of commencement of works, the building period and basis for the calculation. Each was stated unambiguously. On a fair and reasonable reading of the pleading, it was plain that the owners were pursuing a claim for liquidated damages under cl 40 of the contract on the basis of a commencement date of 18 February 2021 and a contractual completion date of 15 November 2021. That is so, notwithstanding that the dates upon which the owners relied were set out in particulars. The inclusion of material facts in particulars may be deprecated as a matter of form, but by r 1.13(1) of the Rules 'pleading' is defined to include 'particulars of any pleading'. When assessing the sufficiency of a pleading,

regard may be had to the particulars incorporated in the pleading.[136] Contrary to the builder's submission, this was not a case where the facts were 'buried in particulars'. The owners' pleaded calculation of the end date for the calculation of agreed damages (being the date on which the occupancy permit was issued after the new builder completed construction) was not pressed on appeal, but that does not affect the substance of the pleading point.

165 We would allow the owners to rely on the letters of 19 and 21 February 2021, noting that the letter of 19 February 2021 by itself would be sufficient to establish the date of commencement of the works. The 21 February letter, which contains a statement by site supervisor Ikbal, is consistent with the 19 February letter. The letters went to an issue in contention at trial, on the pleaded case. They were in the trial court book. The 19 February 2021 letter was expressly referred to in the pleading. It appears from those circumstances that the fact that they were not tendered was attributable to an oversight. What they establish is substantively consistent with the inference that can be drawn from the 3 August 2021 letter which was in evidence.

166 Allowing a 270-day building period from 18 February 2021, the work should have reached completion by 15 November 2021.[137] Under cl 40 of the contract the owners were entitled to agreed damages from the end of the building period until the earlier of the completion of the building works, the ending of the contract and the date the owners took possession of the land.

167 We have concluded, however, that soon after the builder served its notice of termination on 8 August 2022, the parties, by their conduct, abandoned the contract. Thus, we consider that the owners are entitled to agreed damages for the period from 15 November 2021 up to and including 9 August 2022, the day after service of the notice of termination, a period of 38 weeks. Given that the agreed damages under cl 40 are $250 per week, the owners are entitled to $9,500. It will be necessary to hear from the parties on the interest to be applied on this sum.

Agreement to pay bank interest

168 The owners alleged that:

> The plaintiffs are entitled to be compensated a total of $67,542.25 for the interest charges they incurred on their mortgage repayments during the delay period as agreed between the plaintiffs and the defendant.

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136 See *Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63, 73 [14] (Ormiston JA, Chernov JA and O'Bryan AJA agreeing at 105 [85]–[87]); affirmed in *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ, Kirby J at 276 [87], Callinan J at 282 [109]).

137 The owners referred to a start date of 18 February 2021 in their particulars, and if that is accepted, then the 270-day building period would have concluded on 15 November 2021, which accords with the pleaded end date. The 3 August 2021 letter referred to an end date of 11 November 2021 which was adopted in the owners' written case. If the building period concluded on 11 November 2021, then the start date would have been 14 February 2021. We adopt the pleaded start date which is founded on the 19 February 2021 letter.

Particulars

> On 3 August 2021, it was agreed by the Defendant that any extra time which will be taken to complete the property after 11 November 2021, the Defendant will compensate the Plaintiffs by paying their bank loan interests which will arise as extra expenses due to delay in the construction for this property until completion of the construction. And that the construction period will end by obtaining the occupancy permit. A copy of the agreement letter is included in the Court Book (page 611).

169 The particulars of the alleged agreement substantively reflected parts of the builder's 3 August 2021 letter to the owners. The pleading was infelicitous but it was not correct to say, as the judge did, that no separate agreement was pleaded.[138]

170 The builder contended that there was no evidence sufficient to establish the interest charges the subject of the 'bank interest' claim and that in any event the claim was precluded by the provisions in the contract for liquidated damages.

171 We have concluded that this aspect of the counterclaim cannot succeed because the owners did not establish their loss. Separately, the alleged agreement is subject to such uncertainty that we doubt its enforceability.

172 The language of the 3 August 2021 letter was less than clear. The owners did not address the proper construction of the letter in their submissions and proceeded on the basis that the builder 'agreed to pay the owners bank loan interest', without any qualification. In our view, the operative statement, 'any extra time which will be taken to complete this house after 11/11/2021 the builder will compensate the owner by paying their bank loan interest which will arise as an extra expense due to delay in the construction for this house until the completion of this construction', should be read as a promise that the builder would pay so much of the owners' bank loan interest as was an 'extra' expense, meaning an expense that was caused by the delay in construction. That reading is consistent with the purpose of compensating the owners for delays in construction.

173 The only evidence upon which the owners relied was a bundle of bank statements for an account in the names of the owners as borrowers. The statements were headed 'complete home loan transaction'. Neither the statements nor any other document disclosed the property to which that loan related. The statements recorded an opening balance of $600,000 as at 1 July 2021. The loan balance remained at $600,000 until it increased to $603,785.234 in May 2023. Each month a debit for interest charged appeared on the statement, with an identical credit amount designated 'repayment/payment' appearing on the same day. It appeared from the bank statements that the borrowing was an interest-only loan for which the principal amount was unchanged for the period during which the building contract was on foot. A note appeared on 8 March 2022 to the effect that the interest only period would expire on 19 April 2022 and the loan would convert to principal and interest.

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138 Reasons, [348].

174 There was no evidence from the owners about their financial arrangements, nor any evidence at all beyond the bank statements in support of this element of their claim. They did not address why the delay in construction beyond November 2021 resulted in extra interest charges that they would not have otherwise incurred. The answer to that question was not apparent from the bank statements that were relied upon. It may be inferred that the owners were relying on bank finance to pay for the construction of their home. But beyond that, nothing more can be concluded. According to the pleading, the claim concerned interest on mortgage repayments. Speaking generally, in the ordinary course a construction loan would be drawn down progressively as progress payments were made with the loan fully drawn at completion and interest payable on the balance thereafter unless and until the loan was repaid. It is not known how the owners structured their finance for the construction of the home and how, if at all, that finance might have impacted on other borrowings. There might have been a ready explanation for why the delayed construction resulted in 'extra' interest payable on a loan held by the owners but if there was, it was not proved. It was not submitted that the judge ought to have made findings of fact that would have supported this claim. We agree with the judge that the owners did not prove their claim for compensation for bank-loan interest. This part of ground 3 fails for want of proof.

175 This conclusion is sufficient to dispose of the alleged bank interest agreement claim. We shall address the other arguments shortly. The enforceability of the agreement was addressed only in a limited fashion in the submissions. Whilst not needing to resolve this issue, we make the following observations. In some circumstances the presence in a contract of a liquidated damages clause might evidence the parties' intention to exclude any other remedy for the breach of contract to which the damages relate.[139] In this case, by cl 40, the contract fixed the amount payable by way of damages if building works had not reached completion by the end of the building period. A separate agreement expressed in the builder's letter of 3 August 2021 was alleged. Clause 40 of the contract and the 3 August 2021 letter both addressed compensation for failure to reach completion within the building period. The 3 August letter provided for compensation by 'paying [the owners] bank loan interest which will arise as an extra expense due to delay in the construction' which was a more particular and discrete agreement.

176 It was not explained how the agreement said to have been recorded in the 3 August 2021 letter was intended to operate consistently with the agreed damages clause. The contract provided for a 'building period' of 270 days[140] and by cl 40 the owners were entitled to agreed damages if the building works had not reached completion by the end of the building period. The letter of 3 August 2021 stated that construction would not be completed by the end of the 270-day period and that 'the construction period will end by obtaining the occupancy permit'. One available construction of the letter is that it was intended to reflect an agreement varying the contract such that the construction period was extended to the point at which an occupancy permit was obtained (whenever that might be) and that, in consideration of

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139 See *Hacer Group Pty Ltd v Euro Façade Tech Export Sdn Bhd* [2022] VSC 373, [177]–[180] (Stynes J) and the case cited there.

140 Contract, sch 1.

the owners agreeing to extend the construction period, the compensation they would be paid would increase after the expiry of the date originally fixed to completion to end. However, such a provision would not sit conformably with the basis for agreed damages under cl 40, which was predicated on a 270-day construction period, after which time a right to damages would accrue. As we have said, the parties' submissions did not address the question of construction.

177 How the alleged agreement is to be understood affects the question of consideration. The builder's promise was made in the context of complaints by the owners about delays that commenced in March 2021. We accept that as a broad proposition the owners' forbearance from exercising rights or claims against the builder might be capable of providing consideration. However, given the terms of the 3 August 2021 letter and the lack of clarity about its relationship with cl 40, which, if any, rights were foregone is uncertain. In these circumstances, we are not satisfied that there was any enforceable agreement consistent with cl 40 of the contract.

Compensation for defects

178 The owners conceded that a claim for compensation for defects had not been pleaded. They identified no basis on which they should be permitted to pursue an unpleaded claim on this appeal. This part of ground 3 fails.

Credit for the value of the work

179 The builder submitted orally that 'to the extent that the owners succeed and are entitled to damages they must give credit for the value of the builder's work'. The submission was unelaborated. It had not been made in the builder's written case, or at trial. It was not the subject of any pleading or proposed ground of appeal.

180 It is not clear whether the submission was intended to refer to the quantum meruit claim, or to the assessment of the owners' loss if they were to succeed in the counterclaim, or some other basis for taking account of the value of the builder's work. In the circumstances, no issue has been properly raised for consideration in the present appeal.

Application to adduce evidence

181 The owners applied pursuant to r 64.13(2) of the Rules for leave to rely on evidence that was not tendered at trial.

182 In support of ground 3, the owners sought to rely on a letter from the builder dated 19 February 2021 and a letter from Emperial Homes dated 21 February 2021. For the reasons we have given earlier, we would grant the application in respect of those letters.

183 In support of grounds 2 and 2A, the owners sought to rely on the affidavit of Rupinder Kaur sworn 16 September 2025 which exhibited the following documents:

(a) a construction quote from Emperial Homes received by the owners in May 2020, which was referred to at [88] of the Reasons, but not tendered at trial;

(b) a post-trial online search of the Building and Plumbing Commission website;

(c) an article entitled, 'Industry Alert: Concerning increase in license lending' dated 9 June 2022;

(d) a deposit invoice from the builder, which was in the Court Book but not tendered at trial;

(e) a photo of the site fence taken on or about 8 February 2022 which listed Emperial Homes as the builder, which was in the Court Book but not tendered;

(f) a letter from the liquidator of Emperial Homes dated 21 September 2022, demanding payment of lock-up stage;

(g) three reports filed with ASIC regarding Emperial Homes' liquidation which pre-dated the trial (initial report to creditors dated 26 August 2022, statutory report by a liquidator to creditors dated 3 November 2022, third report to creditors dated 22 March 2023);

(h) three reports filed with ASIC regarding Emperial Home's liquidation and subsequent deregistration which post-dated the trial (annual administration return dated 4 November 2024, deregistration request dated 18 June 2025, current and historical company extract for Emperial Homes);

(i) post-trial correspondence between the parties' solicitors and between the owners' solicitors and the liquidator of Emperial Homes concerning the ASIC reports.

184 The affidavit of Ms Kaur deposed to certain facts said to be within Ms Kaur's knowledge about the owners' relationship with the builder and some propositions said to have been taken from documents.

185 The Court has a discretion to allow a party to adduce fresh evidence.[141] If the evidence relates to pre-trial events, leave will ordinarily be refused unless the court is satisfied that the evidence is sufficiently credible; that it could not have been obtained with reasonable diligence for use at the trial; and that there is a high probability that the result would have been different had it been received at trial.[142] The test is stringent and is 'supported by considerations of justice and of public interest and in particular that there should be finality of litigation in other than the truly exceptional case'.[143] Where evidence concerns post-trial events, leave will ordinarily be refused unless the

141 *Carroll v Goff* [2021] VSCA 267, [54] (Maxwell P, Kennedy and Walker JJA).

142 *Foody v Horewood* [2007] VSCA 130, [61] (Chernov, Ashley and Neave JJA).

143 *Foody v Horewood* [2007] VSCA 130, [61], citing *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, 141 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) (citations omitted).

event in question is an exceptional event which undermines the basic assumptions held by the parties at trial.[144]

186 The purpose for which the owners sought to adduce the documents was to support proposed ground 2A by making a new case which was summarised in these terms in the owners' submissions:

> [E]ven if that remedy [quantum meruit] were available the facts of this case disentitle the builder from claiming restitution for unjust enrichment. Relevant to that submission is the fact that the builder in this case acted unconscionably in lending its licence to Emperial Homes, a company which was unregistered and insolvent from 2019. That is what caused the dispute.

187 As Ms Kumar put it in her affidavit, the owners 'were tricked into signing the contract with the builder as part of what we now understand is referred to in the building industry as "license lending"'. The owners submitted that the builder had engaged in 'licence lending' to circumvent the owner protections in the Act, it had received an undisclosed payment from Emperial Homes and would receive a windfall if it obtained payment for its work on a quantum meruit. The builder submitted that the concept of 'licence lending' is not known to the law, observing that the judge accepted uncontested evidence that the builder contracted Emperial Homes in order to carry out the works, and that no authority was cited in support of the notion that the arrangement between builder and Emperial Homes was unlawful, including because it was unconscionable.

188 As the owners conceded, their 'licence lending' case was neither pleaded nor run at trial. The reason given for their failing to do so was that the owners' lawyers did not appreciate the significance of the issue at the time of trial.

189 There is no proper basis on which to exercise the discretion in this case.

190 The new case, in aid of which the further evidence would be adduced, raises questions of fact and law that would entail significant controversy. The builder has not had the opportunity to meet that case with evidence.[145] The owners' adviser's inadvertence or failure to raise these matters earlier do not constitute exceptional circumstances that justify departing from the general rule that a party is bound by the conduct of its case at trial, and the considerations of fairness and finality of litigation that underpin that rule.[146]

191 It was not said that, insofar as the evidence related to pre-trial events, it was unavailable to the owners at trial. To the contrary, for the most part the evidence comprised documents which were in the owners' possession, or which could have

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144 *Carroll v Goff* [2021] VSCA 267, [56], citing *Apostolidis v Kalenik* (2011) 35 VR 563, 581–2 [56] (Nettle, Ashley and Tate JJA) (citations omitted).

145 See *Alphington Developments Pty Ltd v Amcor Pty Ltd* [2025] VSCA 48, [439] (Walker and Whelan JJA) (citations omitted).

146 See *University of Wollongong v Metwally (No 2)* (1985) 60 ALR 68, 71 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

been obtained with reasonable diligence, including company searches,[147] a publicly available article,[148] and discoverable documents.[149]

192 The post-trial events with which the evidence is concerned (the liquidation of Emperial Homes and the deregistration of Ikbal) were not exceptional events in any relevant sense. Those facts did not undermine the basic assumptions held by the parties concerning the case run at trial.

193 The application is refused.

Conclusion

194 The owners should have leave to appeal. The appeal should be upheld on grounds 1, 2 and 2A(b) and part of ground 3.

195 Paragraphs 1 to 4 of the orders of the judge made on 8 October 2024 should be set aside and in their place it should be ordered that there be judgment for the defendants on the claim and judgment for the plaintiffs by counterclaim for the sum of $9,500 plus interest.

196 We will hear the parties as to the costs of the appeal and of the trial.

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147 ASIC search, which contained historical information regarding Emperial Homes, and the search of the Building and Plumbing Commission website.

148 Article entitled, 'Industry Alert: Concerning increase in license lending' dated 9 June 2022.

149 Initial Report to Creditors dated 26 August 2022; Statutory Report by a Liquidator to Creditors dated 3 November 2022, and Third Report to Creditors dated 22 March 2023.