

IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2025 03487

MACDONALD & CO CONSTRUCTION
PTY LTD

Plaintiff

v

KHARTY PROPERTY GROUP PTY LTD &
ANOR

Defendant

JUDGE: Craig J
WHERE HELD: Melbourne
DATE OF HEARING: 8 to 10 December 2025 and 2 February 2026
DATE OF JUDGMENT: 2 June 2026
CASE MAY BE CITED AS: MacDonald & Co v Kharty
MEDIUM NEUTRAL CITATION: [2026] VSC 336

CONTRACT – Whether common law right to terminate excluded by contractual show cause termination process – Contract permitted the plaintiff to terminate for ‘substantial breach’ following a show cause process – Plaintiff did not follow that process and purported to terminate at common law – Proper construction of contract required the Plaintiff to follow the contractual termination process except in cases of repudiation by ‘renunciation’ – Aggressive and threatening behaviour by Defendant constituted renunciation – Termination by Plaintiff therefore valid – *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312; [2000] HCA 64, applied; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, applied; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, applied; *Shevill v Builders Licensing Board* (1982) 149 CLR 620, applied; *Amann Aviation Pty Ltd v Commonwealth of Australia* (1990) 22 FCR 527, discussed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Liam Connolly	HWL Ebsworth Lawyers
For the First Defendant	Andrew Downie	Level Playing Field Lawyers Pty Ltd
For the Second Defendant	No appearance	No appearance

Contents

A Introduction.....	1
B Witnesses and fact finding	3
B.1 Onus and the process of fact finding	3
B.2 The Witnesses.....	6
C Events leading up to 19 March 2025.....	7
D 19 March 2025.....	11
D.1 The Events at Mac & Co.....	11
D.2 The exchange on Queen Street.....	31
D.3 Events following the exchange on Queen Street.....	35
E Was the Subcontract lawfully terminated?	36
E.1 The common law right to terminate for repudiatory conduct.....	36
E.2 Did the Subcontract restrict or limit Mac & Co's ability to terminate at common law?	38
E.3 Was Mr Al-Hasawee an agent or representative of KPG on 19 March 2025?	52
E.4 Did KPG's conduct on 19 March 2025 constitute a renunciation of the Subcontract?	56
F Alleged breaches of the Subcontract	63
F.1 The Express Terms.....	63
F.1.1 Clause 2	63
F.1.2 Clause 15(c).....	66
F.1.3 Clauses 85 and 87 of the Subcontract.....	69
F.2 Implied terms	71
F.2.1 The role of clause 5	71
F.2.2 The duty to co-operate.....	72
F.2.3 The alleged implied obligation of good faith	75
F.2.4 The alleged implied term that KPG would not engage in illegal, threatening or violent behaviour towards Mac & Co's employees	76
G Conclusion.....	76

HIS HONOUR:

A Introduction

- 1 Physically aggressive and threatening conduct ought to have no place in the Australian building industry specifically, or commercial life, generally. The question which arises for determination in this proceeding is whether an act of aggressive and threatening behaviour, if found, constitutes repudiatory conduct entitling an affected counterparty to terminate the applicable contract. In such a setting, the question must of course be answered within the specific contractual framework governing the parties' rights and obligations.
- 2 The plaintiff, MacDonald & Co Construction Pty Ltd (**Mac & Co**) was engaged to construct an early learning centre at 397 Blackburn Road, Burwood East, Victoria. Pursuant to a written subcontract dated on or about 25 July 2024, Mac & Co engaged the first defendant, Kharty Property Group Pty Ltd, trading under the name 'Basement and Above Structures' (**KPG**), to carry out concreting, excavation, piling, post-tensioning, wall system works and associated installation services (the **Subcontract**).
- 3 At approximately 10:00am on 19 March 2025, a meeting was held at Mac & Co's office at level 4, 170 Queen Street in Melbourne (the **19 March Meeting**). The general purpose of the meeting was to discuss the project works the subject of the Subcontract. This was not the first meeting held at Mac & Co's offices for the purposes of discussing the project works. A meeting had previously occurred on 4 December 2024.
- 4 The attendees at the 19 March Meeting were:
 - (a) Mr Richard MacDonald, Mr Chris Reid and Ms Yen Nguyen of Mac & Co;
 - (b) Mr Hisham Khartabil and his brother, Mr Mohamad Khartabil, of KPG;¹ and,

¹ Without any disrespect intended and for reasons of clarity, I have used Hisham and Mohamad's first names from time to time in the course of these reasons.

(c) Mr Ahmed Ali Safwan Al-Hasawee,² a director of A1 Formwork and Steelfixing Pty Ltd (**A1**), an entity retained by KPG to perform certain of the subcontracted works.

5 What occurred at Mac & Co's offices on 19 March 2025, and shortly thereafter on Queen Street, is in dispute.

6 In short, Mac & Co submits that the conduct of Hisham Khartabil, Mohamad Khartabil and Mr Al-Hasawee was violent, threatening and intimidating and entitled Mac & Co to immediately terminate the Subcontract.

7 KPG submits that the conduct properly attributable to it was not repudiatory in character and that the terms of the relevant Subcontract did not permit Mac & Co to effect an immediate termination without following the contractually stipulated 'show cause' process.

8 The critical question in the proceeding is whether the conduct of KPG and its representatives on 19 March 2025 entitled Mac & Co to immediately terminate the Subcontract.

9 The significance of that question arises in the following context.

10 On 19 March 2025, Mac & Co's lawyers issued a letter to KPG terminating the Subcontract immediately on the grounds that the conduct at and shortly after the 19 March Meeting constituted a serious breach of an essential and fundamental implied term, repudiation of the Subcontract, and constituted a serious breach of material express terms (the **Termination Letter**). The Termination letter is annexed as Annexure A.

11 On or about 26 March 2025, KPG served a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the **SOP Act**) on Mac & Co in the amount of \$288,452.13 (**March Payment Claim**). On or about 27 March 2025 and 9 April 2025, Mac & Co responded to the March Payment Claim. On or about 10 April 2025, KPG made an adjudication application in respect of the amounts the

² Mr Al-Hasawee was also referred to in the course of the evidence as Ahmed Ali. See Transcript of the hearing on 8 to 10 December 2025 and 2 February 2026 in *MacDonald & Co v Kharty* (**Transcript**) 250:11-13 and 391:8.

subject of the March Payment Claim (**Adjudication Application**). On or about 14 April 2025, the second defendant³ (the **Adjudicator**) accepted an appointment as adjudicator of the Adjudication Application. On or about 17 April 2025, Mac & Co issued an adjudication response to the Adjudication Application (**Adjudication Response**).

- 12 On 23 April 2025, KPG served further submissions in response to a notice from the Adjudicator. Thereafter, the Adjudicator issued an adjudication determination under the SOP Act in which he determined that KPG was entitled to the sum of \$204,583.64 (including GST) (**Adjudicated Amount**) in respect of the March Payment Claim (**Adjudication Determination**).
- 13 Mac & Co contends that the Adjudication Determination was invalid as it was not served on, or from, a valid reference date. Mac & Co raises a jurisdictional fact for the court's determination – namely, whether Mac & Co validly terminated the Subcontract prior to the service of the March Payment Claim.
- 14 Consistent with High Court authority,⁴ KPG accepts that no reference date would exist for KPG's March Payment Claim and the Adjudication Determination would be invalid, if the Subcontract was effectively terminated by Mac & Co on 19 March 2025.
- 15 The parties agreed upon a list of issues directed to this critical question. Ultimately, not all of the identified issues were in dispute or of dispositive relevance to the proper determination of this proceeding. Annexure B sets out the issues agreed upon, and the answers to those issues consequent upon these reasons.

B Witnesses and fact finding

B.1 Onus and the process of fact finding

- 16 The factual controversy in the proceeding centred around what was alleged to have been said at Mac & Co's offices on 19 March 2025 and shortly thereafter on Queen

³ The Second Defendant elected not to participate in the trial of this proceeding nor engage legal representation, but acknowledged he would be bound by any decision of the Court.

⁴ *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, 360[61] and 365 [79] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

Street. Evidence was adduced *viva voce* and witnesses gave conflicting and competing accounts in respect of key aspects of the exchanges on that day.

- 17 The applicable standard of proof is enshrined in s 140 of the *Evidence Act 2008* (Vic) (*Evidence Act*).⁵ Mac & Co must prove its case on the ‘balance of probabilities’. The phrase ‘balance of probabilities’ requires a subjective belief in a state of facts on the part of the tribunal of fact.⁶ The “facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied”.⁷ That is, when the law requires proof of any fact, the tribunal of fact must feel an actual persuasion of its occurrence or existence before it can be found.⁸
- 18 The fallibility of human memory and the assessment of a witness’ credibility and reliability has been well traversed in judicial writing. I am indebted to Waller J, who recently collated and succinctly summarised a number of observations applicable in the present context in *Monland Pty Ltd v Oman*.⁹ I agree with the observations in *Monland* and have adopted and applied them in assessing the witnesses and undertaking the act of fact finding in this proceeding.
- 19 With respect to the fallibility of human memory, Waller J observed:¹⁰

Human memory is an inherently unreliable vehicle for establishing the content of conversations occurring years before trial. Memory is not a fixed record. Each act of recall involves a process of reconstruction, and the very act of remembering alters what is subsequently retained. Neither the vividness of a recollection nor the confidence with which it is held provides a reliable indication of its accuracy.

The unreliability of memory in relation to conversations has several identifiable causes. Accuracy diminishes with time, regardless of the significance of the event. Where a dispute has emerged, a witness’s recollection becomes susceptible to subconscious distortion by self interest and by hindsight about what ought to have been said. Perhaps most

⁵ Section 140 of the *Evidence Act 2008* (Vic) provides: (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—(a) the nature of the cause of action or defence; and (b) the nature of the subject-matter of the proceeding; and (c) the gravity of the matters alleged.

⁶ *Lehrmann v Network Ten Pty Ltd* (2024) 422 ALR 507, 526 [98]; [2024] FCA 369.

⁷ *Jones v Dunkel* (1959) 101 CLR 298, 305 (Dixon CJ).

⁸ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361 (Dixon J).

⁹ [2026] VSC 240 (Waller J) (*Monland*).

¹⁰ *Ibid*, 17 [106]–[108] (citations omitted).

significantly, a witness may sincerely believe they are recalling a conversation when they are in fact constructing a plausible account from the surrounding circumstances, with little or no connection to what was actually said.

The process of preparing for trial compounds these difficulties. Drafting and revising witness statements, reviewing documents including materials the witness did not see at the time of the relevant events, and discussing the matter with lawyers can progressively replace original memory with a later reconstruction that feels equally authentic but may be substantially less accurate. The act of confronting a witness with inconsistencies during preparation may itself introduce further distortion.

20 As to the assessment of witnesses, Waller J stated:¹¹

In assessing whether to accept a witness's evidence, the Court will have regard to the internal coherence of that witness's account, its consistency with the evidence of other witnesses and with undisputed facts, the general credit of the witness including impressions from demeanour, any relevant infirmities or vulnerabilities, and the inherent probability or improbability of the account in question. Evidence given against a witness's apparent interest, or which is inherently probable in light of the surrounding circumstances, carries particular weight in this assessment.

Credibility, which concerns whether a witness is honest and genuinely attempting to tell the truth, is a distinct question from reliability, which concerns whether their account of a particular event is accurate. A witness may be entirely truthful and yet give evidence about a specific conversation that is substantially inaccurate, because their recollection has been distorted by the passage of time, the pressure of litigation, or unconscious self-interest, without any deliberate intent to mislead.

A court possesses no special capacity to determine from a witness's manner of giving evidence alone, whether they are telling the truth. The surest guide to credibility and reliability is the comparison of the witness's account with objective fact, documentary evidence, and the inherent probabilities. Separately, the rejection of a witness's evidence on a particular matter does not of itself establish the truth of the contrary proposition. While inferences may, in appropriate circumstances, arise to support an alternative state of affairs, the Court must be cautious about treating its disbelief of one account as constituting affirmative proof of the other.

21 Whilst the relevant facts occurred less than a year before trial, they remained heavily contested. Thus, whilst the degradation of memory over time has been less of a factor in this case than in many commercial cases, I have sought to make my determination by paying particular regard to the coherence of the witnesses' evidence on the contested issues, its inherent reliability and its relationship with objectively ascertainable facts including the audio visual and documentary record.

¹¹ *Monland*, 19–20 [113]–[115].

B.2 The Witnesses

- 22 Witnesses gave evidence in the following order.
- 23 Ms Yen Nguyen is Mac & Co's Chief Financial Officer and had been working at Mac & Co for approximately three years at the time of giving her evidence. Ms Nguyen was an impressive witness. Her evidence was forthright and clear. She was able to distinguish between matters she could recall clearly and matters in which she had little detailed recollection.
- 24 Mr Mark Menegatti is the director of MRM Construction Pty Ltd (**MRM**). MRM was engaged as a subcontractor by Mac & Co in relation to the construction of the early learning centre the subject of these proceedings. MRM was responsible for removing scaffolding and planking systems and installing concrete hobs. MRM had no relationship with KPG. Mr Menegatti gave candid and direct evidence on a question of tangential or contextual relevance – namely, the question of whether an invoice purportedly prepared by MRM and issued to Mac & Co had, in truth, been prepared by MRM.
- 25 Mr Richard MacDonald is a director of Mac & Co and responsible for overseeing the day to day operation of the company. On a small number of occasions, I formed an assessment that Mr MacDonald's answers when giving evidence, or the extent of his answers, were calculated to maximise the position of Mac & Co in the litigation rather than provide a direct and complete answer to the question being asked. However, in respect of the critical exchanges on 19 March 2025, I have accepted much of Mr MacDonald's evidence as it was corroborated by the account of another witness or my own assessment of the objective evidence.
- 26 Mr Ryan Le is employed as a project co-ordinator at Mac & Co. At the time of giving his evidence, he had been employed at Mac & Co for approximately nine months. He was a junior employee, having obtained his Diploma of Building and Construction in 2023.
- 27 Mr Nathan Hilbig is a management accountant at Mac & Co. Mr Hilbig has been employed at Mac & Co since December 2022.

- 28 Mr Hisham Khartabil was the general manager of KPG. For the majority of his evidence, Hisham endeavoured to, and in most respects did, give direct and truthful answers to the examiner's questions. I have elaborated on the principal exception¹² to this later in these reasons.
- 29 Mr Mohamad Khartabil was the company director of KPG and a foreman on its project sites. Mohamad was not an impressive witness. His recollection of the events was generally poor.
- 30 Mr Ahmed Ali Safwan Al-Hasawee was the director of A1. At the time of the 19 March Meeting, A1 had worked on at least five jobs with KPG previously. Mr Al-Hasawee's first language was Arabic. He had a sufficient grasp of written and spoken English to give evidence without the aid of an interpreter. Save for one interaction on Queen Street, to which I will come, Mr Al-Hasawee was largely a passive participant in the events of 19 March 2025.

C Events leading up to 19 March 2025

- 31 What happened on 19 March 2025 is critical to the disposition of this proceeding. However, an understanding of certain background events leading up to that day is important to an appreciation of the matters discussed on that day and, to some extent, the driving or dominating emotions of those involved.
- 32 On 19 December 2024, Mac & Co sent a letter to KPG proposing to end the Subcontract and agree a final account. The offer was open until 3:00pm that day and proposed that Mac & Co would pay KPG the sum of \$207,084.24 (ex of GST) in full and final settlement. Mr MacDonald described the project as being 'distressed' at this time. Mr MacDonald was eager for KPG to sign this offer as it was the final day of work for 2024.
- 33 KPG did not accept the offer. Hisham Khartabil received nine missed calls from Mr MacDonald on the evening of 19 December 2024 over a 41 minute period. Mr MacDonald also sent separate messages to Mohamad that evening with his name,

¹² First, I have rejected his evidence denying the threat made in the presence of Ms Nguyen. Second, I have rejected his evidence as to what was said in Queen Street insofar as it is not clearly discernible from the available audio visual recording or is otherwise inherently improbable having regard to the objective circumstances.

birthdate and the word 'spineless'. Mr MacDonald described it is 'accidental' that he texted Mohamad Khartabil with his name and date of birth. He did not explain why he had called Mohamad 'spineless'.

34 When work resumed at the site, MRM worked on the site between 28 December 2024 and 5 January 2025. The invoice for the work issued by MRM to Mac & Co was dated 6 January 2025 and was for \$19,253.28. However, the evidence disclosed that Mac & Co had sought to pass onto KPG an invoice from MRM, purporting to be for the same work, in the sum of \$65,758 (**Purported MRM Invoice**).

35 When Hisham received the Purported MRM Invoice from Mac & Co he was surprised at the large sum of the invoice and considered that the invoiced sum should have been less than \$10,000 as KPG had previously quoted for the work. Hisham rang Mr Menegatti asked him why MRM had charged \$65,000. Mr Menegatti explained the sum actually invoiced had been a lot less. Mr Menegatti gave evidence that he then spoke to Mr Reid and Mr MacDonald. Mr Menegatti explained that the conclusion that was agreed with Mr Reid and Mr MacDonald was that there had been an error within Mac & Co that had led to the generation of the Purported MRM Invoice.

36 On 14 January 2025, the site supervisor for Mac & Co, known to Mohamad as 'Kevin' told Mohamad that he could not let him onto the site because Mr MacDonald did not want him on site.

37 On 13 February 2025, Hisham sent an email to Mr Reid, copying in Mr MacDonald, Mohamad, Ms Nguyen and Mr Capuano (an employee of Mac & Co). The email alleged that the Purported MRM Invoice had been fraudulently prepared. Hisham gave evidence that he spoke to Mr Reid and Mr MacDonald about the Purported Invoice after sending the email. Hisham gave evidence that Mr Reid said 'I do as I am told' and that Mr MacDonald said that the invoice had been issued as a consequence of an error by his junior staff.

38 Mr MacDonald gave the following evidence in cross examination:

COUNSEL FOR THE FIRST DEFENDANT: Do you know – do you know who in your organisation altered MRM Construction's invoice at court book page – supplementary court book p52?

MR MACDONALD: ah, yes.

COUNSEL FOR THE FIRST DEFENDANT: And who was that?

MR MACDONALD: Chris Reid.

COUNSEL FOR THE FIRST DEFENDANT: When did you establish that he had altered the invoice?

MR MACDONALD: Um, around the time, after the conversations the day after I first raised the conversation after the email that [was] received from...Hisham.

39 Mr MacDonald gave the following additional evidence in response to questions by the Court:

HIS HONOUR: Mr MacDonald, let me ask you this.

MR MACDONALD: Yes.

HIS HONOUR: By the middle of February 2025, you knew that, on your evidence, Mr Reid had inflated an invoice by over 300 per cent, didn't you?

MR MACDONALD: I had – I'd come to the understanding that he adopted a document to suit an amount.

HIS HONOUR: And as I understand the import of your evidence, you took no disciplinary consequence with Mr Reid as a consequence of that?

MR MACDONALD: Under – that's correct.

40 Ultimately, whether or not the Purported MRM Invoice was fraudulently prepared by Mac & Co is irrelevant to the disposition of this case. However, the circumstances in which it was prepared and the lack of a clear and convincing explanation by Mac & Co as to how an invoice from a third-party subcontractor came to be significantly altered (on Mac & Co's case, by one of its staff members), reflected very poorly on Mac & Co. More significantly, it created an environment in which Hisham had, at the very least, an identifiable cause for his expressed lack of trust in Mac & Co when attending the meeting on 19 March 2025.

41 On 24 January 2025, Mac & Co and KPG executed a deed varying the Subcontract. The deed relevantly provided, *inter alia*, that:

2.4 Incomplete and defect rectification

(a) The parties must meet as reasonably required by the Builder and use best

endeavours to agree on a rectification programme for those Defects referred to in the Payment Schedule or as otherwise notified by the Builder.

- (b) The rectification programme must ensure that the defects are rectified in accordance with the Subcontract and in a sequence that allows the Builder to comply with its obligations under the Subcontract.
- (c) The proposed rectification programme and works must comply with all reasonable requirements of the Builder's appointed consultants.

42 Mac & Co had determined that the spoon drain constructed at the project site was defective. On 31 January 2025, Hisham sent an email to *inter alios* Mr MacDonald and Mr Reid setting out a proposed rectification solution.

43 On 17 February 2025, Mr Reid emailed Hisham a 'rectification method required from [the] engineer for the spoon drains.' The rectification method required the building of a hob. According to Hisham's evidence, which I accept:

- (a) KPG proceed to go to the site and started working on the hob.
- (b) Two days after completing the formwork, Mr Reid instructed KPG to cease working on hob because Mr MacDonald was not happy with the solution.
- (c) No further work was commenced on the hob because no further instructions were received from Mac & Co about how to proceed.

44 On 17 March 2025, Mr Reid sent Hisham an email confirming the meeting to be held on 19 March 2025, copying in Mr MacDonald and Ms Nguyen. The email provided as follows:

As discussed, I will send a calendar invite now for a meeting at our head offices this Wednesday 19th March at 10am.

Noting there has been no workers from Basements & above onsite Friday 14th & Monday 17th March.

Please provide formal response to my email attached sent on Thursday 6th March advising where the joins will be if there are any along with commencement of the spoon drains in the Basement as none of these works have yet started. Further to this, this means the ramp is still incomplete along with the handrails on either of the stairs are not yet installed.

Please confirm completion dates for the above items to be rectified by COB Tuesday 18th March prior to our meeting.

45 On the morning of 18 March 2025, Hisham responded to Mr Reid, copying in Mr MacDonald, Ms Nguyen and Mohamad. The email stated:

Chris,

Firstly, we were not allowed to work on the ramp as per your instructions until your elevator has been installed. Please confirm that your elevator has been installed and that we can commence work on the ramp.

Secondly, for the stairs handrails, Mo discussed with you onsite that you need to install your balustrades and gates that are connected to them before we can install the handrail. Please confirm once that has been done.

Regarding the spoon drain, we commenced the work where we formed most of the spoon drain hob based on your engineer's design. You then instructed us to remove the hob formation as you changed your mind.

For the shotcrete wall, we suggest the following: jackhammer and overlap mesh sheets as per the engineering suggested design. Shotcrete the remaining wall area and blend into existing. Once cured, we apply a thin Layer of cementitious product on the whole ramp shotcrete wall to give it a uniform Look.

For the basement spoon drain, Mo and Daniel discussed a solution onsite that is depicted in the attached image. Essentially, we cut a shallow cut (20mm) on the edge of the existing spoon drain, separating the remaining slab from the spoon drain. We then jackhammer enough of the existing spoon drain to allow us to use a cementitious product to form a new spoon drain with correct falls.

For the soffits above the ramp, I can only suggest aluminium fins either side of the ramp to hide the bow. Fins will be installed with a laser level.

We await your response on all the above before we can commit a timeframe.

Thanks,

D 19 March 2025

D.1 The Events at Mac & Co

46 The meeting at Mac & Co was attended by Mr MacDonald, Mr Reid and Ms Nguyen on the part of Mac & Co.

47 Hisham and Mohamad Khartabil attended on behalf of KPG.

48 Mr Al-Hasawee also attended the 19 March Meeting, although the capacity in which he was attending was in dispute. Hisham told Mr Al-Hasawee to attend the 19 March Meeting. At the time of the 19 March Meeting, A1 still had not been paid by

KPG. I accept Hisham's evidence that he invited Mr Al-Hasawee to attend the meeting to get an understanding as to why KPG were still owed money and observe that KPG was in discussion with Mac & Co. This was the purpose of Mr Al-Hasawee's attendance. I also accept Mohamad's evidence that Mr Al-Hasawee attended the meeting as KPG's subcontractor. According to Ms Nguyen, Mohamad Khartabil said that Mr Al-Hasawee 'worked for us'. That colloquial description is consistent with the fact that A1 was a subcontractor for KPG. Mr MacDonald did not invite Mr Al-Hasawee to the meeting. When Mr Al-Hasawee attended the meeting, Mr MacDonald knew that Mr Al-Hasawee was a representative of A1. According to Mr MacDonald, he understood that Hisham and Mohamad owned a percentage of A1. I reject Mr MacDonald's evidence that he was told that by Hisham. There was no objective documentary evidence supporting Mr MacDonald's evidence and Hisham was not challenged on his evidence that he had never had any interest in A1.

49 The meeting was held around the board table in Mac & Co's boardroom. The Mac & Co representatives sat closest to the exit and opposite Hisham, Mohamad and Mr Al-Hasawee.¹³

50 There is no CCTV footage of what occurred inside the boardroom.

51 Introductions were made at the commencement of the meeting.

52 Mr MacDonald gave evidence that the purpose of the meeting was to identify what work remained to be performed by KPG under the Subcontract, including what the defective and outstanding work was. Mr MacDonald gave evidence that for about 10 to 15 minutes, a number of matters were discussed, including:

- (a) what needed to be done on the stripping of the level 3 lift shaft;
- (b) the pouring of a lid roof and the stripping of formwork;
- (c) the stairs, balustrades and handrails; and

¹³ Beyond these identified seating arrangements, the witnesses did not agree on where precisely each participant in the meeting sat around the board table. It is unnecessary to make any factual finding in that regard.

(d) the shotcrete ramp.

53 Mohamad's evidence as to what was said in the meeting was more general than that of Mr MacDonald and Hisham. According to Mohamad, Mr MacDonald was seeking to blame KPG for 'all defects there and all the delays' and that Mr MacDonald said words to the effect of '[i]t's best you walk off'. According to Mohamad, Hisham denied responsibility for the delays and said that 'we won't just walk away from the project'. It is not necessary to make a finding as to whether or not Mr MacDonald encouraged KPG to leave the project during the meeting. Whilst it is plausible that such a statement was made given the late 2024 settlement offer and text message exchanges, I do note however, that it was not suggested to Mr MacDonald in cross examination that he made such a statement and that Hisham did not give corroborating evidence to that effect.

54 Hisham gave evidence that Mr MacDonald started the meeting by stating that KPG was supposed to finish their work in January and asked why the project was not finished. According to Hisham he responded by saying that most of the work within scope was finished and that KPG were waiting on Mac & Co for directions on how to proceed with respect to the balance of the work.

55 Hisham gave evidence that the following items were outstanding: the ramp; the shotcrete wall; and, the spoon drain. I accept this evidence.

56 Hisham gave evidence that Mr Reid had directed Mohamad that the ramp could not be occupied until the lift was installed. Hisham gave evidence that this direction precluded the concreting of the ramp and the rectification of the defect on the shotcrete wall.

57 The ramp was discussed in the meeting. I accept Hisham's evidence as follows:

- (a) Mr MacDonald questioned why the ramp had not been installed.
- (b) Hisham said that Mac & Co had instructed KPG to cease work on the ramp until the elevators had been installed.
- (c) Mr MacDonald responded that the installation had occurred on Friday (i.e. 15 March 2025).

- (d) Hisham responded that there had only been 24 working hours in between the completion of the elevator and the meeting.

58 Conversation then turned to the spoon drain. The spoon drain was designed to take water away from the basement slab. According to Mr MacDonald the spoon drain was defective and the discussion then turned to a solution. Mr MacDonald gave the following evidence as to what occurred next:

MR MACDONALD: Hash started to talk through the solution of forming up an additional hob as such on top of the spoon drain, that would go round the perimeter of the – the perimeter of the slab, and make up, in theory, a gutter and we'd keep the ground slab intact. And that was when I proceeded to explain to him that um we wouldn't be able to do that, it would be non with traffic management and car spaces, as in your front bumper would be hitting the hob. Um and that what we needed to do was cut up a control joint all the way round the perimeter of the slab and then form up a new spoon drain.

COUNSEL FOR THE PLAINTIFF: And what, if anything, did Hisham Khartabil say in response to that proposal?

MR MACDONALD: Um it didn't go down too well. Um. He ah took offence to it and that was when the meeting um – yeah, overspilled and – and ah he got up, he punched the table twice um shouted offences to me.

59 Mr MacDonald's evidence was corroborated by Ms Nguyen in general terms and I accept it. Ms Nguyen gave evidence that rectification work was discussed and that Mr MacDonald said that the solution that had been provided by Hisham was a 'band aid solution' and would not suffice. According to Ms Nguyen, in response to this, Hisham started raising his voice, stood up, pushed his laptop to one side and punched the meeting room table twice.

60 Hisham did not dispute that he punched the table twice. According to Hisham, Mr MacDonald would not accept his explanations as to why the ramp and drain were not complete and instead wanted to make the point that KPG was delaying the project. According to Hisham, Mr MacDonald's failure to accept 'partial responsibility' for the delay in the scope of works caused him to get 'very frustrated'. According to Hisham:

HISHAM: because Richard was refusing to accept at least partial responsibility of why the scope of works hasn't been completed, I got very frustrated, because, in previous conversations, it's always the same, that we are the blame for all the delays. So I punched the table and I said 'Enough. Enough of the bullshit. I'm sick of it'. And then, I don't recall the exact

exchange, but I sat back down. So I stood up, but I sat back down and there was further discussions. I don't recall those further discussions, but it was on the same tone, that Richard wasn't accepting that um, that the scope hasn't been completed because of their instructions on site. And um so I just stood up and I struck the table again. And I, I started swearing at Richard.

COUNSEL FOR THE FIRST DEFENDANT: And when that occurred, what happened?

HISHAM: So I said 'Enough of your fucking bullshit, I've had enough. You're always trying to blame us for your shit'. So Richard got up and um I don't recall him saying the meeting is over, but he walked out of, out of the room, and he was followed by Yen and, and Chris, straight, straight after.

- 61 Hisham accepted in cross examination that Mohamad was holding him back at that stage. He gave evidence that he was yelling and swearing and that Mohamad was holding him back and telling him to calm down. Mohamad gave evidence that he was just telling Hisham to calm down as he was 'a little bit angry'.
- 62 Hisham accepted that this behaviour was 'inappropriate' and that 'it might be intimidating'. However, he denied it was 'aggressive'. Hisham's subjective belief is irrelevant. His words and actions were objectively aggressive.
- 63 Ms Nguyen gave evidence that she was in state of shock and that she could not believe this was occurring in a work environment. Ms Nguyen said that at this stage there was a lot of swearing and that she did not remember the actual words that were being 'said or yelled'.
- 64 According to Ms Nguyen, Mr MacDonald then stood up and said 'this is the end of the meeting' and requested that Mr Reid and Ms Nguyen leave. According to Ms Nguyen, Hisham started yelling at Mr Reid as Mr MacDonald left. Mr Reid and Ms Nguyen then left the room. I accept Ms Nguyen's evidence. I also note that Mr MacDonald's evidence broadly corroborates this account. According to Mr MacDonald, as Mr MacDonald was walking out of the meeting room, Hisham said 'Fuck you, you coward. Come here you cunt'. I accept Mr MacDonald's evidence. Hisham did not dispute saying something to Mr MacDonald as he was leaving the meeting room. On Hisham's account:

HISHAM: So Mohamad turned around to me and told me to relax and I said, 'No, I'm sick of this bullshit.' And then when Richard walked out, to him I said, 'Where you going? Where you going you fucking coward? Come back.'

He just walked out straight – turned left on the corridor and headed towards his room.

65 I find that Hisham downplayed the level of profanity used and said the words attributed to him by Mr MacDonald.

66 The open plan area of Mac & Co's premises was the subject of CCTV surveillance and the movements of the witnesses once in that area were recorded on footage tendered at trial (the **Open Plan Footage**). The Open Plan Footage and the conduct which occurred during its recording lasted for 1 minute and 17 seconds. There was no sound recording accompanying the Open Plan Footage.

67 A still image of the Open Plan Footage shortly after the commencement of the tendered recording is set out below.



68 Five persons are in the Open Plan Footage at this time:

- (a) Ryan Le, on the left hand side of the image, wearing a black t-shirt and sitting on a chair with a cream coloured jacket;
- (b) Jason Yao, on the right hand side of the image, sitting next to a column;

- (c) Kaching Lao, sitting opposite Mr Yao;
- (d) Chris Greco, standing at the top of the screen in a white-shirt, near a white-board and indoor plant and,
- (e) Anthony Capuano, standing at the right hand side of the screen in a white shirt outside Mr Hilbig's office.

69 The meeting room is not visible in the Open Plan Footage but is located in a room near the indoor plant next to the whiteboard on the image above. It is located near the elevator and reception area.

70 Viewing the Open Plan Footage makes it clear that something occurred in the vicinity of the meeting room which caused each of Mr Le and Mr Yao to stand up and walk towards the meeting room and Mr Greco and Mr Capuano to also advance towards the meeting room. Mr Le gave evidence that he stood up because there was shouting and yelling from further along the hallway. At the time of the meeting, Mr Hilbig was working in his office at the end of the corridor, approximately three offices away from the meeting room. Mr Hilbig gave evidence that he heard a 'loud bang coming from the board room area of the building.' I infer that what caused the men in the open plan area to stand up was the noise generated by Hisham which was emanating from the meeting room. I am fortified in drawing this inference by Mr MacDonald's evidence that he could still hear Hisham shouting at him to come back to the boardroom as he walked along the corridor to go back to his office.

71 The advance of those in the open plan area towards the meeting room ceased as Mr MacDonald, dressed in blue jeans and a black jacket, emerged from the meeting room looking at his phone. Mr MacDonald walked along the corridor of the open plan area towards his office,¹⁴ and was followed out of the meeting room by Mr Reid, dressed in all black. Hisham accepted in cross examination that Mr MacDonald and Mr Reid left the meeting room quickly because of his behaviour.

72 As they were walking out, something occurred which caused Mr MacDonald and Mr Reid to both turn their heads back to the meeting room. The Open Plan footage then

¹⁴ Mr MacDonald's office is near Mr Hilbig's office and near where Mr Capuano is standing in the image extracted at the commencement of the Open Plan Footage.

reveals Hisham (in a black and orange shirt) and Mohamad (in a yellow and black shirt) walk out of the meeting room just behind Ms Nguyen. Hisham accepted in cross examination that he followed Mr MacDonald down the corridor for the purpose of yelling abuse at him. Hisham then moved through the open plan area, followed by Mohamad.

- 73 Hisham came out of the meeting room and was yelling and screaming. According to Ms Nguyen:

And then Hash started yelling and screaming and coming out of that meeting room, and that's where it was just more, 'Fuck this, fuck that', and then all the way down the hallway and he went direct to Richard's office first and then came out to the main area and started yelling and spraying at everyone else.

- 74 The Open Plan Footage demonstrates that Hisham is gesticulating aggressively at a number of the Mac & Co staff members. A still image of the Open Plan Footage,¹⁵ illustrating this, is set out below:



¹⁵ At 31 seconds into the Open Plan Footage.

75 Mr Le gave evidence that as Hisham was moving down the corridor he was yelling. Mr Le was unable to remember what Hisham was saying, but was able to recall that 'there was a lot of profanity and cursing'. According to Mohamad, he and Hisham walked towards Mr MacDonald's office and Hisham was pointing at people and saying 'fuck you fuck you fuck you.'

76 Mr Hilbig, who was observing from his office with a line of sight into the open plan area identified that the men in the dark grey shirt (i.e. Hisham) and fluorescent shirt (i.e. Mohamad) were shouting and swearing aggressively. According to Mr Hilbig:

MR HILBIG: Um the, the men were um, you know, shouting extremely aggressively, um and then they've sort of ventured into the middle, the middle area.

COUNSEL FOR THE PLAINTIFF: I'll just pause you there, Mr Hilbig?

MR HILBIG: Yep.

COUNSEL FOR THE PLAINTIFF: Do you recall what they were shouting at that point in time, when they were making their way down the corridor, the two men you referred to?

MR HILBIG Ah yep, ah so there, there was lots of swearing. My, my recollection was um they were pointing and shouting, 'Fuck you' to multiple people. Um there, there would have been other expletives, but I, I can't recall exactly what, but there was a lot of aggressive, loud swearing. Specifically, you know, 'Fuck you' is what I had recalled.

77 I reject Mr Hilbig's evidence insofar as it suggests, by its generality, that Mohamad was shouting and swearing aggressively on the way to Mr MacDonald's office. Such a conclusion is not supported by the Open Plan Footage or the evidence of the other witnesses. At that juncture, it was Hisham who was swearing and acting in an aggressive manner.

78 Mr Le confirmed, by reference to the Open Plan Footage, that Hisham came quite close to him. The relevant footage is between 0:30 and 0:32 in the Open Plan footage recording.



79 Mr Le gave the following evidence as to what happened at this juncture:

COUNSEL FOR THE PLAINTIFF: And if we just push pause there. Do you recall what Hisham was saying at that point in time? He's come over quite close to where you're sitting?

MR LE: Yes. So ah in that moment I – from what I recall, like I said, there was a lot of swearing, there was a lot of fucks, there's a lot of profanity um ah at that same time I think this is beside me where ah I don't – you don't really see him in the frame but I think that's where Chris, Chris Reid was.

COUNSEL FOR THE PLAINTIFF: Is that his legs you can see?

MR LE: Yeah.

COUNSEL FOR THE PLAINTIFF: on the left-hand side?

MR LE: Yes. So that's ah Chris and you know, I think that's when he – when he was yelling and, you know, waving, you know, um aggressive gestures is when he was making threats to Chris.

COUNSEL FOR THE PLAINTIFF: And by 'making threats', what do you mean by that?

MR LE: Ah at that point he was yelling out um things like 'I know where you live. I'll find out.' You know.

80 The topic of what Hisham said to Mr Reid was returned to in the cross examination of Mr Le:

COUNSEL FOR THE FIRST DEFENDANT: Mr Le, you seem to recall very little of what occurred on that day, but you seem to have good recollection about what was said to Mr Reid. Is it possible that you may be mistaken about your recollection of what was said to Mr Reid on that day?

MR LE: No, no. I - the reason why it stands out was because, in that moment, it, it was so close and he specifically said it to Chris Reid, which was just behind myself. And, you know, it's not something you want to hear when you have a young family, which - well, Chris had a young family, not myself, but it's not something that you would want to hear.

81 I am not actually persuaded that Hisham threatened Mr Reid in the manner suggested by Mr Le. That is so for the following reasons:

- (a) First, the words attributed to Hisham do not actually make any sense. They are contradictory. The inherent likelihood of someone saying 'I know where you live', followed by the words 'I'll find out' is low.
- (b) Second, Mr Le attributed Hisham making the threatening comments when Hisham was quite close to Mr Le and making aggressive gestures.¹⁶

¹⁶ See the exchange extracted at paragraph [79] above.

However, a viewing of the Open Plan Footage at this juncture¹⁷ does not readily lend support to Mr Le's evidence that substantive words were spoken to Mr Reid. The Open Plan Footage appears more consistent with the Hisham using monosyllabic profanity.

- (c) Third, it was open to Mac & Co to adduce evidence from Mr Reid as to what was said by Hisham to him. The failure to call Mr Reid was not properly explained. The fact that Mr Reid was no longer an employee of Mac & Co and that Mac & Co did not call him to shorten the duration of the trial¹⁸ were not sufficient explanations. As at 19 March 2025, Mr Reid was employed at Mac & Co as a Senior Project Manager. He was a central participant in the events leading up to and at Mac & Co on 19 March 2025. Drawing upon the principles in *Blatch v Archer*,¹⁹ that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'²⁰ and *Jones v Dunkel*²¹ that when a party who is capable of testifying, fails to give evidence without explanation 'it may lead rationally to an inference that his evidence would not help his case',²² I accept KPG's invitation to infer that any evidence from Mr Reid would not have assisted Mac & Co in establishing that Hisham threatened him in the manner alleged by Mr Le.

82 At this point in time, Mohamad was a bystander, watching as, in Ms Nguyen's words '[Hisham] was raging'. Mohamad denied that Hisham said to Mr Reid 'I know where you live.' Mr Al-Hasawee gave evidence that he could not hear what Hisham was saying.

83 Hisham gave evidence that as Hisham and Mohamad moved through the open plan area, he said as follows:

HISHAM: I was saying, 'How the fuck do you work for a person like that? He's a thief and a liar.' And then at that point I started um talking to the people in the – in the open area there. I said, I said, 'We have families. How

¹⁷ 0:30 to 0:33 of the Open Plan Footage.

¹⁸ See Transcript 455:28–456:3.

¹⁹ (1774) 1 Cowp 63 98 ER 969.

²⁰ Ibid, 979 (Lord Mansfield).

²¹ *Jones v Dunkel* (1959) 101 CLR 298.

²² Ibid, 321 (Windeyer J).

the fuck do you stand for this? We have families as well and he's trying to rip us off, he's a thief and a liar.'

COUNSEL FOR THE FIRST DEFENDANT: If we can continue the video please, from 10:33:35 and 30 seconds.

(Recording played to court.)

COUNSEL FOR THE FIRST DEFENDANT: And we'll stop the video there. What are you doing at this point where we stopped the video at 10:33:38 time stamp and 33 seconds?

HISHAM: So part of what I said goes, 'How did you get me into this?' And I pointed at Chris because he as the project manager, I pointed at Anthony Capuano because he's the one that engaged me at the start of the – the tender process and he was involved ah in the project ah later on. And I pointed to him and I said, 'Fuck you, fuck you and fuck you for getting me involved in this project.'

84 Mr Al-Hasawee gave the following evidence:

COUNSEL FOR THE PLAINTIFF: And you couldn't recall what was being said when they were in that open area?

MR AL-HASAWEE: No.

COUNSEL FOR THE PLAINTIFF: And so you wouldn't dispute that at some point in that open area, Hisham said – made a threat to Mr Reid?

MR AL-HASAWEE: No.

HIS HONOUR: Just be clear, Mr Connolly. The basis on which you're putting the question is that Mr Al-Hasawee didn't hear it, or couldn't hear it?

COUNSEL FOR THE PLAINTIFF: Yes. And so if I suggested to you that Hisham said to Mr Reid, 'I know where you live, I'll find out' or words to that effect, you wouldn't disagree?

MR AL-HASAWEE: No, I didn't hear that.

85 At this point in time (34 seconds into the recording), Ms Nguyen bravely pointed Hisham and Mohamad toward the exit of the building and asked them to leave. Hisham could not recall this occurring and his evidence did not contradict this. I do however accept Ms Nguyen's evidence that she did in fact ask Hisham to leave. Mr Le gave evidence that Ms Nguyen was 'just telling them to leave'. According to Ms Nguyen, at this point, Hisham was 'just yelling and swearing still.' Hisham said, and I accept, that he did not hear Ms Nguyen. It is inherently likely that the reason he did not hear Ms Nguyen was because he was yelling.

86 Ms Nguyen's entreaties to leave were thus ignored and instead Hisham and Mohamad then moved out of the open plan area (and thus outside the area recorded by CCTV) and into Mr MacDonald's office. Mr MacDonald gave evidence that he had closed the door to his office but that Hisham entered the room and was being held back by Mohamad. Mr MacDonald gave evidence that he was shouted at further in his office and that Mr MacDonald requested that Hisham and Mohamad leave. According to Mr MacDonald, Mohamad then suggested to Hisham that they should leave.

87 Hisham gave evidence that when he opened the door to Mr MacDonald's office he saw that Mr MacDonald was talking on the phone. Hisham said to Mr MacDonald 'What the fuck are you doing? You fucking coward?'. According to Hisham, Mr MacDonald did not respond and Hisham shut the door and walked away from his office. Hisham accepted in cross examination that his behaviour was highly inappropriate. Mohamad did not refer to Mr MacDonald being on his phone, but said he was sitting 'on his desk' and 'kept his head down'.

88 After Hisham and Mohamad left Mr MacDonald's office the door to his office closed automatically and Mr MacDonald remained in his office. Mr MacDonald gave evidence that he could hear the following:

COUNSEL FOR THE PLAINTIFF: Could you hear anything being spoken in the open area, the open office area at that point in time?

MR MACDONALD: I could just hear the profound, 'Fuck you, fuck you, fuck you' um 'Fuck you cunt' um, 'You work for a scum bag, coward' um yeah, just mainly that. Yeah.

COUNSEL FOR THE PLAINTIFF: And what happened from that point in time?

MR MACDONALD: Yeah, a lot of shouting um and then yeah, they left.

COUNSEL FOR THE PLAINTIFF: And you didn't hear any other words that were used apart from those profanities that you mentioned at that point in time?

MR MACDONALD: No.

89 Hisham returns into view from Mr MacDonald's office at 0:51 in the Open Plan Footage recording. He is pointing in the direction of Ms Nguyen and Mr Al-Hasawee further down the corridor. This is depicted in the following image:



90 Between 0:51 and 0:54 on the Open Plan Footage, it is clear that Hisham is approaching Ms Nguyen and pointing at her. Hisham is speaking in an observably animated fashion to Ms Nguyen during this period. Ms Nguyen gave evidence, which I accept, that she was 'terrified' and that it 'just felt like it was going on forever'. According to Ms Nguyen:

MS NGUYEN: Um I - I then asked them to leave as he started pulling away from yelling at Chris and um Anthony um and I asked him to leave and as I walked closer to the lift, that's when Hash started yelling at me. I mean, he was yelling at me the whole way but then he made a threat at me.

COUNSEL FOR THE PLAINTIFFS: And when you say he made a threat, what did he say?

MS NGUYEN: He said, 'I'll remember your face. You better watch your back'.

91 Mohamad gave evidence in chief that he could not recall what was said at this juncture. That is not surprising as he was at the far end of the corridor from Hisham and Ms Nguyen.

92 Mr Le was also unable to recall what Hisham was saying as he was moving along the corridor from Mr MacDonald's office. He was therefore unable to corroborate Ms Nguyen's account. Nor was Mr Hilbig. His evidence was of a general nature, as follows:

COUNSEL FOR THE PLAINTIFF: Did you hear anything else that they said, apart from what you've described as yelling aggressively and 'Fuck you' and other swearing?

MR HILBIG: Ah not specifically that I can recall. Um yeah, like I said, I was in a, yeah, a state of shock, I guess you would call it and, you know, that's the only words I can, you know, categorically recall as was said.

93 Hisham disputed Ms Nguyen's version of what he said to her. His evidence was as follows:

I was telling Ms Nguyen, 'How the fuck do you work for someone like that? He makes you lie. Have some respect for yourself. Why are you lying like this?' Because she was telling me every time we asked for a payment, or twice when I asked, 'Why is the payment late?' she was coming back to me and telling me that the payment - because there was a bank issue. So she used that reason twice. And in my opinion she was lying because on one occasion she said, 'I'm going to the bank at 9.30 when it opens and I'll get back to you' and she never did. So I was saying to her, 'Why the fuck do you lie for this guy? Have some respect for yourself.' Um. As I was walking out, sir.

94 Mr Al-Hasawee gave the following evidence:

COUNSEL FOR THE FIRST DEFENDANT: Can you please pause there, Madam Associate, at 53 seconds? We saw shortly before this, Mr Hisham Khartabil pointing towards the meeting room area. You saw that?

MR AL-HASAWEE: Yeah.

COUNSEL FOR THE FIRST DEFENDANT: Do you recall what he was saying at that point?

MR AL-HASAWEE: Um, something about - I don't know, he was saying to her, leave something or respect for yourself, you're working for someone liar, like this. You know he didn't pay us, something like this, yeah

95 I do not accept Hisham's and Mr Al-Hasawee's evidence in this regard. I have formed the view that they have constructed a narrative of what Hisham asserts was said to Ms Nguyen in an attempt to overcome the obviously damaging import of what she has attributed to him. I accept Ms Nguyen's evidence that Hisham said 'I'll remember your face. You better watch your back' to her.

96 I have reached that conclusion for the following reasons.

97 First, Ms Nguyen's oral evidence in chief was clear and cogent. It was not diminished in any respect in cross examination. Ms Nguyen had a clear recollection of Hisham's threatening words. In the context of the unfolding events at Mac & Co I accept that a threat of that type was inherently memorable to Ms Nguyen. Ms Nguyen had no apparent personal incentive or motive to falsely attribute the threatening words to Hisham. Nor was any such motive or incentive alleged to exist.

98 Second, Hisham's account had as its premise that Ms Nguyen had previously lied to him twice about bank issues being responsible for delayed payments to KPG. Establishing the existence of this predicate was relevant, albeit not critical, to an acceptance of Hisham's version of events. However, counsel for KPG did not put to Ms Nguyen that she had previously lied to Hisham about delayed payments on Mr MacDonald's behalf. Despite adducing documentary evidence said to support this contention through Hisham, the proposition that Ms Nguyen had lied about bank issues as a justification for delaying payment was simply never put to Ms Nguyen herself.

99 Third, the actual evidence adduced as to delayed payments revealed that there was no clear basis to think that Mac & Co were deliberately withholding payments and providing a false explanation for the delay. Two circumstances of non-payment were relied upon by Hisham.

100 In the first circumstance, a text message exchange was relied upon.²³ That text exchange reveals:

- (a) a request for payment by Hisham on Thursday 30 January 2025;
- (b) a response from Mr MacDonald that it was approved that morning;
- (c) a follow up from Hisham on Saturday 1 February 2025; and

²³ Court Book filed in *MacDonald & Co v Kharty Group* ('CB'), 861.

- (d) a screenshot from Mr MacDonald demonstrating a bulk payment being made on Wednesday 29 January 2025.

101 Hisham confirmed that the payment was received on Tuesday 4 February 2025. In circumstances where the authenticity of the text message exchange was not impugned and the overall delay in payment was three business days, it is inherently unlikely that this minor delay would rationally have caused Hisham to confront Ms Nguyen as lying on behalf of Mr MacDonald with respect to the making of late payments.

102 In the second circumstance, Hisham relied on the following email exchange with Mr MacDonald on 12 March 2025:

Richard,

This was supposed to be paid on 4th March. It has nothing to do with Friday's email.

Hisham (Hash) Khartabil

General Manager

You were supposed to be finished by 31st of January, welcome to my world of disappointment!

Regards

Richard MacDonald

Director

103 This email does not demonstrate the involvement of Ms Nguyen in the making of delayed payments to KPG. Nor does it demonstrate that 'bank issues' were proffered as a reason. Moreover, as Hisham said in his evidence, the invoice he was chasing was actually paid later that week. Again, it is inherently unlikely that this delay would rationally have caused Hisham to confront Ms Nguyen as lying on behalf of Mr MacDonald with respect to the making of late payments.

104 I have accepted the evidence of Ms Nguyen about the threatening words spoken by Hisham. In preferring her evidence, I reject the evidence of Hisham that 'there is no way I would threaten anybody in any situation, because it's not in my... nature to

threaten people, and...I know exactly what it feels like to be threatened.’ Hisham admitted that he was angry when he was in the open plan area of Mac & Co. The Open Plan Footage and lay evidence of Mr Le, Ms Nguyen and Mr Hilbig makes it clear that Hisham lost control of his emotions and was deeply angry whilst at Mac & Co’s premises. He punched the meeting table twice, was shouting and yelling and acting in physically aggressive way by pointing at and moving towards people. In those circumstances, despite Hisham’s evidence as to his ‘nature’ he was clearly inherently capable of acting in a verbally threatening way. I find, having regard to the unambiguous evidence of Ms Nguyen that he in did in fact say the words she has attributed to him.

- 105 Returning to the chronology of events at Mac & Co, as Hisham exited the open plan area towards the lift well, Mohamad started gesticulating towards and addressing those in seated in the open plan area. This can be seen between 0:56 and 1:08 of the Open Plan Footage. According to Mohamad’s evidence, he said to Mr Reid and the other assembled staff ‘how do you work for someone who doesn’t pay you straight’ and in the course of doing so mentioned what he described as the ‘forged invoice’. At one stage (1:04 of the Open Plan Footage), Mohamad points at Mr Reid and addresses him. According to Mohamad he said to Mr Reid that ‘this is mainly your fault as well’.
- 106 Mohamad then joined Mr Al-Hasawee and Hisham in the lift well. The three men waited for the lift to arrive and then left the building. They then walked towards Hisham’s white utility truck which was parked on Queen Street.
- 107 Once Hisham, Mohamad and Mr Al-Hasawee left the Mac & Co office, Mr Hilbig went to check on the Mac & Co receptionist, Julie Wilson. The reception area is located near the meeting room and lifts. In cross examination, Mr Hilbig explained that Ms Wilson told him that ‘she exited her reception area and hid around the other side of the couch’.
- 108 Mr Al-Hasawee did not speak during the meeting at Mac & Co. It is also apparent that throughout the recorded interactions in the open plan area, following the meeting, that Mr Al Hasawee was a passive observer. His conduct during these exchanges cannot be impugned. Mr Al-Hasawee was not actively involved in the

confrontation in the open area of Mac & Co's office. As Ms Nguyen explained in cross examination:

COUNSEL FOR THE FIRST DEFENDANT: He didn't appear to be engaging in the sort of conduct that Mr Hisham Khartabil was engaging in at the time?

MS NGUYEN: Correct. He was just standing on the side.

COUNSEL FOR THE FIRST DEFENDANT: And he didn't appear to be particularly excitable or upset at the time?

MS NGUYEN: Not at that point, no.

COUNSEL FOR THE FIRST DEFENDANT: Yes. And you asked him to usher them out as he seemed to be in control of himself?

MS NGUYEN: What do you mean by in control of himself?

COUNSEL FOR THE FIRST DEFENDANT: Well, you asked him out because he seemed to be the calm one there?

MS NGUYEN: Um yes.

109 I conclude that Hisham's behaviour whilst at Mac & Co was inappropriate, angry, intimidating and, in the case of Ms Nguyen, threatening. The effect on the Mac & Co employees was significant. There can be no doubt that punching the table in the meeting room twice, angrily moving around the office, following Mr MacDonald down the corridor for the purpose of yelling abuse at him, swearing and gesticulating to people and threatening Ms Nguyen with the words 'I'll remember your face. You better watch your back' was objectively unreasonable and inappropriate behaviour.

110 I accept Ms Nguyen and Mr Hilbig's evidence as to their subjective response to Hisham's behaviour.

(a) Ms Nguyen gave evidence that:

I was terrified. I just didn't know when it was going to end. It just felt like it was going on forever.

(b) Ms Nguyen was plainly left reeling by the conduct:

COUNSEL FOR THE PLAINTIFF: How did that make you feel?

MS NGUYEN: I just couldn't understand why this was happening. We're in a workplace. I just didn't understand how someone can be so angry.

(c) Similarly, Mr Hilbig gave evidence that:

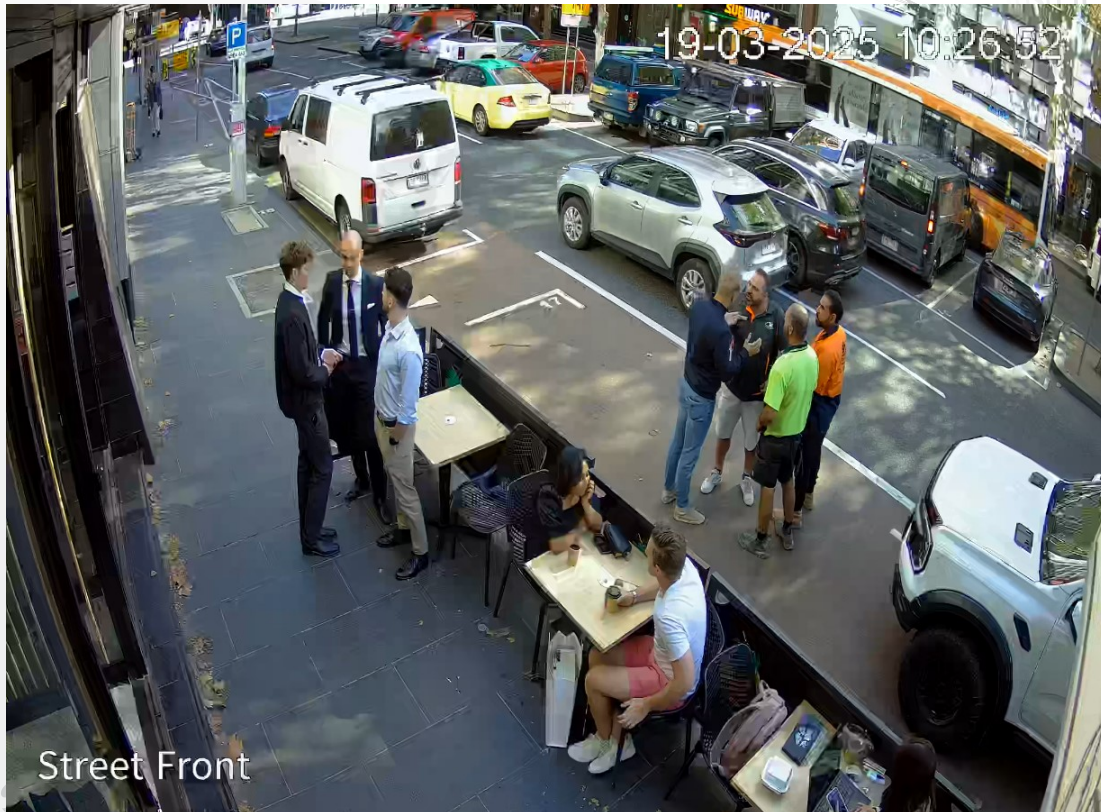
I mean, I, I was - yeah, I was sitting in my office and I was, you know, extremely terrified if I'm, if I'm being honest. Um I think the initial outburst when they were coming down the corridor put me into a - I, I quickly sat down and, you know, I was in, you know, kind of a state of shock, um because you don't often hear such aggressive and violent tone in, in someone's voice. And then the fact that they were, you know, heading into, you know, our peaceful office space. Um and then, you know, going up to, you know, people in fairly close, you know, vicinity, um you know, and pointing and, you know, continuously um, you know, aggressively shouting and swearing at um, yeah at different employees was, yeah, it was quite terrifying, yeah.

...

Well I - just quite, quite shaken up by the incident. Um yeah, it's not something I'd really want to witness ever again. Um you know - yeah, yeah, yeah, wasn't good.

D.2 The exchange on Queen Street

111 Mr MacDonald made his way onto Queen Street to speak to Hisham. Once on Queen Street, Mr MacDonald had an exchange with the three men in front of Hisham's white utility truck. The exchange on Queen Street was recorded by the CCTV from a nearby coffee shop and accounting business (together, the **Queen Street Footage**). Unlike the Open Plan Footage, the Queen Street Footage included an audio recording. The relevant interaction starts at 16:30 in the Queen Street Footage as Mr MacDonald walks down Queen Street looking for the three men. A still of the Queen Street Footage taken at 16:52 demonstrates the four men converged in front of the white utility on Queen Street:



112 The parties submitted competing transcripts of the Queen Street Footage.

113 Mac & Co submitted that the following exchange occurred:

Hisham: *You what? Mate, don't you fucken lie up there. The whole time you were fucken lying. I'm sick of your shit. I'm shouting because you're full of shit.*

Hisham: *You want to come fucken down here.*

Inaudible

Hisham: *Do you know what they do on site? Do you know what they do on site? Do you know what they do on site?*

Hisham: *You want to be a fucken smart arse in the meeting.*

Hisham: *You're being a smart arse. I've sent you 3 or 5 emails.*

Mr MacDonald walks away.

Mr Al-Hawasee: *I'm going to bring all my workers here. I'm going to fuck you.*

Mr Al-Hawasee: *I'm going to stalk you, all of you. Everywhere you go outside. You're not safe.*

Mr Al-Hawasee: *Cunt!*

114 KPG submitted that, instead, the following accurately captures the exchange.

Mr MacDonald: *Come on, give it to me, give it to me.*

Mr MacDonald: *I'm here, give it to me.*

Hisham: *Don't fucking lie up there. The whole time you're fucking lying. You're talking shit.*

Hisham: *I'm shouting. You wanna come down on the fucking street, you're gonna yell at too*

Hisham: *Hey do you fucking realise what your workers do onsite? Do you realise what they do onsite?*

Hisham: *Do you realise what they do onsite?*

Hisham: *Yeah because you started being fucking a smartass in the meeting.*

Mr Al-Hawasee: *I'm gonna bring all my workers here*

Hisham: *You're a smartass yeah.*

Hisham: *You started telling me I send 3 emails about that. You don't reply to my Emails*

Mr Al-Hawasee: *We have everything, emails, text messages, we're gonna put it on the internet.*

Mr Al-Hawasee: *You stupid ass. I'm gonna bring all my worker here.*

Mr Al-Hawasee: *I'm gonna expose you. 7 news everywhere you go outside.*

Mr Al-Hawasee: *Fuck you.*

115 I have viewed and listened to the Queen Street Footage and considered the lay evidence of each of the participants involved in the exchange on Queen Street. I am not persuaded that either of the competing versions accurately captures what was said by the participants on Queen Street.

116 I am not actually persuaded by Hisham's evidence that Mr MacDonald was saying, at 16:42, in the Queen Street Footage 'Come on, come on, give it to me. Give it to me' as he was approaching the three men. Whilst Mohamad and Mr Al-Hasawee corroborated Hisham's account, Mr MacDonald cannot be heard to say those words on the audio recording and he rejected the suggestion that he used those words in his evidence. I also consider that Mr MacDonald's body language at the time he is alleged to have said those words is inconsistent with a man speaking aggressively or inviting an aggressive confrontation.

117 Having listened to the Queen Street Footage, I find that the following was said, amidst inaudible exchanges due to traffic and men shouting across each other, in the following order:

- (a) Hisham: 'Mate don't you fucken lie up there. The whole time you were fucken lying. I'm sick of your shit. I'm shouting because [inaudible].'
- (b) Hisham: 'Do you know what they do on site? Do you know what they do on site? Do you know what they do on site?'
- (c) Hisham: 'You want to be a fucken smart arse in the meeting.'
- (d) Hisham: 'You're being a smart arse. [inaudible]. I've sent you three or five emails.'
- (e) Mr Al-Hasawee: 'I'm going to bring all my workers here. They are going to stalk you. 7 news everywhere you go. You are not safe. Fuck!'

118 Although I cannot hear it on the Queen Street Footage, I accept Hisham's evidence that Mr MacDonald denied that he was lying. I find that the denial was made immediately after Hisham made the accusation and that it prompted Hisham to then say 'Do you know what they do on site? Do you know what they do on site? Do you know what they do on site?'

119 Mr MacDonald accepted in cross examination that Hisham and Mr Al-Hasawee were talking over each other for moments during the confrontation on Queen Street.

120 According to Mr MacDonald, the following exchange occurred on Queen Street:

COUNSEL FOR THE PLAINTIFF: What happened when you made your way to Queen Street to speak to them?

MR MACDONALD: Yep, so I come out, I see where the guys were, they were walking back to their car and I shouted, 'Hash' and he turns around um and I explained to him that, 'You can't do that, that's not on'. I said to the words of um, 'She's a female employee', that's what the opening line was.

COUNSEL FOR THE PLAINTIFF: Can you just speak up a bit?

MR MACDONALD: She was a female employee. To the point where he starts shouting into my face. I turned to the right-hand side and put my hand out to

the people that are sitting and having coffee on the right-hand side as a way of apologising for what was happening.

COUNSEL FOR THE PLAINTIFF: And when you say he started shouting, do you know what – do you 11 recall what Hisham was shouting at this point in time?

MR MACDONALD: Yeah. 'You fucken come down here, you fucken know what goes on, you know what they fucken do', um, 'What they fucken do on site'.

COUNSEL FOR THE PLAINTIFF: And what, if anything, did you say in response?

MR MACDONALD: I was talking – I turned to Mo and – and just that this is your brother as if to say, what was coming out um that was the conversation and then I'm trying to talk but I can't – I couldn't talk because they were shouting and then Hash turns away, that's when I think Ali starts talking and then that's when I walk away.

COUNSEL FOR THE PLAINTIFF: And was anything said to you as you walked away?

MR MACDONALD: Yeah. Um 'I know where you – I'm going to stalk you, you're not safe, fuck you, you cunt', something like that.

- 121 Mr MacDonald confirmed in cross examination that Hisham made no threat to him outside the Mac & Co premises. Consistently with the audio recording and the *viva voce* evidence of Mr MacDonald, I accept that Mr MacDonald was told by Mr Al-Hasawee that he would be stalked and that he was not safe.

D.3 Events following the exchange on Queen Street

- 122 After Hisham, Mohamad and Mr Al Hasawee left the building, Mr MacDonald asked Ms Nguyen to organise for the lifts to be locked. The lifts were subsequently locked to ensure that no one was able to access the floor on which Mac & Co's office was situated. Later that day Ms Nguyen attended a police station to file a report.
- 123 An hour or so after the incidents on 19 March 2025, Mac & Co's solicitor, Mr Moon of HWLE attended at Mac & Co's office and met with Mr MacDonald for approximately one hour. Later on 19 March 2025, HWL Ebsworth, the solicitors for Mac & Co sent the Termination Letter to KPG. At trial, Mac & Co confirmed that the only ground of termination pressed before the Court was the threatening conduct on

19 March 2025 and that the other grounds referred to in the letter of 19 March 2025 did not require determination.²⁴

E Was the Subcontract lawfully terminated?

124 Mac & Co did not follow the contractual ‘show cause’ process for termination pursuant to clauses 73 to 75 of the Subcontract. Therefore, a conclusion that the Termination Letter validly terminated the Subcontract was dependent upon the scope and continuing existence of a right to terminate at common law. The requisite analysis has the following stages:

- (a) First what are the relevant common law principles with respect to the right to terminate?
- (b) Second, to what extent did clauses 73 to 75 of the Subcontract regulate and limit Mac & Co’s right to terminate?
- (c) Third, to the extent that Mac & Co had a common law right to terminate upon a proper construction of the Subcontract, was that common law right to terminate enlivened by the events of 19 March 2025 so as to justify Mac & Co’s act of termination?

E.1 The common law right to terminate for repudiatory conduct

125 This case involves consideration of the right to terminate for repudiation. The relevant principles governing the ability of a party to terminate for repudiatory conduct were examined by the High Court in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (Koompahtoo)*.²⁵

126 In *Koompahtoo*, Gleeson CJ, Gummow, Heydon and Crennan JJ explained that the term repudiation can be used in two different ways.²⁶

127 The first sense in which repudiation is used is when it refers to conduct ‘which evinces an unwillingness or an inability to render substantial performance of the

²⁴ Transcript 193: 24-31.

²⁵ (2007) 233 CLR 115 (*Koompahtoo*).

²⁶ Ibid, 135 [44].

contract'.²⁷ It has been described as conduct 'which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations'.²⁸ The test is whether the conduct of the alleged wrongdoer was such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.²⁹ The manifestation of the unwillingness or inability can occur before or at the time when performance is due.

128 The second way in which repudiation is referred to is where there is any breach of contract which justified termination by the other party.³⁰ At common law, breaches which justify termination are classified into one of two categories.³¹ Those categories are:

- (a) Where there has been a failure to comply with an obligation which the contracting parties have agreed is essential.³² As the High Court stated in *Koompahtoo*, 'such an obligation is sometimes described as a condition.'³³ The test of whether a term is essential requires construction of the contract. As the High Court explained:

It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is "essential", so that any breach will justify termination.³⁴

- (b) The other category is where there is a 'sufficiently serious breach of a non-essential term'.³⁵ Termination for breaches of this type is permissible in recognition of the fact that 'although as a matter of construction of a contract it may not be the case that *any* breach of a given term will entitle the other

²⁷ Ibid.

²⁸ *Koompahtoo*, 135 [44] citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 (*Laurinda*), 634 (Mason CJ).

²⁹ *Koompahtoo*, 135 [44], citing *Laurinda*, 659.

³⁰ *Koompahtoo*, 135 [44] (citations omitted).

³¹ *Koompahtoo*, 136-138 [47]-[49].

³² *Koompahtoo*, 136 [47] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

³³ Ibid.

³⁴ *Koompahtoo*, 138 [48].

³⁵ *Koompahtoo*, 138 [49].

party to terminate, some breaches of such a term may do so.’³⁶ The High Court went on to explain that:

We add that recognition that, at the time a contract is entered into, it may not be possible to say that any breach of a particular term will entitle the other party to terminate, but that some breaches of the term may be serious enough to have that consequence, was taken up in *Ankar*. Breaches of this kind are sometimes described as “going to the root of the contract”, a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to damages, the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract.³⁷

E.2 Did the Subcontract restrict or limit Mac & Co’s ability to terminate at common law?

129 Where a party is entitled to rely upon a contractual right to terminate and a common law right to terminate, there is no obligation to elect between the two grounds for terminating, rather, the party is entitled to rely upon both.³⁸

130 A common law right to terminate will only be excluded when the contract contains a clear intention to exclude it.³⁹ This requires assessing, as a matter of construction, whether the contractual right to terminate excludes or limits the common law right to terminate. As Deane J stated in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*:

A party entitled to terminate a contract for repudiation or fundamental breach may rely upon both a specific contractual right to terminate the contract and the common law right to terminate unless, as a matter of construction, the former excludes the latter...⁴⁰

131 It is necessary to pay heed to the ‘the familiar principle of construction that clear words are needed to rebut the presumption that a contracting party does not intend

³⁶ *Koompahtoo*, 138 [49] (Emphasis in original).

³⁷ *Koompahtoo*, 140 [54] (citations omitted).

³⁸ *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 (*Progressive Mailing*), 55 (Deane J)

³⁹ *Holland v Wiltshire* (1954) 90 CLR 409, 415; *Concut Pty Ltd v Worrell* (2002) 176 ALR 693 (*Concut*) 699–700 [23]; *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117, 135; *Ashell Homes Constructions Pty Ltd v Kobus* [2022] ACTSC 323 (*Ashell*), 13 [44] (McWilliam AsJ).

⁴⁰ *Progressive Mailing*, 55–56.

to abandon any remedies for breach of the contract arising by operation of law'.⁴¹ As the High Court explained in *Concut Pty Ltd v Worrell* (*Concut*):⁴²

[A]n express provision for termination for breach in certain circumstances may be regarded as designed to augment rather than to restrict or remove the rights at common law which a party otherwise would have had on breach.⁴³

132 The question which arises for determination is therefore whether clauses 73 to 75 of the Subcontract augment the common law right of Mac & Co to terminate upon breach or to restrict or refashion those rights. As it is a question of construction,⁴⁴ the following general principles are applicable:

- (a) the rights and liabilities of the parties are determined objectively by reference to the contract's text, context, and purpose;⁴⁵
- (b) when determining the meaning of the terms of a commercial contract, the necessary enquiry requires 'consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract';⁴⁶
- (c) the approach to be taken assumes that the parties intended to produce a commercial result, so that a construction which results in commercial nonsense or works commercial inconvenience should generally be avoided.⁴⁷

133 Clauses 73-75 and 81 of the Subcontract provide as follows:

Substantial Breach

73 If the Subcontractor commits a substantial breach of the Subcontract, the Builder may give the Subcontractor a written notice to show cause ("show cause notice"). Substantial breaches include, but are not limited to:

- (a) failing to:

⁴¹ *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, 893; *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689, 717, cited and endorsed by the High Court in *Concut*, 317 [23].

⁴² *Concut*.

⁴³ *Ibid*, 317 [23] (citations omitted).

⁴⁴ See eg *Amann Aviation Pty Ltd v Commonwealth* (1991) 100 ALR 267, 300.

⁴⁵ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46] (*Mount Bruce*).

⁴⁶ *Mount Bruce*, 116 [47].

⁴⁷ *Mount Bruce*, 117 [51].

- i. provide security;
 - ii. provide evidence of insurance;
 - iii. comply with a direction of the Builder;
 - iv. use the materials or standards of work required by the Subcontract;
 - v. rectify defects within the time provided for in the Subcontract;
 - vi. comply with a defects rectification notice;
- (b) wrongful suspension of work;
 - (c) substantial departure from a construction program or a Subcontract Works Program without reasonable cause or without the Builder's approval;
 - (d) failing to proceed with due expedition and without delay;
 - (e) carrying out work or performing services at the site on instruction from the Principal or other third party, whether in connection with the Subcontract Works or otherwise, without written authorisation from the Builder.

74 A show cause notice must state that it is a notice under clause 73 of the Subcontract, the alleged substantial breach; that the Subcontractor is required to show cause in writing why the Builder should not exercise a right referred to in clause 75; the date and time by which the Subcontractor must show cause (which must be no less than 5 Business Days after the notice is received by the Subcontractor); and the place at which cause must be shown.

75 If the Subcontractor fails to remedy the substantial breach of the [Subcontract or] otherwise show cause by the stated date and time, the Builder may by written notice to the Subcontractor:

- (a) take out of the Subcontractors hands the whole or part of the Subcontract Works remaining to be completed; or
- (b) terminate the Subcontract.

If a purported termination of the Subcontract pursuant to this clause is determined by a competent body having jurisdiction not to be properly a termination, then the purported termination will be deemed to be a termination under clause 81, which termination has effect from the date of the purported notice of termination given pursuant to this clause 75, and the Subcontractor's sole rights in such circumstances will be only those set out in clause 81.

TERMINATION WITHOUT FAULT

81 The *Builder* may, in addition to any other power or right conferred upon it, for any or no reason, in its absolute discretion, forthwith

terminate the *Subcontract* at any time prior to the issue of the *final certificate*. Such termination may be effected by notice in writing given by the *Builder* to the *Subcontractor* and such notice shall provide that it is given pursuant to the terms of this clause. In the event of such termination the respective rights and obligations of the parties shall be as follows:

- (a) the *Subcontractor* shall with all reasonable dispatch and in such manner and with such precautions to avoid injury, death or damage of the classes in respect of which before the date of termination it was liable to indemnify the *Builder*, remove from the *Subcontract Works* all construction plant, temporary works and any other equipment, plant, tools, goods and material;
- (b) after taking into account amounts previously paid, the *Subcontractor* shall be paid by the *Builder*;
- (c) the value of the *Subcontract Works* executed at the date of termination;
- (d) the cost of materials or goods properly ordered for the *Subcontract Works* for which the *Subcontractor* has paid or for which the *Subcontractor* is legally bound to pay and on such payment by the *Builder* any material so paid for shall become the property of the *Builder*; and
- (e) the reasonable cost to the *Subcontractor* of demobilisation.

134 It is first necessary to construe what is meant by the phrase ‘substantial breach of the Subcontract’ in clause 75. The existence of a ‘substantial breach’ is a contractual pre-requisite to the exercise of the contractual right to terminate.

135 Two separate decisions of John Dixon J provide significant assistance on this point.

136 In *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3) (Dura)*,⁴⁸ it was alleged that Dura as contractor had committed substantial breaches of its obligations under the relevant contract, which incorporated general conditions of contract AS 2124-1992. In a manner similar to the structure of clause 73 of the present Subcontract, cl 44.2 of AS 2124-1992 defined the term “substantial breach”, as including, without limitation, by reference to various obligations under the contract: failing to proceed with due expedition and without delay (in breach of cl 33.1), failing to use the standard of materials or provide the standards of workmanship

⁴⁸ [2012] VSC 99 (*Dura*), upheld on appeal in [2013] VSCA 179, but the appeal concerned other grounds.

required by the contract (in breach of cl 30.1), and failing to comply with the direction of the superintendent (in breach of cl 23).⁴⁹

137 John Dixon J construed 'substantial breach' as requiring that the breach be 'material or important'.⁵⁰ His Honour went on to observe that:⁵¹

'the adjective 'substantial', provides guidance. It requires that the conduct in breach be of real or actual significance with respect to the important qualities of the bargain. Trivial or inconsequential conduct will not suffice, but it is unnecessary to show conduct that 'goes to the root of the contract'. The consequences of the conduct must be material or important, to the substance of the contract.'

138 Whether a breach is substantial is a question of fact to be determined objectively.⁵²

139 John Dixon J returned to the construction of 'substantial breach' in *Stojanovski v Australian Dream Homes*.⁵³ In that case, clause 20.1 of the relevant contract entitled an owner to terminate a contract for 'substantial breach' unless the builder remedied the breach within 14 days of receiving notice of the breach. His Honour described the word 'substantial' as protean.⁵⁴ His Honour reasoned as to the meaning of 'substantial breach' in the following way:⁵⁵

Although I agree that a substantial breach is one that is more than ephemeral or de minimis in its character, the concept and purpose of evaluating, and limiting, the kind of breach that enlivens the owner's right to serve a default notice is given context by reference to the terms of the contract as a whole. It is unhelpful to paraphrase the qualifying condition introduced by the word 'substantial' by using the phrase 'only really important breaches' because that is not the language.

In some applications of cl 20.1, but perhaps not where cl 10.1 is breached, that evaluative concept may be too narrow. Because the qualifier is applied to the phrase 'breach of this contract', the concept of 'substantial' could apply to a breach of any term of the contract, across the range of the differing obligations cast on the builder by the contract. In that context, its protean quality serves a purpose and the precise meaning intended by the use of the word will be revealed by the nature of the breach. Whether a breach of the contract is a substantial breach is a question of fact and the answer to the legal question what was intended by 'substantial' is that the nature and the

⁴⁹ Ibid, 137 [376].

⁵⁰ *Dura*, 168–169 [443].

⁵¹ *Dura*, 171 [447].

⁵² *Dura*, 169 [444].

⁵³ [2015] VSC 404 (*Stojanovski*).

⁵⁴ Ibid, 15 [45].

⁵⁵ *Stojanovski*, 18 [52]–[53].

consequences of the breach must satisfy that description and, in the present context, be ample or considerable or important.

- 140 Consistently with the approach by John Dixon J, I consider that in the present context, Mac & Co's contractual right to terminate was enlivened when the *nature* and *character* of the breach was ample, considerable or important.
- 141 Importantly, in the context of termination for breach by Mac & Co, the enquiry required by the Subcontract was different to that required by the common law. The Subcontract eschewed an enquiry into the essentiality of the term alleged to be breached or an enquiry into whether a breach of a non-essential term went to 'the root of the contract'. It focussed on the existence of a 'substantial breach'.
- 142 In closing addresses, significant attention was given to the decision of the Full Federal Court in *Amann Aviation Pty Ltd v Commonwealth of Australia (Amann)*.⁵⁶ As will be recalled, in that case, under a contract between Amann and the Commonwealth of Australia, Amann was to provide specialised aircraft and equipment and carry out coast watch operations in northern Australia. On the first day of operations under the contract the Commonwealth purported to terminate the contract. The Commonwealth did not follow the show cause regime in clause 2.24 of the contract prior to termination. An issue arose as to whether the contractual mechanism in clause 2.24 comprehensively regulated the Commonwealth's right of termination.
- 143 As recorded in the judgment of Davies J, clause 2.24 provided as follows:⁵⁷

2.24 TERMINATION

Whenever and so often as the Contractor fails to carry out the Contract or comply with a condition of the Contract to the satisfaction of the Secretary then in either of these events the Secretary may, by notice in writing, require the Contractor to show cause in writing to the satisfaction of the Secretary, why the Contract or any specified portion thereof should not be cancelled. If the Contractor fails to show cause in writing, as so required, the Secretary shall be entitled to treat the Contract or any specified portion thereof as having been cancelled and may declare the whole or any part of the security lodged by the Contractor forfeited by the Commonwealth, and thereupon the amount so declared to be forfeited shall become the property of the Commonwealth absolutely.

⁵⁶ (1990) 22 FCR 527 (*Amann*).

⁵⁷ *Ibid*, 531 (Davies J).

The Commonwealth shall, in addition, be entitled to recover from the Contractor any damages, losses costs and expenses which the Commonwealth may sustain, or incur in consequence of such cancellation of the Contract or portion thereof as the case may be. A certificate by the Secretary stating the amount of any damages, losses, costs and expenses sustained or incurred by the Commonwealth in consequence of the cancellation of the Contract or portion thereof shall be conclusive evidence of the matter stated. The Secretary will likewise be entitled to treat the Contract as having been cancelled if the Contractor commits an act of bankruptcy or enters into a composition with creditors or assigns his estate for the benefit of creditors or, if the Contractor, being a company, goes into liquidation otherwise than for the purpose of reconstruction.

144 It will be immediately observed that clause 2.24 only dealt with the Commonwealth's right of termination. Davies J (with whom Sheppard J agreed on this issue)⁵⁸ made the following determinations as to the proper construction of clause 2.24:

- (a) Clause 2.24 eschewed the distinction between a condition, being a term going to the essence of the contract, breach of which would justify rescission, and a warranty, breach of which would only give rise to a claim for damages.⁵⁹
- (b) Clause 2.24 empowered the Secretary of the Director of Transport to treat the contract or any specified portion thereof as cancelled in the event of a breach of any term of the contract; but it required him before doing so to give notice to the contractor to show cause in writing to the satisfaction of the Secretary.⁶⁰ That being the agreed procedure for cancellation on breach, the Commonwealth was not entitled, of its own motion, outside the agreed procedure to specify that a term was of the essence and to rescind forthwith for breach.⁶¹
- (c) Clause 2.24 did not deal with the case of repudiation by the contractor, using that term in its strict sense as referring to an anticipatory breach. Thus, clause 2.24 was inappropriate to cover of an instance where, before the time for

⁵⁸ *Amann*, 540.

⁵⁹ *Amann*, 532.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

performance arose, the contractor informed the Commonwealth that it did not intend to perform the Contract.⁶²

145 Sheppard J, after endorsing Davies J's construction of clause 2.24,⁶³ held that:

I am satisfied that cl 2.24 provided a comprehensive procedure for the termination of the contract, at least in the circumstances which applied here, and that, except in cases of true anticipatory breach, the provisions of the common law were intended by the parties not to apply.⁶⁴

146 Thus, in *Amann* the Full Federal Court held that the provisions of the contract ousted the Commonwealth's right to terminate for repudiatory conduct where that conduct constituted a breach of contract. *Amann* demonstrates that a contract can partially excluded common law rights of termination. It is also appropriate to observe that the decision in *Amann* preceded the clear exposition in *Koompahtoo* of the two presently relevant senses in which repudiation can arise.

147 In the present context, I have determined that the contractual regime was intended to partially exclude, supplant and 'codify',⁶⁵ Mac & Co's common law right to terminate rather than augment it. That is so for the following reasons.

148 First, in conferring rights of termination on Mac & Co, the contracting parties eschewed using the distinction between essential and non-essential terms. They also eschewed any enquiry into whether a breach 'went to the root of the contract'. In doing so, they chose to stipulate a different enquiry – that is, whether or not a substantial breach had occurred. A right to terminate for substantial breach does not establish an objectively discernible intention to augment or add to existing common law rights. The basis on which the contractual right to terminate was alleged to have enlarged Mac & Co's common law right to terminate was not developed in submission. In truth, there is significant overlap between a contractual right to terminate for 'substantial breach' and a common law right to terminate for breach of an essential term, because a substantial breach will often arise if the importance or *nature* of the relevantly breached promise is such that the promise would not have

⁶² *Amann*, 533.

⁶³ *Amann*, 540.

⁶⁴ *Amann*, 544 (Sheppard J).

⁶⁵ To use the phrase adopted by Sackar J in *SK Chop Pty Ltd v Man Cave Barber Shop Rouse Hill Pty Ltd* [2021] NSWSC 410, [237].

entered into the contract unless assured of its strict or substantial performance. Similarly, there is significant overlap with the common law right to terminate for a non-essential term, because a substantial breach will often arise where the *consequences* of that breach are considerable. The fact that a different test was agreed by the parties, the significant overlap with the common law right and the absence of clear augmentation, reveals an objective intention to supplant rather than add to the existing common law rights of Mac & Co to terminate for breach of contract.

149 Second, the contractual regime embedded a number of rights and protections. Those rights and protections included:

- (a) the ability of KPG to meet the allegation of substantial breach before any right to terminate crystallised and demonstrate why, upon cause, that a termination or removal of work should not occur;
- (b) the protection afforded to Mac & Co, who could effect an improper termination of the contract pursuant to clause 75, yet bring the Subcontract to an end on the terms set out under clauses 75 and 81 of the Subcontract.

150 If a common law right to terminate for breach co-existed with Mac & Co's rights under the contract, the rights and protections afforded to KPG could be side-stepped by terminating at common law. The difficulty created by Mac & Co's approach to clauses 73 to 75 was exposed in the course of an exchange with Mac & Co's counsel⁶⁶ which culminated in the following:

HIS HONOUR: On your case, one's got a contractual structure where if it's renunciation, one can terminate a common law; if it's breach of a warranty going to the root of contract, one can terminate at common law. And if it's a breach of an essential term, one has a 'show cause' regime or a right to terminate at common law.

COUNSEL FOR THE PLAINTIFF: Yes.⁶⁷

⁶⁶ Transcript 428:17 to 430:20.

⁶⁷ See also following exchange at Transcript 427:28-428:3: COUNSEL FOR THE PLAINTIFF: Substantial breach, I think they should be construed consistent with the common law meaning of that phrase. HIS HONOUR: Well, what's the common law meaning of that phrase. COUNSEL FOR THE PLAINTIFF: A substantial breach being a breach that may give rise to the right to terminate.

- 151 The practical outcome of this submission is that Mac & Co contends that it was never mandated to follow clauses 73-75 when terminating the Subcontract irrespective of the nature of the breach involved.
- 152 The consequence of construing Mac & Co's common law right to terminate as being co-existent with the contractual right would therefore be to considerably weaken the protections afforded to KPG by the show cause process. It would also create considerable uncertainty in the administration of the Subcontract by imposing a requirement to classify whether a breach necessitated following the show cause process (because it was construed to be a 'substantial breach') or gave rise to an immediate right of termination at common law (because the relevant term was 'essential' or the breach was of an inessential term but nonetheless went 'to the root of the contract'). Different outcomes would also follow an improper termination by Mac & Co under the contract and at common law. An improper termination at common law would constitute a repudiation, whilst an improper termination under the Subcontract would result in a termination with the consequences stipulated by clause 81.
- 153 Objectively construed, the intention of clauses 73 to 75 was to provide certainty to the parties by replacing Mac & Co's common law rights of termination for breach with termination rights which: were contingent upon a substantial breach; provided procedural fairness to KPG by giving an opportunity to respond, including by rectifying the alleged default;⁶⁸ and, created a clear and defined consequence, pursuant to clauses 75 and 81, if the termination was found to be improper. Similarly to *Amann* and with the benefit of the dichotomy identified in *Koompahtoo*, once it is recognised that there was an agreed procedure for termination on breach, Mac & Co was not entitled, on its own motion and outside the agreed procedure, to terminate for breach forthwith absent a renunciation.⁶⁹ Such a conclusion is consistent with the role of commercial purpose in construction and the mandate to

⁶⁸ See, by way of analogue, *Fonterra Brands (Australia) Pty Ltd v Bega Cheese Ltd* [2021] VSC 75, 223 [681] (McDonald J).

⁶⁹ *Amann*, 532 (Davies J); 544 (Sheppard J).

ensure that '[a] commercial contract is to be construed so as to avoid it making a commercial nonsense or working commercial inconvenience.'⁷⁰

154 Third, the Subcontract does not include any language which preserves or reserves Mac & Co's common law right to terminate for breach. This is no mere neutral oversight. As the following insolvency provisions of the Subcontract reveal, the drafters of the Subcontract were explicit, about preserving 'any other rights and remedies' in the separate context of an insolvency. Clauses 79 to 80 of the Subcontract stated:

Insolvency

79 Where the *Subcontractor* commits an act of insolvency, the *Builder* may without giving a show cause notice forthwith terminate the *Subcontract*. For the purposes of this clause, an act of insolvency includes:

- (a) a party is, or informs the other party in writing or creditors generally that the party is, insolvent or financially unable to proceed with the *Contract*;
- (b) that execution is levied against a party by a creditor;
- (c) in relation to a body corporate:
 - i. the party is insolvent within the meaning of section 95A of the *Corporations Act* 2001 (Cth), or must be presumed by a court to be insolvent under section 459C of that Act;
 - ii. a circumstance specified in section 461 of the *Corporations Act* 2001 (Cth) occurs with respect to the party;
 - iii. notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;
 - iv. a party stops or suspends payment to creditors generally or enters into an arrangement, assignment or composition with or for the benefit of its creditors generally or any class of them or proposes to do so;
 - v. an administrator, receiver, receiver and manager, controller, managing controller, trustee, provisional liquidator or liquidator is appointed to a party or any of its assets or business or any step is taken to do so or any party requests such appointment;

⁷⁰ *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 657 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

- vi. an application is made, a resolution is passed or an order is made for the winding-up of the party, including an application relating to dissolution, liquidation, provisional liquidation or bankruptcy;
 - vii. a mortgagee of any property of the party takes possession of that property;
 - viii. the corporation resolves by special resolution that the party be wound up voluntarily (other than for a members' voluntary winding-up); or
 - ix. anything analogous or having a similar effect to an event listed in paragraphs (i)-(viii) above occurs; and
- (d) in relation to a person other than a body corporate:
- i. the commission of an act of bankruptcy;
 - ii. the presentation of a bankruptcy petition against the person;
 - iii. the presentation by the person of that person's own bankruptcy petition;
 - iv. the appointment of an official manager in respect of all any part of the property of the person concerned;
 - v. the entry by the person into a scheme of arrangement or a composition with, or assignment for the benefit of, all or any class of the person's creditors;
 - vi. has a deed of assignment or deed of arrangement made, accepting a competition, or having a sequestration order made under Part X of the *Bankruptcy Act 1966* (Cth);
 - vii. being made bankrupt; or
 - viii. anything analogous or having a similar effect to an event listed in paragraphs (i) - (vii).

80 The rights and remedies available to the *Builder* in relation to the above clause are in addition to any other rights and remedies. They may be exercised notwithstanding that there has been no breach of the *Subcontract*.

155 The existence of a clause in a contract which explicitly preserves 'other legal rights or remedies' is a sufficient, but not necessary, means by which an intention to preserve common law rights can be inferred. However, as McWilliam AsJ observed in *Ashell Homes Constructions Pty Ltd v Kobus* (*Ashell*),⁷¹ by reference to the Full Federal Court

⁷¹ *Ashell*.

decision in *Amann*, where the terms of the contract comprehensively regulate the field (or like in *Amann* a part of the field), without any such preserving provision, that may manifest an intention to exclude certain common law rights.⁷² Here, the absence of a preserving clause in the part of the Subcontract dealing with termination for breach by Mac & Co, in a context where such a provision was deliberately inserted in the following section of the Subcontract manifests an intention to exclude Mac & Co's common law right to terminate for breach.

- 156 In *Perar BV v General Surety & Guarantee Co Ltd*,⁷³ a clause permitting immediate termination by a principal of a contract on the appointment of a receiver to the contractor (cl 27.2) did not have a carve out for common law termination, but other clauses in the contract as to termination did (including a clause for termination on the contractor's default in cl 27.1 and a clause permitting the contractor to terminate for the principal's insolvency in cl 28.1).⁷⁴ Peter Gibson LJ, with whom Staughton and Waite LJ agreed, regarded the termination regime in cl 27.1 as an exclusive code, and said:⁷⁵

It is noticeable that cl 27.2, unlike cl 27.1 and cl 28.1, does not commence with the words 'Without prejudice to any other rights or remedies which the employer may possess'. If the parties wished to allow rights or remedies other than those set out in cl 27.2 and 27.4, to be exercisable, then they would in my judgment have put in express words to that effect.

- 157 The language explicitly used in clause 80 could have been readily deployed in the context of termination for substantial breach, if the Subcontract was intended to preserve Mac & Co's common law rights to terminate for breach.
- 158 Finally, I have considered the reasoning of Fagan J in *Eden Co Construction Pty Ltd v Leed Engineering and Construction Pty Ltd (Eden)*.⁷⁶ In *Eden*, Fagan J held that clause 23 of the relevant contract did not provide the exclusive source of the defendant's rights of termination for breach. In doing so, Fagan J reasoned as follows:⁷⁷

Most significantly, cl 23 fails to provide a mode of termination suitable to repudiatory breaches which may create an urgent situation on site. For such

⁷² *Ibid*, 14 [48], citing *Amann*, 544 (Sheppard J); 554-5 (Burchett J).

⁷³ (1994) 43 ConLR 110 (*Perar*).

⁷⁴ *Ibid*, 110-112.

⁷⁵ *Perar*, 120-121.

⁷⁶ [2018] NSWSC 1882.

⁷⁷ *Ibid*, [34].

breaches an allowance of three days within which to commence corrective action would be unreasonable. With respect to safety breaches of the nature found by the learned magistrate in this case, it would mean the defendant would have to allow the plaintiff to continue its unsafe practices for three days before it could be expected to commence to remedy its default. Shortly stated, cl 23 is not in terms apt to cover situations which must be taken to have been in the contemplation of the parties when the subcontract was made. This is a strong counter-indication to the plaintiff's argument that cl 23 covers the field with respect to termination for breach.

- 159 The application of the reasoning in *Eden* to the Subcontract in question is unpersuasive. In the present case, it is to be recalled that Mac & Co control access to the site and can, pursuant to clause 44, suspend the carrying out of the works for such time as Mac & Co thinks fit, if it is of the opinion it is necessary. Thus, if there was an urgent safety breach of the type posited in *Eden*, which did not constitute a renunciation, Mac & Co could suspend the Subcontract Works and serve a notice of substantial breach under clause 73, so as to maintain safety on the site and afford KPG the contracted for benefit of being able to show cause before the Subcontract was terminated.
- 160 In the circumstances, I accept KPG's submission that the extensive termination regime for fault in clauses 73-75, the extensive termination regime for insolvency in clause 79 (which preserves rights at common law), the 'no fault' termination regime in clause 81 and the deeming provision for unlawful termination in clause 75 all reflect, objectively, a desire on the part of the parties to comprehensively regulate Mac & Co's rights to terminate for breach.
- 161 In the present context, I have found that the agreed procedure for termination on breach by Mac & Co was stipulated in clauses 73 to 75 of the Subcontract. Clauses 73 to 75 did not however deal with a case of renunciation, or repudiation in the first sense identified in *Koompahtoo*. The Subcontract therefore does not restrict the ability of either contracting party to terminate upon the occurrence of a repudiation in the first sense used by the High Court in *Koompahtoo* – that is, in the event of a 'renunciation'.
- 162 That is an objectively understandable outcome. In cases of renunciation the right to terminate is not assessed by reference to the criterion and language of breach, which may involve a legal question, but by reference to the entirely factual characterisation

of conduct. As the New South Wales Court of Appeal explained in *Wesiak v D&R Constructions (Aust) Pty Ltd*:⁷⁸

In either of the senses identified by the joint reasons in *Koompahtoo*, the question, whether one party has repudiated the contract or its obligations to the other, is fact-dependent. Where the question is whether one party has renounced the contract or its fundamental obligations, the question is entirely one of fact, involving the characterisation of the conduct to see whether it meets (or is capable of meeting) the requisite standard. Where repudiation in the second sense is alleged, then there may be a legal issue as well, relating to the proper construction of the contract and the classification of the term said to have been breached. And in both cases, of course, the factual inquiry is not one carried out at large. It is one intended to ascertain whether the conduct in question satisfies the test for repudiation.⁷⁹

- 163 The distinction between renunciation and substantial breach warranting termination was also examined by the Full Federal Court in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)*.⁸⁰ In that case, Allsop P, Rares and McKerracher JJ stated as follows:

There is much to be said for distinguishing categories of repudiation between renunciation and substantial breach warranting termination. In the case of renunciation, the intention or the acts of the defaulting party can be distilled as the relevant factor. There is an evincing of an intention not to be bound by the obligations of the contract, or whilst intending to comply, only to do so in a manner inconsistent with those obligations and in no other way. In the case of substantial failure of performance, one looks to the nature and consequences of the breach(es), which may or may not direct attention to acts of the other contracting party.⁸¹

E.3 Was Mr Al-Hasawee an agent or representative of KPG on 19 March 2025?

- 164 The legal distinction between ‘agency’ and ‘representation’ in the present context was not elaborated on by Mac & Co in closing submissions. I accept KPG’s submission that ‘representation’ is a form of agency. Representation can describe the acts and conduct of an agent undertaken with the principal’s authority.⁸²
- 165 Whether or not Mr Al-Hasawee (or A1) was acting as KPG’s agent on 19 March 2025 is to be determined by reference to the well established principles concerning actual

⁷⁸ [2016] NSWCA 353 (*Wesiak*).

⁷⁹ Ibid, [92] (McDougal J, with whom Beazley P and Simpson JA agreed).

⁸⁰ [2017] FCFCA 102.

⁸¹ Ibid, 24 [71].

⁸² *Guan v Li* [2021] NSWCA 65, [43]–[46] (Bell P, Basten and Meagher JJA).

and apparent authority. As Elliott J explained in *Cargill Australia Ltd v Viterro Malt Pty Ltd* (No 28):⁸³

Actual authority is established on the basis of a consensual legal relationship between principal and agent, under which the agent is conferred with authority to act on behalf of the principal. Consent may be express, or implied when it is inferred from the conduct of the principal and agent and the circumstances of the case. The scope of authority is to be determined by the ordinary principles of construction of contracts, and by reference to any proper implication from the course of business between the principal and its agent. Further, not every particular act or individual piece of conduct need be authorised; if an act or class of acts (or conduct or a class of conduct) is within an agent's actual authority, the principal is bound.

Apparent authority, on the other hand, is not based on a consensual relationship between principal and agent. Instead, apparent authority arises when there is an appearance or representation of authority to a third party, created by the principal in respect of her or his agent. Succinctly expressed in the context of contractual relations:

... "apparent" or "ostensible" authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. [She or he] need not be (although [she or he] generally is) aware of the existence of the representation ... The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that [she or he] is not bound by the contract.

Although this original expression of apparent authority was confined to an agent's authority to enter into contracts, the underlying principles are relevant, and have been applied, to any conduct that an agent purports to perform on behalf of her or his principal.

- 166 It is necessary to consider the purpose for which one is asking whether a party is an agent for another.⁸⁴ Adapting the approach taken by the New South Wales Court of Appeal in *Tonto Home Loans Australia Pty Ltd v Tavares* (***Tonto Home Loans***),⁸⁵ the question is whether KPG appointed A1 (or Mr Al-Hasawee) to undertake works for it such that the conduct of A1 (or Mr Al-Hasawee) in the performance of such tasks

⁸³ [2022] VSC 13, 932-933 [3088]-[3090].

⁸⁴ *Tonto Home Loans Australia Pty Ltd v Tavares* [2001] NSWSC 389 (***Tonto Home Loans***), 74 [173] (Allsop P with Bathurst CJ agreeing), citing *Kirkpatrick v Kotis* (2004) 62 NSWLR 567,581 [86] (per Campbell J).

⁸⁵ *Tonto Home Loans*, 74 [173] (Allsop P with Bathurst CJ agreeing).

would be conduct for which KPG would be held legally responsible by some form of vicarious attribution.

167 Importantly, in *Tonto Home Loans*, Allsop P (with whom Bathurst CJ agreed), held that:⁸⁶

Not every independent contractor performing a task for, or for the benefit of, a party will be an agent, and so identified as it, or as representing it, and its interests. Agency is a consensual relationship, generally (if not always) bearing a fiduciary character, in which by its terms A acts on behalf of (and in the interests of) P and with a necessary degree of control requisite for the purpose of the role. Central is the conception of identity or representation of the principal.

168 Mac & Co submitted that the following evidence supported a finding that Mr Al-Hasawee attended the meeting on 19 March 2025 having being authorised to do so by KPG, in order to assist KPG in seeking payment from Mac & Co:

- (a) Mr Al-Hasawee was the director of A1, a subcontractor engaged by the KPG to perform the Subcontract Works;
- (b) as at 19 March 2025, A1 had carried out significant work but remained unpaid for certain work by KPG;
- (c) Hisham Khartabil invited Mr Al-Hasawee to the meeting;
- (d) Mr Al-Hasawee had been told by Hisham or Mohamad Khartabil that when KPG was paid by Mac & Co, KPG would make payment to A1;
- (e) Mr Al-Hasawee attended the meeting to assist KPG in explaining why KPG was owed money from Mac & Co;
- (f) Mr Al-Hasawee was introduced at the meeting as "*working for us*";
- (g) during the exchange on Queen Street, Mr Al-Hasawee agitated his concerns regarding the alleged failure of Mac & Co to make payment of outstanding moneys owing under the Subcontract to KPG; and

⁸⁶ *Tonto Home Loans*, 77 [177].

- (h) at no point during the exchange out the front of Mac & Co's offices on Queen Street or immediately following, did either Hisham Khartabil or Mohamad Khartabil take any steps to prevent or curtail Mr Al-Hasawee's behaviour.

169 I accept the evidence relied upon by Mac & Co save that:

- (a) I have found that the identified purpose of Mr Al-Hasawee attending the meeting on 19 March 2025 was to get an understanding as to why KPG were still owed money and observe that KPG was in discussion with Mac & Co.
- (b) Whilst Ms Nguyen tentatively gave evidence that Mohamad had said that Mr Al-Hasawee 'worked for us', Mr MacDonald clearly understood and there was no relevant dispute that A1 was attending (and represented by Mr Al-Hasawee) as a subcontractor to KPG.

170 Mac & Co also relied upon the following warranties provided under the Subcontract as supporting a conclusion that Mr Al-Hasawee was acting as an agent or representative on 19 March 2025:

General Subcontractor Warranties

12 The *Subcontractor* warrants that:

...

- (e) it will ensure that all of its employees, contractors and agents who are engaged in the *Subcontract Works* will be fully aware at all relevant times of everything necessary to be done to execute the *Subcontract Works* in accordance with the terms of this *Subcontract*;

ASSIGNMENT AND SUBCONTRACTING

27 Should the *Subcontractor* be permitted to subcontract out the *Subcontract Works*, in part or whole, the *Subcontractor* warrants that the *Subcontract Works* will in all respects be performed in accordance with the *Subcontract*, notwithstanding that the *Subcontract Works* will have been contracted out to others.

OCCUPATIONAL HEALTH & SAFETY

85 The *Subcontractor* warrants that:

...

- (b) it accepts the entire responsibility for compliance with all relevant occupational health and safety legislative requirements by every

corporation or person (whether an employee of the *Subcontractor* or otherwise) involved in the carrying out of the *Subcontract Works*;

171 Mac & Co has not satisfied its onus⁸⁷ that Mr Al-Hasawee had any actual or apparent authority to act on behalf of KPG on 19 March 2025. That is so for the following reasons:

- (a) The quote for the provision of A1's services, which formed the written basis for the contract as between A1 and KPG did not expressly establish a relationship of agency.
- (b) There was no conduct identified on the part of KPG or A1 from which it can be inferred that A1 and Mr Al-Hasawee had actual authority to act on behalf of KPG in the performance of the Subcontract Works or in the course of the discussions on 19 March 2025.
- (c) There was no representation by KPG that A1 or Mr Al-Hasawee had authority to act on behalf of KPG at the 19 March 2025 meeting.
- (d) The Subcontract placed clear limitations on the manner in which KPG assumed responsibility for its subcontractors. This was done through the provision of the warranties referred to above. Those warranties did not constitute a representation by KPG that A1 had an authority to act for it in dealing with Mac & Co, but rather identified the contractual responsibility of KPG for a non-performance by any subcontractor of any subcontracted works.

172 It follows that Mr Al-Hasawee was not an agent or representative of KPG at the meeting on 19 March 2025 or during the exchanges thereafter.

E.4 Did KPG's conduct on 19 March 2025 constitute a renunciation of the Subcontract?

173 In light of my earlier conclusion as to the scope and operation of clauses 73 to 75 of the Subcontract, it is therefore necessary to examine whether KPG's conduct on 19 March 2025 constituted a renunciation of the Subcontract. The test is whether the

⁸⁷ *Doolkoora Pty Ltd v Stumpy Gully Holdings Pty Ltd* [2024] VSC 155, [318] citing Dal Pont, *Law of Agency* (Lexis Nexis Australia, 4th ed, 2020) [20.7], citing: *Robinson v Tyson* (1888) 9 LR (NSW) 297, 308 (Windeyer J); *Farquharson Bros & Co v C King & Co* [1902] AC 325, 341 (Lord Lindley); *Hoare v McCarthy* (1916) 22 CLR 296, 303 (Griffith CJ), 305 (Isaacs J); and other cases.

conduct of KPG was such as to convey to a reasonable person, in the situation of Mac & Co, renunciation either of the contract as a whole or of a fundamental obligation under it.⁸⁸ As has already been assayed, this is essentially a question of fact, involving the characterisation of the conduct to see whether it meets the requisite standard.⁸⁹

- 174 The test for renunciation articulated by the High Court in *Koompahtoo* was drawn from the judgment of Mason J and the joint judgment of Deane and Dawson JJ in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (Laurinda)*.⁹⁰ In *Laurinda*, Deane and Dawson JJ explained that:⁹¹

The question which must now be answered is whether the lessor's conduct up to and including the letter of 3 September 1986 was such as to constitute repudiation of the contract. Lord Wright's oft-quoted admonition that "repudiation of a contract is a serious matter, not to be lightly found or inferred" (*Ross T. Smyth & Co. Ltd. v. T. D. Bailey, Son & Co.*) is, no doubt, a wise one. It should not, however, be allowed to cloud the fact that an allegation of repudiation of contract in a civil case does not involve an assertion that the alleged repudiator subjectively intended to repudiate his obligations. Thus, it is of little assistance in the present case to identify reasons why the lessor was unlikely to have subjectively desired to repudiate its agreement to grant a lease. An issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention. The question is what effect the lessor's conduct "would be reasonably calculated to have upon a reasonable person" (per Lord Herschell L.C., *Carswell v. Collard; Forslind v. Bechely-Crundall*). It suffices that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

- 175 As is clear from the quoted passage, a finding that a party to a contract has renounced the contract or its fundamental obligations under it does not depend on the subjective state of mind or intention of that party. The question is whether the conduct, whether verbal or otherwise, would convey to a reasonable person, in the position of the other party, repudiation or disavowal of the either the contract as a whole or some essential obligation under it.⁹² As the Court of Appeal has explained, 'this test reflects the objective theory of contract: "[t]he legal rights and obligations of

⁸⁸ *Koompahtoo*, 135–136 [44], citing *Laurinda*, 659.

⁸⁹ *Laurinda*, 659 (Deane and Dawson JJ). See also, *Wesiak*, [92] (McDougal J, with whom Beazley P and Simpson JA agreed).

⁹⁰ *Laurinda*, 634 (Mason J) and 657–659 (Deane and Dawson JJ).

⁹¹ *Laurinda*, 657–658 (Deane J, Dawson J)(full citations omitted).

⁹² *Laurinda*, 647 (Brennan J) and 657–658 (Deane and Dawson JJ). See also, *Wesiak*, [90] (McDougal J, with whom Beazley P and Simpson JA agreed).

the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions.”⁹³

176 As the High Court made plain in *Koompahtoo*, renunciation or repudiation in the first sense, may sometimes be described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it in a manner substantially inconsistent with the party’s obligations.⁹⁴ As already identified, that explanation was drawn from the judgment of Mason J in *Laurinda*,⁹⁵ which was in turn based upon the judgment of Gibbs CJ in *Shevill v Builders Licensing Board* (*Shevill*).⁹⁶

177 In *Shevill*, the lessee constantly failed to pay the rent on time. Prompt payment was requested, but late and partial payments were accepted. By August 1977, two months rent remained unpaid. The lessor served a statement of claim and took possession of the land. An issue in the case was whether the lessee’s conduct amounted to a repudiation. Gibbs CJ (with whom Murphy and Brennan JJ agreed), in a passage later referenced in *Koompahtoo*, held that:⁹⁷

There is nothing to suggest that the lessee had any intention other than to fulfil the contract, according to its terms, to the best of its ability. However, if one party, although wishing to perform the contract, proves himself unable to do so, his default in performance will give the other party a right to rescind the contract, if the breach goes "so much to the root of the contract that it makes further commercial performance of the contract impossible".

178 Wilson J reasoned to similar effect, in finding that:⁹⁸

This case does not call for a detailed examination of the law touching repudiation, because in my opinion the circumstances do not even approach the point at which it can be said that by its words or conduct the lessee had demonstrated that it would or could no longer perform its obligations under the contract. Repudiation of a contract is a serious matter and is not to be lightly found or inferred: *Ross T. Smyth & Co., Ltd. v. T. D. Bailey, Son & Co.* In considering it, one must look to all the circumstances of the case to see whether the conduct "amounts to a renunciation, to an absolute refusal to perform the contract".

⁹³ *Thousand Hills Property Pty Ltd v LBA Capital Pty Ltd* [2025] VSCA 115, 5 [22] (Beach, Walker and Osborn JJA) (*Thousand Hills*).

⁹⁴ *Koompahtoo*, 135 [44].

⁹⁵ *Laurinda*, 634.

⁹⁶ (1982) 149 CLR 620, 625-626 (*Shevill*).

⁹⁷ *Shevill*, 626 (citations omitted).

⁹⁸ *Shevill*, 633 (citations omitted).

179 As the judgment of Deane and Dawson JJ makes clear,⁹⁹ in *Laurinda*, the alleged repudiation of the lessor was of the fundamental obligation to produce a lease in registrable form. There was deliberate delay in producing the lease for the lessor's own commercial purposes and a failure on the part of the lessor to explain the delay in the face of requests and complaints by the lessee. Having explained the facts as set out above, their Honours concluded:

[T]he combined effect of dishonoured assurances, continued failure to produce a lease in registrable form and continued refusal properly to address the lessee's legitimate requirements and complaints was, to adapt words used by Fullagar J. in *Carr v. J. A. Berriman Pty. Ltd*, such that a reasonable man could hardly draw any other inference than that the lessor was not prepared to take its primary obligation under the contract seriously.¹⁰⁰

180 I am conscious of the long standing caution of Lord Wright cited by Deane and Dawson JJ in *Laurinda* that 'repudiation of a contract is a serious matter, not to be lightly found or inferred'. The proper enforcement and regulation of contractual promises requires that renunciation (eg, disavowal, abandonment or refusal) - must be capable of being clearly ascertained pursuant to s 140 of the *Evidence Act*.

181 Three cases were emphasised by Mac & Co.

182 In *Lichaa v Boutros*,¹⁰¹ the New South Wales Court of Appeal upheld the trial judge's finding that the appellant had repudiated a contract. Ms Lichaa was the appellant homeowner and Mr Boutros was the builder. The trial judge had found that:

- (a) Mr Boutros was approached by a Mr Mousakis, a friend of Ms Lichaa.
- (b) Mr Mousakis said he wanted to discuss the performance of the works with Mr Boutros, which Mr Boutros declined to do.
- (c) Mr Boutros said that Mr Mousakis tried to prevent him leaving, threatening in effect to throw him from the scaffolding.
- (d) Mr Boutros left the site under the threat of physical violence and that accordingly he was deprived access to complete the works and that Ms Lichaa thereby repudiated the contract.

⁹⁹ *Laurinda*, 658.

¹⁰⁰ *Ibid*.

¹⁰¹ [2021] NSWCA 322.

183 The New South Wales Court of Appeal did not need to deal with the question of whether the threat of physical violence constituted a repudiation because Mr Boutros was informed he would not be allowed back on site:¹⁰²

In relation to the finding of repudiation, I consider that her Honour was entitled to find that Ms Lichaa repudiated the Contract even without recourse to the physical (on Mr Boutros's evidence) confrontation with Mr Mousakis because by her solicitor's letter of 12 November 2015, Mr Boutros was informed that he would not be let back on site. By this conduct, Ms Lichaa evinced an intention no longer to be bound by the Contract. In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115; [2007] HCA 61 at [44], the High Court said that this type of repudiatory breach of contract may be termed renunciation. It follows then that water damage due to the site being left unprotected and the cost to complete the Contract by engaging AIT to rectify that damage could not be claimed from Mr Boutros.

184 The resolution of the case therefore turned on the fact that the builder was being refused access to the site by the homeowner.

185 In *Ellis v John Benson Ltd*,¹⁰³ Freedman J examined a series of breaches, including abusive behaviour, through the prism of whether or not a repudiatory breach of contract arose. Freedman J ultimately held:¹⁰⁴

In the instant case, the breaches identified above comprise a course of conduct and/or multiple breaches, which by themselves or in their totality have gone to the root of the contract. The breaches have continued throughout the duration of the agreements and have caused serious damage to the relationship between the parties and/or amounted to commercially unacceptable behaviour and/or have undermined the terms of the bargain. This has caused distress and anguish to the franchisees who find it extremely difficult to be in a contact with a company owned and controlled by Mr Benson. Returning to the supplemental note of JBL of 17 April 2025, the complaint is not about objectionable or antisocial behaviour, but is about conduct in breach of the pleaded implied terms.

186 This case therefore involved the application of a different factual situation (repeated breaches and course of conduct throughout the duration of a contract) to the question of whether a repudiatory breach (i.e. the second type of repudiation identified in *Koompahtoo*) had occurred. It provides little assistance by way of analogue or application of principle to the question of whether the events of 19 March 2025 amount to a renunciation in the sense articulated in *Koompahtoo*.

¹⁰² Ibid, [23] (Rein J with whom MacFarlan and Gleeson JJA agreed).

¹⁰³ [2025] EWHC 2096 (KB).

¹⁰⁴ Ibid, [468].

187 In *Buchmueller v Allied Express Transport Pty Ltd*,¹⁰⁵ Dowsett J observed:¹⁰⁶

If a contract for the provision of services is to be efficacious, there must be an express or implied term as to the conduct of each party towards third parties to the extent that such conduct may affect the other. If one party is abusive towards or threatens an employee of the other, it is likely to be highly disruptive of the relationship between the parties and of the business of each of them. If one party demonstrates a propensity to such behaviour it will be difficult for the relationship to continue. **A threat of physical violence is inevitably so disruptive as to make it most unlikely that the persons concerned can continue to work together in a co-operative and trusting way.** I conclude that it was an implied term of the contractual arrangements between the parties in this case that in the event of significant misconduct by either in the course of their joint business, the other could immediately terminate their relationship. The applicant's conduct was such as to justify his termination in this case. It would be unreasonable to expect the respondent to continue to allow the applicant to deal with clients on its behalf, once it knew that he responded to stress in business relationships by threatening violence. In those circumstances, no question of payment in lieu of notice arises. It is not necessary for me to consider that matter further.

188 In the present case, there is no express or implied term of the type found by Dowsett J. No such term was urged upon the Court if clause 2 was held to apply to the attendance at Mac & Co on 19 March 2025. Importantly however, as Dowsett J's judgment properly reveals, a threat of physical violence is likely to be fundamentally disruptive to the relationship of trust and confidence required in many contractual relationships.

189 In the present case, the conduct of Hisham, and therefore KPG, at Mac & Co's offices on 19 March 2025 was aggressive and threatening. There can be no doubt that punching the table in the meeting room twice, angrily moving around the office, following Mr MacDonald down the corridor for the purpose of yelling abuse at him, swearing and gesticulating to people and threatening Ms Nguyen with the words 'I'll remember your face. You better watch your back' was objectively unreasonable and inappropriate behaviour.

190 As I have found in section F below, it was conduct which constituted a breach of clause 2 and 85(c) of the Subcontract. I have found, as set out in section F1.1 below that clause 2 is an essential term of the Subcontract. For the same reasons, the

¹⁰⁵ (1999) 88 IR 465.

¹⁰⁶ Ibid, 472–473 [30] (Emphasis added).

obligation to carry out the Subcontract Works in good faith was a fundamental obligation under the Subcontract.

- 191 The question is whether KPG's conduct evinced an intention that it would no longer be bound by the Subcontract generally or clause 2 specifically, or would perform it in a manner substantially inconsistent with its obligations. As has been stated, that question falls to be judged objectively having regard to what KPG's conduct would convey to a reasonable person in the position of Mac & Co. In particular, it is necessary to ask whether the conduct would convey that KPG would not perform the contract or a fundamental obligation under it.¹⁰⁷
- 192 In my view, a reasonable person in the position of Mac & Co would have understood as a consequence of KPG's aggressive and threatening conduct that KPG would not perform the fundamental obligation of good faith in carrying out the Subcontract Works. Importantly, in the context of the aggressive and intimidating tirade throughout Mac & Co's office, the statement made to Ms Nguyen "I'll remember your face. You better watch your back" conveyed a prospective and ongoing threat. Those words would have implied to a reasonable person in Mac & Co's position that a staff member was not safe and that Hisham would potentially harm her in the future.
- 193 An ongoing and prospective threat to the physical safety of a staff member of KPG's contractual counterparty was a disavowal of the fundamental term of the Subcontract to act reasonably in the carrying out of the Subcontract Works. It fundamentally undermined the relationship of trust and confidence required to continue the carrying out of the Subcontract Works and demonstrated, to paraphrase Deane and Dawson JJ in *Laurinda*, that KPG was not prepared to take its obligation to carry out the works in good faith seriously.
- 194 It follows that termination for renunciation was a course open to Mac & Co on 19 March 2025.

¹⁰⁷ *Thousand Hills*, 5 [23].

195 If I am wrong in that conclusion, the serious misconduct of KPG on that day did not leave Mac & Co without the ability to terminate the Subcontract. Instead of terminating immediately, Mac & Co could have:

- (a) issued a notice of substantial breach under clause 73;
- (b) suspended the works for a period of 5 days under clause 44 of the Subcontract pending receipt of KPG's show cause response; and
- (c) thereafter terminated the contract for substantial breach under clause 75.

196 Any termination under clause 75 of the Subcontract would have been effective either as a termination at law or a deemed termination under clause 81. There was therefore an alternative contractual mechanism by reference to which Mac & Co could have ended its relationship with KPG following the events of 19 March 2025.

197 I pause to also observe that if, contrary to my earlier conclusion, Mr Al-Hasawee's conduct on 19 March 2025 was attributable to KPG, it would reinforce my conclusion as to the existence of renunciation. Mr Al-Hasawee's behaviour on Queen Street was part of the same highly inappropriate sequence of events and would have conveyed to a reasonable person in Mac & Co's position that Mr MacDonald was no longer safe and was at risk of being the subject of ongoing harassment.

F Alleged breaches of the Subcontract

F.1 The Express Terms

198 Mac & Co submitted that KPG's conduct on 19 March 2025 constituted a breach of clauses 2, 15(c), 85(c), 85(e) and 87 of the Subcontract. Mac & Co further submitted that each of those terms were 'essential terms'.

F.1.1 Clause 2

199 After the definitions in clause 1, clauses 2 to 4 in the Subcontract set out with primacy the following rights and obligations:

- 2 The *Subcontractor* must with good faith carry out and complete the *Subcontract Works* in accordance with the *Subcontract* in a proper and workmanlike manner and to the satisfaction of the *Builder*.

- 3 The *Subcontractor* must do all acts, matters and things necessary on its part to be done to ensure that, upon reaching practical completion of the *Subcontract Works*, each and every element of the *Subcontract Works* is functional and fit for the purpose for which it is intended. The *Subcontractor* has no *Claim* in connection with any matter necessary to be undertaken in the fulfilment of this obligation.
- 4 The Builder must pay the Subcontractor:
 - (a) for work for which the *Builder* accepted a lump sum, the lump sum; and
 - (b) for work for which the *Builder* accepted rates, the sum of the products ascertained by multiplying the measured quantity of each section or item of work actually carried out under the *Subcontract* by the rate accepted by the *Builder* for the section or item or as set out in the schedule of rates;
 - (c) adjusted by any additions or deductions made pursuant to the Subcontract.

200 The meaning to be attributed to the good faith obligation in clause 2 was not relevantly in dispute. KPG submitted, and I accept, that the usual content of the obligation of good faith, applicable here, was articulated by the Full Federal Court in *Paciocco v Australia and New Zealand Banking Group Ltd*¹⁰⁸ as follows:

[A]n obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

201 The parties were in dispute as to whether or not clause 2 operated with respect to the attendance of KPG at Mac & Co's premises.

202 KPG submitted that clause 2 did not apply for the following reasons:

- (a) Clause 2 concerned 'completion' of the Subcontract Works.
- (b) The Subcontract Works are the 'works stated in Schedule C'.
- (c) Schedule C refers to the 'scope of works provided in the subcontract agreement pack provided via email on 19 July 2024' (the **Scope**).

¹⁰⁸ (2015) 236 FCR 199, [288].

- (d) Nowhere in the Scope is there a reference to standards of conduct in relation to off-site meetings.
- (e) The obligation in the Scope directed towards meetings is item 329, which obliged KPG to attend weekly subcontractor meetings on site.

203 This submission ignores the full text and context of clause 2.

204 Turning first to the text, clause 2 does not only refer to the 'complet[ion]' of the Subcontract Works. It attaches the obligation of good faith to the carrying out and the completion of the Subcontract Works. The use of the phrasal verb 'carry out' must be given separate work to do from the act of completion. The obligation of good faith attached not only to the completion of the work but the manner of its performance.

205 The context in which the obligation appears is a subcontract for the performance of specified building works which may, as a matter of necessity, require negotiation, discussion and engagement about *inter alia*, defects, variations and delays. The 'performance', 'undertaking' or 'carrying out' of the Subcontract Works therefore necessarily encompasses any negotiation or consultation between the contractual counterparties directed towards identifying the manner in which the completion of those works will be carried out.

206 Objectively considered, the meeting at Mac & Co on 19 March 2025 was intended to deal with the manner of performance of the Subcontract Works. On any view of the evidence, the defects identified by Mac & Co and proposed solutions were discussed. When attending Mac & Co for the purposes of discussing the carrying out of the Subcontract Works, clause 2 of the Subcontract therefore obliged KPG to act reasonably and with fair dealing having regard to the interests of the parties.

207 In acting though Hisham at Mac & Co's offices in the manner I have found, KPG acted unreasonably and in breach of clause 2 of the Subcontract.

208 I consider that clause 2 was an essential term of the Subcontract. Clauses 2 to 4 of the Subcontract set out the fundamental obligations of the parties. Mac & Co was the principal contractor. It was dependent upon KPG to carry out and complete the

subcontracted works. Clauses 2 to 4 enshrined that KPG would reasonably and honestly carry out and complete the Subcontract Works in a proper and workmanlike manner. In return for that core promise, Mac & Co agreed to pay KPG pursuant to clause 4 of the Subcontract. To adopt and apply the language of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*,¹⁰⁹ the promise by KPG that it would honestly and reasonably carry out and complete the Subcontract Works, was of such objective importance, that Mac & Co would not have entered into the Subcontract and agreed to pay for the Subcontract Works unless assured of its strict or substantial performance.

F.1.2 Clause 15(c)

209 Under the heading 'Codes, Standards & Consents' clause 15 relevantly states that:

The *Subcontractor* warrants that all *Subcontract Works* will comply with:

...

(c) Acts, regulations, ordinances, by-laws, awards and proclamations of the jurisdiction where the *Subcontract Works* are, or the particular part thereof is, being carried out.

...

210 On a proper construction of clause 15(c) it applies to the 'carrying out' of the Subcontract Works and not simply their ultimate physical form. That is made textually clear by the attachment of the identified legislative and quasi-legislative instruments to the jurisdiction where the work is being 'carried out' and the broad ranging nature of the instruments concerned. To take an example, the physical form of the 'Subcontract Works' cannot comply with an industrial award for the payment of employees but the Subcontract Works can be 'carried out' in a manner which complies with relevant awards as to pay and conditions. The warranty therefore applied to any place where the Subcontract Works were being 'carried out'. As I have identified, negotiations, consultations and meetings in relation to the Subcontract Works necessarily formed part of, and were directed to, the carrying out

¹⁰⁹ (1938) 38 SR (NSW) 632, 641–642. Cited with approval in *Koompahtoo*, 136–137 [47].

of those works. It follows that clause 15(c) applied to the attendance of KPG at Mac & Co's offices.

211 Mac & Co submitted that KPG was in breach of ss.23(1) and 26(1) of the *Occupational Health & Safety Act 2004* (Vic) (**OHS Act**) and was therefore in breach of clause 15(c) of the Subcontract.

212 Section 23(1) of the OHS Act relevantly provides:

An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.

Penalty: 1800 penalty units for a natural person; 9000 penalty units for a body corporate.

213 The allegations of a breach of s 23 of the OHS Act (and therefore clause 15(c) of the Subcontract) were not properly developed. Whilst I accept that s 23 applied to KPG because Hisham was employed as the general manager,¹¹⁰ it is necessary to focus on whether the risk in question arose 'from the conduct of the employer'. For the purposes of establishing the undertaking element of s 23 of the OHS Act, it is necessary to satisfy two limbs:¹¹¹

- (a) that KPG was conducting an undertaking; and,
- (b) the relevant risk arose from that undertaking.

214 The section applies only to events so connected with the business and activities of KPG that they constitute occurrences in the course of KPG's undertaking.¹¹² The meaning of 'conduct of the employer's undertaking' was considered by Hansen J in *Whittaker v Delmina (Whittaker)*¹¹³ in the context of the predecessor provision¹¹⁴ to s 23 of the OHS Act:

The expression is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the section is effective to impose the

¹¹⁰ See, s 5 of the *Occupational Health and Safety Act 2004* (Vic) which defines an employer as 'a person who employs one or more other persons under contracts of employment or contracts of training'.

¹¹¹ See, Michael Tooma, *Tooma's Annotated Occupational Health and Safety Act 2004* Victoria (Thomson Lawbook Co, 2005) 71.

¹¹² *WorkCover Authority (NSW) v CSR Ltd t/as CSR Wood Panels* (1995) 109 IR 275, 280.

¹¹³ (1998) 87 IR 268 (*Whittaker*).

¹¹⁴ *Occupational Health and Safety Act 1985* (Vic) s 22.

duty it states ... The word must take its meaning from the context which it is used. In my view it means the business or enterprise of the employer ... and the word 'conduct' refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable.¹¹⁵

215 KPG's undertaking was an earthworks, retention and concrete structuring business. The attendance at Mac & Co in the course of carrying on that business, for the purpose of discussing defects and delays in the contracted works, formed part of the conduct of KPG's undertaking. Mac & Co did not articulate what the relevant 'risk' arising from the conduct of KPG's undertaking was, nor how it was contended KPG failed to take reasonably practicable steps to avoid the exposure to risk. Mac & Co's case as to a breach of s 23 was not properly or meaningfully developed by reference to the statutory test. Recognising that s 23 is an indictable offence, it is not appropriate or procedurally fair to make any findings as to breach in circumstances where KPG (and the Court) were not properly on notice of the risk said to exist or the reasonably practicable steps that it was alleged ought to have been undertaken.

216 Section 26(1) of the OHS Act states:

26 Duties of persons who manage or control workplaces

- (1) A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health.

Penalty: 1800 penalty units for a natural person; 9000 penalty units for a body corporate.

217 Mac & Co did not explain how it was contended that s 26 of the OHS Act was engaged. KPG did not have management or control of Mac & Co's workplace on 19 March 2025. In those circumstances, there is no tenable basis to suggest that s 26 of the OHS Act was breached.

218 It follows that there was no proven breach of clause 15(c) of the Subcontract in the manner alleged on 19 March 2025.

¹¹⁵ Whittaker, 280-281.

F.1.3 Clauses 85 and 87 of the Subcontract

219 Clause 85 of the Subcontract set out the warranties provided by KPG with respect to occupational health and safety. More specifically, it stipulated that:

OCCUPATIONAL HEALTH & SAFETY

85 The *Subcontractor* warrants that:

- (a) it is aware of all relevant legislative requirements in connection with occupational health and safety;
- (b) it accepts the entire responsibility for compliance with all relevant occupational health and safety legislative requirements by every corporation or person (whether an employee of the *Subcontractor* or otherwise) involved in the carrying out of the *Subcontract Works*;
- (c) the *Subcontract Works* and every part thereof will be carried out and completed in accordance with good and safe work practices and so as to comply strictly with this *Subcontract*;
- (d) if in connection with the carrying out of the *Subcontract Works*, the *Subcontractor* is required to carry out any work or do anything which may reasonably pose a threat to the safety of the *Builder's* employees or any other person on or about the site or any other place for which the *Builder* is or may be responsible, in addition to any other obligation to give notice or otherwise, the *Subcontractor* must take all necessary steps to ensure that such threat or danger is absolutely and totally averted and will not proceed with such work until the safety of every person possibly affected by such work is ensured;
- (e) it must do all acts, matters and things necessary on its part to be done to assist the *Builder* in the performance of the *Builder's* role as principal contractor under the *Occupational Health & Safety Act 2004 (VIC)* (to the extent that the *Builder* has been so appointed).

220 The Subcontract provided, by clause 86, a specified identified consequence for any failure to comply with the warranties in clause 85. Specifically:

The *Subcontractor* hereby indemnifies and shall keep indemnified the *Builder* or any consultant, agent or employee of the *Builder* from any costs, fine, expense, loss or damage arising as a consequence of the *Subcontractor's* failure to comply with the foregoing warranties.

221 Clause 87 relevantly provided that:

The *Subcontractor* shall at all times exercise all necessary precautions to ensure the safety of all persons on the site and the public, appropriate to the nature of the work and the conditions under which this *Subcontract* is to be carried out. The costs of all goods and/or works required under the terms of this clause shall be borne by the *Subcontractor*.

- 222 The focus of Mac & Co's case was that KPG had breached clauses 85(c), 85(e) and 87. Mac & Co submitted that each of those clauses were essential terms of the Subcontract as they imposed 'critical safety obligations'.
- 223 Turning first to clause 85(c), as I have already determined, the carrying out of the Subcontract Works extended to acts of consultation, negotiation and discussion in respect of those works. Understood in that way, the field of clause 85(c)'s operation was not confined to the physical place on which the early learning centre was being constructed. Such a limitation does not make objective commercial sense in circumstances where the safety obligations imposed on KPG extended to those 'involved'¹¹⁶ in the carrying out of the Subcontract Works and the definition of 'site' to which the obligation to take safety precautions¹¹⁷ included the 'lands and other places to be made available to the *Subcontractor* by the *Builder* for the purposes of the *Subcontract*.'
- 224 The Subcontract invokes the concept of 'good and safe work practices'. I consider that this phrase required the adoption of acts, processes and systems of working which were objectively adequate and satisfactory to ensure the physical and psychological wellbeing of those involved in carrying out the Subcontract Works or in the vicinity of those works being carried out.
- 225 The conduct of KPG at Mac & Co's offices on 19 March 2025 was threatening and aggressive. It objectively caused fear on the part of some of Mac & Co's employees. In those circumstances, I find that KPG breached clause 85(c) of the Subcontract.
- 226 If it is necessary to determine whether clause 85(c) was an essential term of the Subcontract, then I find that it was not an essential term. The drafters of the Subcontract have deliberately used the language of 'warranty' and identified, by clause 86, the consequence of any breach as being indemnification for loss or damage caused. As Mac & Co submits, the expression 'warranty' is a description used by the High Court in *Associated Newspapers Ltd v Bancks*,¹¹⁸ to distinguish essential from

¹¹⁶ See clause 85(b) of the Subcontract.

¹¹⁷ See clause 87 and the definition of 'site' in the Subcontract.

¹¹⁸ (1951) 83 CLR 322.

non-essential terms.¹¹⁹ Absent a substantial breach sufficient to invoke clauses 73 to 75, clause 86 discloses the intended remedy for breaches of this clause.

227 Clause 85(e) is confined in its operation. It applies to Mac & Co's role as 'principal contractor' under the OHS Act. The term 'principal contractor' is not defined in the OHS Act, but the obligations of a principal contractor are addressed in the *Occupational Health and Safety Regulations 2017* (Vic) (**OHS Regulations**) made pursuant to s 158 of the OHS Act. Part 5.1 Division 2 Subdivision 2 details duties of 'principal contractors' in respect of construction projects where the cost is \$350,000 or more. The objective purpose of clause 85(e) is therefore to require KPG to warrant the performance of all acts necessary to assist Mac & Co in meeting its obligations as a principal contractor under the *OHS Regulations*. Those regulations impose requirements as to signage¹²⁰ and health and safety coordination plans.¹²¹ Once the proper scope of clause 85(e) is understood in this way, it follows that it cannot be tenably submitted that KPG breached clause 85(e) on 19 March 2025.

228 The focus of clause 87 is 'necessary precautions'. Adopting the ordinary meaning of the word precaution, it requires prudent action taken beforehand to avoid injury or ensure a safe result. The clause does not focus on the outcome but on the process established to ensure safety *ex ante*. It follows that there is no actionable case against KPG for a breach of clause 87 in the present circumstances as there is no contention that KPG failed to take a step necessary to ensure safety before the meeting at Mac & Co on 19 March 2025.

F.2 Implied terms

F.2.1 The role of clause 5

229 Clause 5 of the Subcontract contained an 'entire agreement' clause in the following terms:

Entire Agreement

The parties acknowledge that the *Subcontract* constitutes the entire agreement between the parties and that the *Subcontract* takes effect according to its tenor

¹¹⁹ Ibid, 336.

¹²⁰ *Occupational Health and Safety Regulations 2017* (Vic), s 334.

¹²¹ *Occupational Health and Safety Regulations 2017* (Vic), ss 335–337.

notwithstanding any prior agreement in conflict or at variance with it or any correspondence or documents relating to the subject matter of the *Subcontract* which may have passed between the parties prior to its execution.

- 230 The clause does not expressly refer to implied terms. In those circumstances, the clause does not operate to exclude the implication of specific terms to give business efficacy to a contract, or the implication of terms by law.¹²²

F.2.2 *The duty to co-operate*

- 231 The first implied term contended for by Mac & Co was an implied term that KPG 'would do all things necessary to enable Mac & Co to have the benefit of the Subcontract'. In substance, Mac & Co seek to apply to KPG, the mutually beneficial general rule that where parties have contracted for a thing to be done, each party agrees to do all that is necessary on its part for the carrying out of that thing though there may be no express words to that effect.¹²³ This general rule is often described as a 'duty to cooperate'.
- 232 The existence of the duty to cooperate is to be analysed by reference to the principles governing the implication of terms by law.¹²⁴ 'Necessity' must be demonstrated for such a term to be implied.¹²⁵ Necessity will be demonstrated where, absent implication, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps seriously undermined; or the contract would be deprived of its substance, seriously undermined or drastically devalued.¹²⁶

¹²² N C Seddon and R A Bigwood, *Cheshire & Fifoot Law of Contract* (2017, 11th ed) 431, 10.7 citing *Hart v MacDonald* (1910) 10 CLR 417 (clause 'that there is no agreement or understanding between us not embodied in this tender' held not to preclude implication). See also *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190, 196; *CF & SP Pty Ltd v FAI General Insurance Co Ltd* (NSWSC, Bryson J, 17 December 1998, unreported); *Etna v Arif* [1999] 2 VR 353, 371 [46]; *Vitale v Bednall* [2000] WASC 207, [67]; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1; [2003] FCA 50, [916], [922]; *National Roads and Motorists' Association (NRMA) v Whitlam* [2007] NSWCA 81 [97]; *Barnes v Forty Two International Pty Ltd* (2015) 316 ALR 408; [2014] FCAFC 152 [148].

¹²³ The general principle is usually traced back to *Mackay v Dick* (1881) 6 App Cas 251, 263 and *Butt v McDonald* (1896) 7 QJ 68, 70–71. In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason J, with whom Gibbs, Stephen and Aickin JJ agreed), the High Court adopted these statements of general principle. See further *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201 (*Adaz Nominees*), [106] (Whelan JA and Riordan AJA) and [268]–[269] (McLeish JA); *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* (2022) 37 BCL 248; [2021] VSCA 69 [104] (Niall, Emerton and Sifris JJA).

¹²⁴ *Adaz Nominees*, 36 [116].

¹²⁵ *Commonwealth Bank v Barker* (2014) 253 CLR 169 (*Barker*), 189 [29]; *Adaz Nominees*, 36 [116]

¹²⁶ *Barker*, 189 [29]; *Adaz Nominees*, 36 [116].

233 In appropriate circumstances, the law therefore implies:¹²⁷

- (a) a positive obligation to cooperate and do all such things as are necessary to enable the other party to have the benefit of the contract; and
- (b) a negative covenant not to hinder or prevent the fulfilment of the express promises made in the contract.

234 It is important to note that the ambit of the duty is limited to affording the benefit of what has been *contracted for* and that the implied term is informed by the express terms of the contract.¹²⁸ In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*,¹²⁹ Mason J, with whom Barwick CJ, Gibbs, Stephen and Aickin JJ agreed, explained as follows:

It is easy to imply a duty to co-operate in the doing of acts which are *necessary to the performance by the parties or by one of the parties of fundamental obligations* under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a *duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit*. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction *as on the intention of the parties as manifested by the contract itself*.¹³⁰

235 The duty to cooperate does not need to be invoked where the express promise already stipulates the performance or non-performance of the necessary act. In those cases a failure to undertake the stipulated act will simply give rise to a claim for breach of the express promise.

236 The implication of the duty to co-operate is necessary in the present context. The Subcontract dealt with the provision of earthworks, basement retention and concrete structuring referable to the construction of a four-level early learning centre. In the performance of those works, the enjoyment of rights conferred by the Subcontract as

¹²⁷ *Adaz Nominees*, 36 [117].

¹²⁸ *Adaz Nominees*, 36 [118] citing *Beerens v Bluescope Distribution Pty Ltd* (2012) 39 VR 1, 13 [54] (Nettle JA).

¹²⁹ (1979) 144 CLR 596.

¹³⁰ *Adaz Nominees* citing *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607–8.

to quality of work, timeliness, variations, rectification and extensions of time, could have been seriously undermined without the implication of such a duty.

237 The more relevant question in the present case is the content of the duty to cooperate and how it was alleged to be breached. In that context it is to be recalled that the focus of the duty is what has been expressly contracted for. The 'benefit of the contract' is performance of the fundamental contractual promises.¹³¹ It is therefore necessary to identify an express promise the performance of which has not occurred because of a failure to take a step necessary for that performance.

238 Mac & Co submitted that the content of the duty would include, but was not limited to, cooperating (or not taking any steps that may hinder Mac & Co's ability to take the benefit of the Subcontract):

- (a) to ensure that Mac & Co's employees were able to access the 'Site' without being intimidated or fearful for their safety; and
- (b) to ensure that Mac & Co was able to comply with its Occupational Health and Safety Obligations to its employees.

239 The duty to cooperate did not extend to requiring KPG to act or refrain from acting in the manner contended for by Mac & Co. That is so for the following reasons.

240 First, the obligation to provide access to the site was placed on Mac & Co and not KPG. It was Mac & Co's contractual obligation to provide site access to KPG. This is made clear by the definition of 'site' as 'the lands and other places to be made available to the *Subcontractor* by the *Builder* for the purposes of the *Subcontract*'. It is reinforced by the express text of clauses 8 and 9 of the Subcontract, which provide as follows:

- 8 The *Subcontractor* will be given sufficient access to the *site* to commence the *Subcontract Works* from the date referred to in clause 7(a). Access will be available during normal site working hours. During such hours, the *Subcontractor* will have non-exclusive possession of such of the site as is necessary to enable the *Subcontractor* to carry out the *Subcontract Works*. The *Subcontractor's* rights of access to, and nonexclusive possession of, the *site* are subject to the *Builder's* right at any time to take possession of the site or any

¹³¹ *Adaz Nominees*, [280] (McLeish JA).

portion of the *site* for any purpose whatsoever. The *Subcontractor's* access to, and use of, the *site* is also subject to the possible use thereof by others.

- 9 The *Builder* and the *Principal* and their employees, servants, agents, consultants and subcontractors, and any other persons authorised or permitted by them to have access, may at any time have access to any part of the *site* and the *Subcontract Works* and access to any place where work under the *Subcontract* is being carried out or materials are being prepared or stored.

241 It follows that there was no express promise made by KPG as to the access by Mac & Co of the site or the attendance of Mac & Co personnel on site. There was no express promise or benefit to which a duty to co-operate of the type alleged could have or was required to attach.

242 Second, the content of the duty to co-operate did not extend to 'ensuring that Mac & Co was able to comply with its *Occupational Health and Safety* obligations to its employees'. The Subcontract, by clauses 15(c), 85 and 87, set out the obligations of KPG with respect to health and safety. The content of the implied term alleged was not necessary having regard to those terms. Nor was there an express promise or benefit contained within those terms, to which a duty to 'ensure' of the alleged type could be said to properly attach so as to give Mac & Co the 'benefit' of the Subcontract.

243 Finally, although it is not necessary to decide, I note that counsel for Mac & Co accepted in closing submissions that the implied duty to co-operate was not an essential term.¹³²

F.2.3 *The alleged implied obligation of good faith*

244 The implied obligation of good faith was said to consist of an obligation on the part of KPG to 'act reasonably and with fair dealing having regard to the legitimate interests of Mac & Co and to the objective purpose of the Subcontract'.

245 The term was alleged to be implied in fact. It was thus necessary for Mac & Co to satisfy each element of the test articulated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*:¹³³

¹³² Transcript 441:12-20.

(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

246 The alleged term cannot be implied. It is not clearly necessary to give business efficacy to the Subcontract.¹³⁴ Clause 2 already imposes an obligation of good faith in the carrying out and completion of the Subcontract Works. Moreover, if the implied term is contended to have a different field of operation to clause 2, it would have the effect of contradicting the expressly agreed ambit of clause 2.

F.2.4 *The alleged implied term that KPG would not engage in illegal, threatening or violent behaviour towards Mac & Co's employees*

247 The parties agreed that if the scope of the obligation in clause 2 of the Subcontract covered KPG's conduct when at Mac & Co's premises on 19 March 2025 there was no basis upon which the term alleged would need to be implied.¹³⁵ Consistently with that submission, having regard to my conclusion as to the scope of clause 2, I therefore find that the alleged implied term does not arise.

G Conclusion

248 For the foregoing reasons, the Termination Letter was effective in terminating the Subcontract for renunciation, in reliance upon the events of 19 March 2025.

249 I will hear the parties as to the making of orders consequent upon the publication of these reasons, including as to costs. To facilitate determination of those issues, I have made the following orders:

- (a) By 4:00pm on 5 June 2026, the parties are to submit any agreed minutes of order arising from the reasons for judgment published on 2 June 2026, including as to costs.
- (b) In the event that the parties do not agree on the orders arising from the reasons for judgment published on 2 June 2026:

¹³³ (1977) 180 CLR 266, 283.

¹³⁴ *No 1 Victoria Dragons Pty Ltd v AEN Developments Pty Ltd* [2022] NSWSC 1345 [177], citing *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 346 (Mason J).

¹³⁵ Transcript 501:14–24 and 522:28 to 523:11.

- (i) by 4:00pm on 10 June 2026, the parties are to file an outline of submissions, any affidavit material and their proposed orders; and
- (ii) the proceeding will be listed for the making of final orders at 10:00am on 12 June 2026.

ANNEXURE A



Our Ref: LM:1267252

19 March 2025

Mr Hisham Khartabil
Basement and Above Structures
77 Raleigh Street
Essendon VIC 3040

Dear Mr Khartabil

Builder: MacDonald & Co Construction Pty Ltd
Subcontractor: Basements and Above Structures
Project: 24MCC031 - 397 Blackburn Rd, Burwood East
Subcontract: Job No: 24MCC031 Contract Number 224 - BAS002-224 Trade-SCA001_CONCRETE, EXCAVATION, PILING, PT & AFS PACKAGE (as amended by the Deed of Amendment dated 24 January 2025)

1. Executive Summary

- 1.1 We act for the Builder on the above Project.
- 1.2 By this letter the Builder terminates the Subcontract with immediate effect.
- 1.3 The primary ground for termination is the physical threats and abuse made by the Subcontractor's director and senior staff to the Builder's director and staff at the Builder's premises today. This constituted a serious breach of an essential and fundamental implied term, and repudiation of the Subcontract. It also constituted a serious breach of material express terms.
- 1.4 The Builder also relies on other breaches of the Subcontract as evidence of the repudiation and as grounds for the immediate termination of the Subcontract.
- 1.5 The Subcontractor is advised that it is not permitted onto the work site, and should not attend any of the Builder's other work sites or its (or its staff's) premises. If it does so, the Builder will immediately contact the Victoria Police.
- 1.6 The Builder will now take steps to complete the Subcontract Works, and will then provide a final account. It anticipates that this will require a substantial payment from the Subcontractor to the Builder given the costs that will be incurred in completing the Subcontract Works and rectifying defects.
- 1.7 The Builder otherwise reserves all of its rights.

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2. Notice Of Termination

- 2.1 This is a notice of termination of the Subcontract.
- 2.2 The termination is on the basis that the Subcontractor has repudiated the Subcontract and seriously breached essential and fundamental implied and express terms.
- 2.3 By this notice the Builder accepts the Subcontractor's repudiation and terminates the Subcontract with immediate effect.
- 2.4 The Builder relies on the following grounds to establish the relevant breaches and repudiation. Individually and collectively, they establish that the Subcontractor has evinced an intention not to be bound by the Subcontract and so has repudiated the Subcontract.
- 2.5 The primary ground relied upon by the Subcontractor's acts of violence and physical threats undertaken at the Builder's office on 19 March 2025. The Builder submits that these acts alone constitute repudiation of the Subcontract and breaches essential term and so allow the Builder to terminate the Subcontract immediately.
- 2.6 In addition, the Builder relies on the grounds as further support of the termination.
- (a) substantial departure from a construction program or a Subcontract Works Program without reasonable cause or without the Builder's approval;
 - (b) failing to proceed with due expedition and without delay;
 - (c) breach of clause 2 of the Subcontract by failing to carry out and complete in good faith the Subcontract Works in accordance with the Subcontract and in a proper and workmanlike manner and to the satisfaction of the Builder;
 - (d) breach of subcontractor warranties set out in clause 12 of the Subcontract; and
 - (e) breach of Occupational Health and Safety requirements pursuant to sections 85 to 87 of the Subcontract.

3. Primary ground: Acts of violence and physical threats undertaken at the Builder's office on 19 March 2025

- 3.1 On 19 March 2025, the Subcontractor attended the Builder's office for a scheduled meeting.
- 3.2 The Subcontractor was represented by:
- (a) Hisham Khartabil;
 - (b) Mohamed Khartabil;
 - (c) Amid (surname unknown),

(Subcontractor's Attendees).

19 March 2025

Page 2

DOC ID 1293715403/V1

1046

- 3.3 During the meeting the Subcontractor's Attendees became aggressive, threatening and violent to the Builder's representatives and staff (**Threatening Conduct**).
- 3.4 The Threatening Conduct included the following:
- (a) Punching furniture in the meeting room;
 - (b) Pursuing the Builder's staff (including a female staff member) out of the meeting room and down the nearby hallway, blocked their passageway and adopting threatening physical stances;
 - (c) Confronting other members of the Builder's staff who were working in the space outside the meeting room;
 - (d) Shouting at the Builder's staff and using swearing and abusive language; and
 - (e) Pointing at and making specific verbal threats to the Builder's director and staff along the lines of *"I know what your face looks like", "You better be scared if you see me on the street"*.
- 3.5 Some of the Threatening Conduct outside the meeting room has been recorded on CCTV. A link to some of that footage is provided here:
- <https://docdrop.hwlebsworth.com.au/message/3mNRSf9Ax28qt3i1jllHK8>
- 3.6 The Threatening Conduct put the Builder's staff in fear of their immediate physical safety. In fact the Threatening Conduct was so extreme that the Builder reported it to the Victoria Police and some personnel of the Builder intend to apply for a personal protection intervention order with Victoria Police.
- 3.7 Such conduct is clear evidence of the Subcontractor's intention to not to be bound by the Subcontract and so constitutes repudiation. It also constitutes a serious breach of an essential implied material term, and a serious and material breach of express terms.
- 3.8 Specifically:
- (a) The Subcontractor failed to carry out and complete in good faith the Subcontract Works in accordance with the Subcontract and in a proper and workmanlike manner and to the satisfaction of the Builder in breach of clause 2 of the Subcontract.
 - (b) Clearly the Threatening Conduct was not:
 - (i) in good faith;
 - (ii) in a proper and workmanlike manner; or
 - (iii) to the satisfaction of the Builder.

- (c) The Subcontractor breached the warranties in clause 12 of the Subcontract, such as:
 - (i) failing to execute the Subcontract Works with high standards of care, skill, competence and diligence, with proper and tradesmanlike workmanship (in breach of clause 12(c) of the Subcontract); and
 - (ii) failing to ensure that all of its employees, contractors and agents who are engaged in the Subcontract Works will be fully aware at all relevant times of everything necessary to be done to execute the Subcontract Works in accordance with the terms of this Subcontract (in breach of clause 12(e) of the Subcontract);
 - (d) The Subcontractor breached the occupational health and safety requirements pursuant to sections 85 to 87. Clearly the Threatening Conduct breaches the obligations to carry out the Subcontract Works with good and safe work practices and not do anything which may reasonably pose a threat to the safety of the Builder's employees or any other person.
- 3.9 Given the nature of the Threatening Conduct - specifically the threats of further physical violence - it is self-evidence that the Builder cannot allow its staff and other contractors to be exposed to the Subcontractor's Attendees. The Subcontractor is advised that the Subcontractor's Attendees are not authorised to attend any of the Builder's work sites or premises. If they do so, then the Victoria Police will be contact.
- 3.10 It is relevant that the Subcontractor's Attendees include the Subcontractor's sole director, senior manager and senior site representative. Given that the Subcontractor's Attendees cannot continue to work on the Subcontract, the Subcontractor is unable to complete the Subcontract Works and so cannot fulfil its obligations under the Subcontract. This is further grounds for repudiation.
- 4. Further ground: Departure from program and failure to proceed with due expedition and without delay**
- 4.1 In breach of clause 7 of the Subcontract the Subcontractor has failed to execute the Subcontract Works in accordance with such construction program or programs. The extent of the failure to complete the Subcontract Works and bring the Subcontract Works to practical completion by the date for practical completion is so significant that it cannot be said that the Subcontractor considers itself bound to the terms of the Subcontract.
- 5. Conclusion**
- 5.1 The cumulative result of the Subcontractor's conduct and continual failings amounts to a repudiation of the Subcontract. By reason of the above, the Subcontractor has evidenced a clear intention not to be bound by the Subcontract and / or an ability to comply with fundamental terms of the Subcontract which amount to an unlawful repudiation. By this letter the Builder accepts that repudiation and so terminates the Subcontract.

- 5.2 This notice is given without prejudice to any of the Builder's other rights and entitlements (including damages), whether under the Subcontract or otherwise at law, including its right to rely upon and refer to the Subcontractor's conduct to date.
- 5.3 The Builder will hold the Subcontractor responsible for any loss, cost, liability or expense incurred by the Builder as a result of the Subcontractor's repudiation of the Subcontract.
- 5.4 The Builder reserves all of its rights.
- 6. Next Steps**
- 6.1 The Subcontractor is instructed to immediately hand over and make available all:
- (a) designs, drawings, specifications and plans;
 - (b) certifications, certificates of compliance, approvals or authorities; and
 - (c) supplier and consultant details and information,
- 6.2 The Builder expressly reserves its right to seek damages should the documents and information requested not be provided and the Builder is required to engage others to reproduce such documents.

Yours faithfully



Leighton Moon
Partner
HWL Ebsworth Lawyers

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ANNEXURE B

1 Does the Subcontract contain implied terms to the effect that:

- (i) KPG would do all things necessary to enable Mac & Co to have the benefit of the Subcontract;

Yes

- (ii) KPG would act reasonably and with fair dealing having regard to the legitimate interests of Mac & Co and to the objective purpose of the Subcontract; and

No

- (iii) KPG would not engage in illegal, threatening or violent behaviour towards Mac & Co's employees?

No

(separately and together the **Alleged Implied Terms**)

2 If the Subcontract contains any of the Alleged Implied Terms are any of those terms essential terms of the Subcontract?

No

3 Are any of the clause 2, clause 12(e), clause 15(c) or clauses 85(a) to (e) of the Subcontract, essential terms of the Subcontract?

Yes, clause 2.

4 Who attended the meeting in the boardroom of Mac & Co's premises on 19 March 2025 and in what capacity?

The attendees at the 19 March Meeting were: Mr Richard MacDonald, Mr Chris Reid and Ms Yen Nguyen of Mac & Co; Mr Hisham Khartabil and his brother, Mr Mohamad Khartabil, of KPG, and Mr Ahmed Ali Safwan Al-Hasawee of A1.

- 5 Did Mr Al-Hasawee attend the meeting on 19 March 2025 as an agent and/or representative of KPG?

No.

- 6 Whether, during and immediately following the meeting that took place between Mac & Co's representatives and KPG's representatives on 19 March 2025 at Mac & Co's premises, KPG's agents or representatives engaged in conduct that was violent, threatening and/or unreasonably intimidatory of Mac & Co's employees?

I conclude that Hisham's behaviour whilst at Mac & Co was inappropriate, angry, intimidating and, in the case of Ms Nguyen, threatening. The effect on the Mac & Co employees was significant. There can be no doubt that punching the table in the meeting room twice, angrily moving around the office, following Mr MacDonald down the corridor for the purpose of yelling abuse at him, swearing and gesticulating to people and threatening Ms Nguyen with the words 'I'll remember your face. You better watch your back' was objectively unreasonable and inappropriate behaviour.

- 7 Whether, following the conclusion of the meeting in the boardroom at Mac & Co's premises, Mac & Co's representatives directed KPG's agents or representatives to leave the premises immediately?

Mr MacDonald asked the attendees at the meeting to leave following the conclusion of the meeting in the boardroom. Subsequently, (34 seconds into the Open Plan Footage), Ms Nguyen pointed Hisham and Mohamad toward the exit of the building and asked them to leave.

- 8 Whether any of Mac & Co's representatives considered the conduct engaged in by KPG's agents or representatives to be threatening, violent or intimidatory?

Yes.

However, an issue of repudiation turns upon objective acts and omissions. The question is what effect the conduct 'would be reasonably calculated to have upon a reasonable person'. It suffices that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable

person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

- 9 Did any of Mac & Co's representatives engage in conduct that provoked the conduct of KPG's representatives?

This is not necessary to decide. An issue of repudiation turns upon objective acts and omissions. The question is what effect the conduct 'would be reasonably calculated to have upon a reasonable person'. It suffices that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

- 10 By those persons on its behalf engaging in the alleged conduct, did KPG breach the terms of the Subcontract, and if so, which terms?

Yes, clauses 2 and 85(c) of the Subcontract.

- 11 Whether by reason of the matters referred to in sub-paragraphs 6 to 10 above, KPG repudiated the Subcontract?

Yes, there was a 'renunciation' of the Subcontract.

- 12 Whether by letter dated 19 March 2025, Mac & Co lawfully terminated the Subcontract or whether that letter was ineffective in terminating the Subcontract on the basis that Mac & Co did not follow the procedure specified in clauses 73 to 75 of the Subcontract?

The Termination Letter was effective in terminating the Subcontract.

SCHEDULE OF PARTIES

S ECI 2025 03487

BETWEEN:

MACDONALD & CO CONSTRUCTION PTY LTD (ACN
638 685 113)

Plaintiff

- v -

KHARTY PROPERTY GROUP PTY LTD (ABN 79 163
751 399)

First Defendant

JOHN MCMULLAN

Second Defendant