VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP244/2018

CATCHWORDS

Domestic Building Contracts Act 1995 – new homes contract – variation – non-compliance with requirements of sections 37 and 38 of the Act – non-compliance with similar clauses in contract – whether builder entitled to recover for variation – alternative claim for quantum meruit – delay in contract completion – owner seeking to offset damages

APPLICANT	Marjen Homes Pty Ltd (ACN: 006 751 542)
RESPONDENT	George Roth
WHERE HELD	Wodonga
BEFORE	Member B. Josephs
HEARING TYPE	Hearing
DATES OF HEARING	5 July and 14 December 2018, 11 April 2019
DATES OF SUBMISSIONS	2 May 2019, 30 May 2019, and 24 June 2019
DATE OF ORDER	9 December 2019
DATE OF REASONS	9 December 2019
CITATION	Marjen Homes Pty Ltd v Roth (Building and Property) [2019] VCAT 1937

ORDERS

1 The application is dismissed.

2 Costs are reserved. The respondent must file and serve any submission on costs by **17 January 2020**. The applicant must file and serve any submission in reply by **14 February 2020**. The proceeding is referred to Member B. Josephs in chambers after 17 February 2020 to determine any costs application.

B. Josephs
Member

APPEARANCES:

For Applicant:	Mr M. Partl and Mrs J. Partl
For Respondent:	Mr T. Bevan of Counsel and Mr G.Roth

REASONS

Background

1 The applicant builder, Marjen Homes Pty Ltd **(Marjen)**, entered into a 'major domestic building contract' as defined in the *Domestic Building Contracts Act 1995* (Vic) **(the Act)** with the respondent owner, Mr Roth on 25 March 2015. It is a Master Builders Association HC6 New Homes Contract **(the building contract).**

2 The works to be undertaken included the building of a new home and garage at 4 Cain Court, Wodonga **(the site)** for a price of $255,685. The building contract provided for a total construction period of 130 days which included 50 delay days, 20 of which related to inclement weather or its effects.

3 Prior to entering into the building contract, Marjen provided Mr Roth with a scope of works dated 3 February 2015 which contained a total cost estimate (inclusive of GST) of $255,685 **(the scope of works)**. The scope of works specifically excluded retaining walls.

4 The building permit for the scope of works was issued on 28 April 2015.

5 A frame inspection was conducted on 29 October 2015 by Mr Steven Costoglou, building surveyor from Wodonga Council. At this inspection, Mr Costoglou directed Marjen that prior to the issue of an occupancy certificate a retaining wall would need to be installed along the front of the dwelling to prevent soil from No 5 Cain Court and from the roadway collapsing into the site and that due to the height of the retaining wall a building permit would also be required for these works **(the council direction)**.

6 The building permit for the retaining wall was issued on 11 February 2016 **(the retaining wall permit)** and showed its estimated value as $6500.

7 The retaining wall works were approved on 6 July 2016.

8 The certificate of occupancy was issued on 13 July 2016.

9 Mr Roth then took possession of the site, having earlier, with the permission of Marjen, commenced using the garage for storage purposes.

10 I find from the evidence that well before the commencement of the building works, the directors of Marjen, Mr Marion Partl and Mrs Jenny Partl, had enjoyed a good friendship with Mr Roth and this had continued through the works, and after completion, until late July 2017.

11 The dispute between the parties is about the provision to Mr Roth by Marjen of a tax invoice dated 27 July 2017. This invoice described works supplied as 'Variation to Building Contract Works – CV 11' **(CV 11)** and sought payment of $50,540.78 (inclusive of GST) for the supply and installation of retaining walls 'to front and back of new home'. Forming

part of CV 11 is a contract variation order attached to the invoice, a copy of which Mr Roth was asked to sign and return.

12 The contract variation order is signed by Mrs Partl on behalf of Marjen and showed, exclusive of GST, materials of $15,008.66 and labour of $30,937.50. It also noted that Mr Roth supplied the concrete sleepers. The variation increased the building contract price by $50,128.28.

13 Mr Roth did not sign the contract variation order and has not paid the invoice. Otherwise, there are no disputes about defective works or the payment of other claims under the building contract.

Proceedings

14 On 9 October 2017, Mr Roth applied to the Tribunal in proceeding BP1404/2017 **(Mr Roth's proceeding)** alleging excessive costs charged by Marjen in CV 11. However, the application was not accepted until 30 January 2018, when Mr Roth filed a conciliation certificate dated 12 January 2018 issued by Domestic Building Dispute Resolution Victoria confirming that the dispute had not been resolved.

15 Mr Roth also filed Points of Claim which relevantly stated that:

- the issues are the retaining walls and their cost;
- the CV 11 invoice, received 14 months after completion of the works, bears no correlation to the estimated value of the front retaining wall of $6500 that Marjen submitted to Wodonga Council;
- he had asked that all building contract variations be submitted to him in writing but Marjen never did so;
- he had obtained a quote for around $16,000 in respect of the same building work;
- he sought orders that CV 11 was excessive and should be reduced;

16 The quote referred to by Mr Roth was from Landscapability. It was dated 29 November 2017 for an amount of $16,156.80 (GST inclusive) for supply and construction of the retaining walls using 102 concrete plain faced sleepers (which had been supplied, as noted from CV 11, by Mr Roth). However, the quote provided that if excessively hard ground or rock had been struck, Mr Roth would have been immediately advised and Landscapability would have reverted to an hourly rate of $187 for use of a machine including an operator plus one employee. It also had not made allowance for any necessary council approvals or permits.

17 I also found on the evidence that the lengthy delay by Marjen in providing CV 11 to Mr Roth was due to significant and stressful personal issues of Mr and Mrs Partl and that Mr Partl had made Mr Roth aware of this situation both during the building works and after completion.

18 Marjen applied to the Tribunal in this proceeding against Mr Roth in February 2018 seeking payment of $50,128.28.

19 Orders were made at directions hearings on 19 April 2018 and 14 June 2018 for various interlocutory steps and for this proceeding to be heard together with Mr Roth's proceeding on 5 July 2018.

20 Marjen, which is self-represented, had filed Points of Claim which relevantly stated that:

- the front retaining wall is 23.40 m. long and varies in height from 1.8m to 1m. and the back retaining wall is 39.6m. long and varies in height from 600mm to 400mm;
- there was no signed variation as it was verbally agreed (between the parties) to supply and construct the walls as 'do and charge' works **(do and charge)** with details being set out on Marjen's job cards;
- Mr Roth saw the works being undertaken when he attended the site;
- all job cards supporting CV 11 were delivered on two occasions by Marjen to Mr Roth for him to review them:
- the first occasion was on 9 August 2017, following which Mr Partl sat with Mr Roth on 24 August 2017 to discuss in detail all the works shown on the cards. However, Mr Roth was unprepared to engage in such discussions and he handed the job cards back to Mr Partl;
- the second occasion was 6 September 2017 when the job cards were left in Mr Roth's meter box, following which, on an unrecorded date, Mr Roth returned the cards to Marjen's office;
- on 5 October 2017, Mr Partl contacted Mr Roth about payment and was informed by Mr Roth that he was intending to arrange refinancing through his bank.

21 Marjen attached to the Points of Claim, plans, job cards and invoices relating to the retaining walls.

22 While a council permit was required for the front retaining wall due to its size, it was apparent from the evidence that, as the height of the back retaining wall was not above 600 mm, no council permit was required for it.

23 I will refer in more detail below to the evidence and hearings.

24 However, it is appropriate to make some reference now to the first hearing date of 5 July 2018. Mr and Mrs Partl attended on behalf of Marjen. Mr Roth attended with a friend who sought leave from the Tribunal to appear for Mr Roth. His proposed advocate had previously emailed the Tribunal on a number of occasions about interlocutory steps. He had noted in the emails that he was assisting Mr Roth in the proceeding due to their friendship and at Mr Roth's request. He had also stated that he was a retired solicitor.

25 Marjen objected, with oral supporting submissions, to Mr Roth's proposed advocate. I accepted Marjen's position and rejected Mr Roth's application on this advocacy issue on the basis of section 62(9) of the *Victorian Civil and Administrative Tribunal Act 1998* and made an order accordingly. I

explained this to the parties and while neither the proposed advocate nor Mr Roth raised any dispute, it was likely to have caused some concerns for Mr Roth in relation to presentation of his case moving forward.

26 Some evidence was given by Mr Partl. However, it became apparent from early in the afternoon that Marjen's case would not be closed by the end of the day. I sought from Mr Roth a short summary of his position.

27 I stood the matter down for the parties to have some discussions. Upon hearing further from them after they returned to the hearing room, I adjourned both proceedings part heard before me and fixed them for administrative mention on 6 August 2018 for the parties to provide written recommendations by that date for the future conduct of the proceedings for the Tribunal's consideration.

28 In this regard, Marjen sought a further hearing date. However, Mr Roth had formally engaged legal representation and his solicitors filed submissions which sought amended pleadings and relevantly stated that:

- the building contract made no provision for a retaining wall;
- CV 11, which increased the building contract price by $50,128.28, was not made in accordance with the building contract;
- CV 11 is not a fair and reasonable sum for the work performed;
- further, as the Act applies to the building contract, the prohibitions in sections 37 and/or 38 of the Act apply to any variations performed;
- Marjen was required by the building contract to complete construction of the dwelling within 130 days of commencing work but did not do so;
- the delay in completion resulted in Mr Roth incurring additional costs including rental, interest and storage charges for which he seeks to formalise a counterclaim/set-off.

Sections 37 and 38 of the Act

29 Section 37 provides:

> Variation of plans or specifications – by builder
>
> (1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that-
>
> (a) describes the variation the builder wishes to make; and
>
> (b) states why the builder wishes to make the variation; and
>
> (c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required;

(d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(e) states the cost of the variation and the effect it will have on the contract price.

(2) A builder must not give effect to any variation unless-

(a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by subsection (1); or

(b) the following circumstances apply-

(i) a building surveyor or other authorised person under the Building Act 1993 requires in a building notice or building order under that Act that the variation be made; and

(ii) the requirement arose as a result of circumstances beyond the builder's control; and

(iii) the builder included a copy of the building notice or building order in the notice required by subsection (1); and

(iv) the building owner does not advise the builder in writing within 5 business days of receiving the notice required by subsection (1) that the building owner wishes to dispute the building notice or building order.

(3) A builder is not entitled to recover any money in respect of a variation unless-

(a) the builder-

(i) has complied with this section; and

(ii) can establish that the variation is made necessary by circumstances that could not reasonably have been foreseen by the builder at the time the contract was entered into; or

(b) VCAT is satisfied-

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a) ; and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(4) If subsection (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(5) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

30 Section 38 provides:

> Variation of plans or specifications – by building owner
>
> (1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.
>
> (2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.
>
> (3) In any other case, the builder must give the building owner either-
>
> (a) a notice that –
>
> (i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
>
> (ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
>
> (iii) states the cost of the variation and the effect it will have on the contract price; or
>
> (b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.
>
> (4) The builder must comply with subsection (3) within a reasonable time of receiving the notice under subsection (1).
>
> (5) A builder must not give effect to any variation asked for by a building owner unless-
>
> (a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3) (a); or
>
> (b) subsection (2) applies.
>
> (6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless-
>
> (a) the builder has complied with this section; or
>
> (b) VCAT is satisfied-
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money.

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

Amended pleadings and further interlocutory orders

31 Various orders were made by the Tribunal on 17 August, 5 October and 8 October 2018.

32 Pursuant to those orders, Marjen filed and served Amended Points of Claim which were the same as its Points of Claim except that they added two paragraphs which relevantly stated:

- further or in the alternative, Marjen sought payment of CV 11 pursuant to s. 37 (3) (b) of the Act on the grounds that it would suffer a significant or exceptional hardship and that it would not be unfair for it to so recover;
- it has paid for all plans, permits, materials, contractors and labour relating to the retaining wall works;
- the non-payment of the variation has impacted its business greatly, with difficulties paying creditors including the Australian Tax Office ("ATO");
- further or in the alternative it claimed $44,610.70 as a quantum meruit.

33 Marjen attached a copy of an ATO statement and payment plan confirmation. It showed an amount owing of $63,808.59 as at 17 August 2018 with weekly payments of $100 to commence on 20 August 2018.

34 In relation to the quantum meruit, Marjen provided an estimate from Wodonga Retaining Walls dated 18 July 2018 for the amount of $44,610.70 (GST inclusive) after deduction of $2040 for the sleepers supplied by Mr Roth **(the Wodonga Walls estimate)**. In contrast to the Landscapability quote, it was an estimate which set out costings for the various steps required rather than only providing a total amount. This resulted in a break up of costings between the front and back walls. At the end of the Wodonga Walls estimate, it was recorded that additional costs may be incurred should inclement weather fill the holes with water which would incur a charge of $85 per hour to remove the water and also if road base may need to be spread in the event of site access becoming wet and boggy.

35 On 8 October 2018, on the application of his solicitor, Mr Roth's proceeding was withdrawn and, in light of this, on the same date, an order was made in this proceeding that any Points of Defence to be filed and served on behalf of Mr Roth must include any set off.

36 The Points of Defence relevantly stated:

- the amount in CV 11 was not fair and reasonable for the work performed;
- there was no agreement made for do and charge;
- even if such an arrangement was to be implied, no agreement as to the charge, fee or profit was expressed, other than the $6500 recited in the retaining wall permit;
- Mr Roth received the job cards from Marjen but did not look at them before handing them back;
- CV 11 was neither made in accordance with the building contract nor was the price for the variation agreed to as a collateral contract;
- in terms of s.37(3)(b) of the Act, whilst Marjen might suffer hardship, it is not established that any hardship would be suffered or, if it was, it is not established that such suffering would be 'significant' or 'exceptional';
- the submission of an ATO debt does not of itself indicate any hardship, let alone exceptional or significant hardship;
- it has not been established in terms of subsection 37(3)(a)(ii) of the Act that the variation was made necessary by circumstances that Marjen could not have reasonably foreseen at the time of entry into the building contract;
- the specific reference to retaining walls in the exclusions from the scope of works which formed part of the building contract confirms that retaining walls were contemplated;
- the council direction to Marjen indicated that it was foreseeable that the retaining wall would be required;
- accordingly, a reasonably competent builder ought reasonably to have foreseen the need for the retaining wall at the time of entry into the building contract;
- due to the above and pursuant to s. 37(3)(a) of the Act, Marjen is precluded from claiming any money from Mr Roth in relation to the variation for the retaining wall;
- Mr Roth did not deny that Marjen paid for all plans, permits, materials, contractors and labour relating to the retaining walls' works;
- however, he denied that failure to pay CV 11 had greatly impacted Marjen's business with resultant difficulties in paying creditors and no substantive supporting evidence had been provided;
- the allegation of Marjen about its ATO situation is not relevant as payment plans with the ATO are normal, especially in small business, and any implication or claim that such an arrangement is exceptional

or significant in terms of hardship in s. 37(3)(b) of the Act is unsustainable;

- Mr Roth has always been prepared to pay a fair and reasonable price for the retaining wall and reiterated that the retaining wall permit cited a price of $6500;
- additionally, or alternatively, the construction cost of the retaining wall should be no more than $16156.80 but if the wall was deemed to be priced at a higher rate this should not be greater than the $44,610.70 pleaded by Marjen;
- additionally, or alternatively, Marjen did not complete the building works within the 130 days agreed in the building contract;
- the building contract provided for work to commence within 14 days of the receipt of the building permit;
- the building permit was issued on 28 April 2015 and accordingly work was to commence by 12 May 2015 and 130 days from that date means that completion of works was required by 19 (sic) September 2015;
- given that the Certificate of Occupancy did not issue until 13 July 2016, works were completed at least 297 days late;
- such delay constituted a breach by Marjen of the building contract resulting in Mr Roth having to pay an extra $10, 378.48 rent for alternative accommodation and an extra $780 for shed storage and these items constituted an entitlement to raise a set off for those amounts.

37 Marjen provided a Reply dated 10 December 2018 to the set off which relevantly stated:

- the works were delayed by 107 days of inclement weather between 21 September 2015 and 13 July 2016 as rain from 1mm to 46mm fell on those days;
- the works were suspended or delayed for a further 119 days being the days Mr Roth undertook works, not being works which Marjen was obliged to carry out under the building contract;
- Mr Roth lived rent -free at Mr and Mrs Partl's house from 6 June 2016 until 13 July 2016;
- shortly after completion of construction of the garage, Mr Roth, from 9 March 2016, used it to store items;
- Mr Roth was not entitled to a set off.

Submissions

38 Mr Partl and Mr Roth gave evidence on the first hearing day. Mr Partl and Mr Adam Capper of Wodonga Retaining Walls gave evidence on the second day. Mrs Partl and Mr Roth gave evidence on the third day.

39 At the conclusion of the hearing, I ordered the applicant and then the respondent to deliver submissions and then the applicant to deliver any submissions in reply. Correspondence was thereafter received by the Tribunal from the respondent's solicitors asserting that the applicant's submissions in reply contained fresh submissions. Further submissions were then received from the respondent's solicitors on 14 October 2019 about the decision in Mann v Paterson Constructions Pty Ltd (2019) HCA 32 **(Mann 2)** which was handed down on 9 October 2019. Mann 2 was being decided at the time of the hearing of this proceeding. These further submissions were also served by the respondent on the applicant. The applicant objected to these further submissions being accepted. In reaching my decision, I have neither accepted the further submissions nor taken them into account nor have I taken into account any correspondence received from the parties subsequent to the applicant's submissions in reply.

40 I will set out the parties' submissions before referring to the evidence.

Applicant's submissions

41 Relevantly, these stated that:

- Marjen claimed the cost of the construction of the two retaining walls on three alternative bases being-
  - (a) $50,128.28 under CV 11 dated 27 July 2017 as a contract variation, or
  - (b) $50,128.28 under a collateral contract made on or about 29 October 2017 under which the respondent requested the applicant to construct the retaining walls as do and charge, or
  - (c) $44, 610.70 on a quantum meruit;
- there was no dispute that the retaining walls were constructed according to engineering drawings and in a proper and workmanlike manner;
- the variation claim was not made in accordance with clause 13 of the building contract but it relied on s. 37 (3) (b) of the Act;
- in relation to the variation claim-
  - (i) the need for the retaining walls was not reasonably foreseeable to Marjen, nor could it have been reasonably foreseen by it, at the time of entry into the building contract. The plans for the scope of works were submitted to Wodonga Council for approval and were accompanied by a report from Civil Test Albury Wodonga and a Soil Classification report of Coffey Geosciences Pty Ltd, both reports having been obtained by Mr Roth. The resulting building permit did not require the construction of the retaining walls,

(ii) it would suffer significant or exceptional hardship if this claim was denied. It is a small family building company currently with three employees which include the two directors. Margins are tight and because CV 11 has not been paid, it owes the ATO $31,114 for GST and suppliers $39,700 and has owed money for 18 months. Suppliers now require immediate cash payment from it, pending the outcome of this proceeding. If it is unsuccessful, it may cease to trade.

- in relation to the collateral contract claim, after the council direction the construction and cost was orally discussed between Mr Partl and Mr Roth and it was then agreed that Marjen would proceed to construct on a do and charge basis. Pursuant to such agreement, it obtained all engineering drawings and the retaining wall permit and proceeded to construct the retaining walls. During construction, Mr Roth supplied all sleepers. Mr Roth conceded in evidence that he gave approval to Marjen to construct the walls on a do and charge basis;
- in relation to the quantum meruit claim-
  - (i) Mr Roth has received the benefit of the walls' construction without payment,
  - (ii) it would be inequitable for Mr Roth to receive this benefit in the absence of any dispute about method or quality of construction,
  - (iii) it has provided all construction cost details,
  - (iv) Mr Capper gave uncontradicted expert evidence that $44,610.70 was a fair and reasonable construction cost.

Respondent's submissions

42 Relevantly, these state that:

- Section 37 of the Act is engaged by Marjen's claim with the consequences that the contract claim is illegal as pleaded and must be disallowed on the evidence, a quantum meruit cannot be claimed, and the only entitlement to the variation is on the basis of 'cost plus' and Marjen largely failed to prove its costs;
- before Mr Roth had purchased the land at the site, he inspected it with Mr Partl who told him that the only problems were trees and the slope;
- money was very tight and the parties agreed that Mr Roth would perform the tiling, kitchen, vanity and underfloor heating in order to reduce cost;
- after several applications, Mr Roth eventually obtained a loan for $253,000, a little less than the price of the building contract:
- however, although the building contract price was $255,685, it was the intention of the parties that Mr Roth would receive credits for

work that he would perform and thereby reduce the effective price to around $230,000;

- the original building plans, upon which the building permit was granted, show a 600mm cut at the front and back of the house;
- when preparing the site, Marjen cut further into the hill than had been envisaged by the plans, which was undertaken primarily for the convenience of Marjen, as it wished to get machinery between the house and the side of the slope;
- this subsequent deeper cut meant that the 1800mm retaining wall was required;
- around the time of the council direction, Mr Partl did discuss with Mr Roth the need for the 1800mm retaining wall;
- Mr Roth authorised Marjen to proceed to build the wall but only on the strict conditions that he required a written quote, that the total cost of the works was not to exceed $253,000 and that, if it did, Marjen was to stop the works, irrespective of the stage they had reached;
- at this time, Mr Roth also reminded Mr Partl that he only had a loan for $253,000, already less than the price of the building contract, and he could not afford any more;
- in this regard, Mr Roth denies that he conceded in evidence that the work would be undertaken on a do and charge;
- Marjen did not provide a written quote or tell Mr Roth how much the work would cost, although Mr Partl prepared the retaining wall application which estimated the cost of the wall at $6,500;
- the oral do and charge pleaded by Marjen is contrary to the building contract and illegal under the Act;
- the Act prescribes the way in which variations to the scope of works in major domestic building contracts are undertaken;
- non – compliance has serious consequences;
- the consumer protection aims of sections 37 and 38 were described by the Victorian Court of Appeal in Mann v Paterson Constructions Pty Ltd (2018) VSC 119 **(Mann 1)** at [138]:

> The evident purpose of s 38 is to protect owners from being liable for variations where builders do not provide sufficient information to the owners to enable them to make an informed decision whether to sign a contract or proceed with a variation. This purpose is borne out by statements made in Parliament prior to the enactment of the Act and its predecessor, the HCG Act. Those statements referred to an unscrupulous practice by some builders of underquoting building work and seeking to recover the difference by subsequent variations, the need for which was not readily apparent to the owners at the time they

signed the building contract. Section 19 of the HCG Act and s. 38 of the Act were enacted to prevent owners from being financially disadvantaged by additional costs concealed in subsequent undocumented and unsigned variations.

- no written costing was provided by Marjen for multiple contract variations;
- in respect of CV 11, Mr Partl gave evidence that he knew this was in breach of the Act but that in his business he never complied with it;
- given his many years of experience, Mr Partl must have always understood that a retaining wall would be necessary but he expressly omitted the retaining wall from the scope of works and in cross – examination he conceded that he had done this because the cost would have blown out;
- in his evidence, Mr Partl described as a mistake showing the estimated cost of the retaining wall at $6500 in the application for the retaining wall permit;
- however, in cross-examination, he admitted that he had not even attempted to calculate the cost;
- Mr Roth was never able to make an informed decision about the retaining wall given Mr Partl's concession that he had never discussed the price of the retaining wall with Mr Roth nor had he told him it would exceed the estimate on the retaining wall permit of $6500;
- the extraordinary delay in providing CV 11 is counter to Marjen's hardship claim;
- Marjen proceeded without any regard to Mr Roth's instructions or to his expressed financial constraints;
- it would be significantly unfair on a number of grounds to Mr Roth to have to pay CV 11. The requirement for the retaining wall was created by Marjen unilaterally modifying the initial site cut. The variation inflates the effective project cost by over 20%. Mr Roth never understood the level of cost. Mr Partl knew Mr Roth's financial constraints and Mr Roth is unable to pay CV 11;
- other considerations aside, section 37(4) permits Marjen to recover its actual costs plus a reasonable profit. Accordingly, it must prove its costs which it has not done;
- in this regard, Marjen, in support of payment, adduced evidence in the form of invoices for materials and machine hire, job cards showing time worked on the walls by its employees, and industry charge out rates for labourers, apprentices and various trades. However, only the invoices establish part of the actual cost to Marjen. Actual cost is required to be proved under s 37(4) and, in this regard, Marjen needed to prove the actual amounts paid in wages to the employees who

worked on the retaining walls. The retaining wall invoices (including GST) total $10,479.72. Adding a profit margin of 10% results in an amount of $11,527.69 which is the only proof by Marjen of its claim;

- Marjen is not entitled to a quantum meruit as its claim falls within s 37 (4);
- Marjen neither sought any extension of time for the construction period under clause 15 of the building contract nor advised Mr Roth of any delays during construction;
- the evidence led by Marjen to justify delays was discredited in cross-examination;
- Mr Roth is entitled, because of delay in completion, to offset $11, 105.82 (total of extra rent and storage costs incurred) against Marjen's entitlement of $11,527.69 and Marjen should therefore be awarded $421.87.

Applicant's reply to respondent's submissions

43 The reply submissions relevantly state:

- even prior to the signing of the building contract, Mr Roth proposed that any retaining walls that might be required would be constructed by him and he informed Marjen that he had constructed retaining walls previously;
- general conditions in the initially approved plans noted that site levels are approximate only and would need to be checked and confirmed prior to any work and further that the site areas indicating construction bench, cut and fill are only approximate and may vary on site. Accordingly, it was unclear if any retaining walls would be required when the building contract was signed;
- on 7 May 2015, the excavation contractor prepared the site, initially with a 600mm cut as in the plans;
- Mr Roth met with Mr Partl and the excavation contractor on that day on site and it became apparent to Mr Roth that a cut of only 600mm was unworkable as insufficient back fill was provided, the driveway slope was too steep and the house was too high at the rear of the block. Therefore, it was decided to increase the cut to 1200mm which would provide more back fill and better driveway slope and back yard height;
- with the cut agreed at 1200mm, Marjen proceeded with construction works and when the framing stage was reached in October 2015, Mr Partl advised Mr Roth that he needed to start constructing the retaining walls. When Mr Roth ordered 120 sleepers for the front and back retaining walls on 14 October 2015, Marjen then assumed that he would start to construct the front and back retaining walls;

- after the council direction, Marjen proceeded further with construction which reached lock up stage by about February 2016 at which point Marjen again urged Mr Roth to start construction of the retaining walls;
- Mr Roth then saw the extent of the work now required and changed his mind about building the retaining walls himself. He also noted there was insufficient space to provide for an alfresco dining area and path at the front of the house, An additional 1.5 metres was needed for this which required an increased cut from 1200mm;
- Marjen was then asked by Mr Roth to build the retaining walls and to increase the cut to 1600 mm. He was not charged for the extra cut and, upon his enquiry, was informed by Mr Partl that the more he helped with the building of the retaining walls, the less their construction cost would be for him. It was impossible for Marjen to provide any accurate costing of the construction of the retaining walls as the final cost would depend on the amount of physical work that Mr Roth would undertake in relation to the walls during their construction. It was therefore agreed that the best way forward was for Marjen to build them on a do and charge basis;
- Marjen was also concerned that the increased cut could result in soil subsiding against the side of the house which would make it harder to build the retaining walls;
- accordingly, the retaining walls needed to be built quickly. When the do and charge was agreed, Marjen organised the engineering drawings and for the issue of the retaining wall permit;
- Mr Roth only wheeled one barrow of concrete for the construction of the retaining walls;
- the delay of Marjen in providing the CV 11 invoice was to the financial benefit of Mr Roth;
- while Marjen neither complied with the building contract nor with s. 38 of the Act, s 38 (3)(b) (i) and (ii) (sic) should apply;
- in this regard, in relation to exceptional circumstances, Marjen set out a number of considerations which were as follows-

  (a) the parties were long standing friends with Mr Roth wanting to reduce construction costs of the house by supplying items not forming part of the building contract and by receiving a credit for works included in the building contract but undertaken by him, all of which was accommodated and agreed to by Marjen,

  (b) when Mr Roth changed his mind about building the retaining walls, he would have known that the cost of the front retaining wall would be considerable, having previously himself built smaller walls,

(c) Marjen was placed in a very difficult position when Mr Roth changed his mind about building the retaining walls himself which was at a point in time well into the construction period. Mr Roth wanted to minimise the cost and had also supplied the sleepers, the variation could not be costed without knowing how much labour he would provide, and Marjen had to proceed quickly as it was anxious to avoid any further cost blow out if the extra cut collapsed,

(d) it reiterated its financial hardship with the ATO and creditors, and

(e) Mr Roth requested the variation;

- it would not be unfair to Mr Roth to pay CV 11 as he caused increased costs, the walls are adequately constructed, the amount claimed is fair and reasonable, and he never enquired about the cost during the period of construction of the walls;
- the effect of s 37 (4) is that it is appropriate to use the MBA Industry Charge Out Rates to prove part of the cost of carrying out the variation. If Marjen was only entitled to recover the actual cost of wages paid to its workers, it would be out of pocket for all the on costs. The profit margin of 15% is appropriate for the variation as that was agreed to by Mr Roth and is in the building contract;
- Mann 1 has some differing factual issues in that the building contract was terminated by the owner by refusing to let the builder back onto the site and the quantum meruit claim was greater than the contract price;
- however, Mann 1 supports Marjen's case as it makes it clear that Marjen can maintain a quantum meruit claim for the value of the work set out in CV 11 as the value of Marjen's work on a quantum meruit basis is very reasonable having regard to CV 11 and the quantum meruit claim also supports the fairness of CV 11;
- Mann 1 also supports Marjen's ability to recover the amount claimed in CV 11 under s 38 (6) (i) and (ii) of the Act on a cost plus profit basis;
- CV 11 was a variation requested by the owner;
- Marjen is entitled to its alternative quantum meruit claim;
- no delay in completion was caused by a breach of the building contract but rather by inclement weather or works undertaken by Mr Roth, the dates and details of which were proved by Marjen in its evidence.

The building contract

44 Clause 12 relates to variations requested by the owner and provides under clause 12.1 that if the owner wishes to vary the plans or specifications, then the owner will give to the builder a written notice describing the variation required. Clause 12.2 provides that if the builder reasonably believes that the variation requested in writing by the owner will not require any amendment to any permit and will not cause any delay in reaching completion and will not add any more than 2% to the original contract price, then the builder, although not obliged to, may at its discretion carry out the variation.

45 Pursuant to clause 12.3, if the builder reasonably believes that an amendment to any permit will be necessary or there will be delay in reaching completion or the variation will add more than 2% to the original contract price, then upon receipt of the written variation notice from the owner, the builder will give to the owner a written notice that either states that the builder refuses to undertake, or is unable to carry out, the variation and the reason for that inability or refusal or states that the builder will carry out the variation and if so, the builder will in the notice, state each of the effect the variation will have on the works as a whole being carried out under the contract, whether or not an amendment to any permit will be required, the cost of the variation, and the effect of that cost on the contract price, and will give a reasonable estimate of any delay in reaching completion.

46 Among other matters in clause 12.4, the builder is not required to commence any variation requested by the owner if the owner has not given to the builder a signed written request for the variation and that written request is attached to the notice required by the builder under clause 12.3. If a variation is requested by the owner and agreed to be carried out by the builder in circumstances where the variation results in an increase to the contract price, under 12.6 the owner will, if requested by the builder, pay to the builder, prior to the commencement of the variation, 10% of the total cost of the variation, where the total cost of the variation is less than $20, 000 or 5% of the total cost of the variation, where the total cost of the variation is $20,000 or more.

47 Clause 12.7 provides that the builder is under no obligation to commence any variation, until such time as the owner has paid any requested applicable deposit to the builder and produces written or other satisfactory evidence to the builder if requested by the builder showing that the owner has the financial capacity to pay the cost of the variation.

48 Under clause 12.8, whenever the builder under clause 12.4 or 13.2 accepted an obligation to carry out a variation, then the owner agrees to either pay to the builder the agreed variation price or if the variation falls within clause 12.2 and no price has been agreed for the variation, the documented cost of

carrying out the variation plus 15% of that cost for the builder's margin, less any deposit already paid by the owner under clause 12.6.

49 In the building contract, clause 13 provides for variations by the builder. Under clause 13.1, if the builder wishes to vary the plans or specifications, then the builder will give the owner written notice that describes the variation, states each of why the builder wishes to make the variation, the effect the variation will have on the works, whether or not an amendment to any permit will be required, the cost of the variation and its effect on the contract price, and provides a reasonable estimate of any delay the variation is likely to cause in reaching completion.

50 Clause 13.2 provides that the builder will not give effect to any variation requested by the builder unless either the owner has given the builder a signed consent to the variation attached to a copy of the clause 13.1 notice, or in circumstances where each of a building surveyor issued a building notice or order requiring the variation to be made, the variation arose as a result of circumstances beyond the builder's control, the builder has given the owner a copy of the building notice or order with the clause 13.1 notice, and the owner does not notify the builder within five business days of receiving the clause 13.1 notice that the owner wishes to dispute the building notice or order.

51 Clause 15 relates to delays and extension of time claims.

52 In particular, clause 15.1 provides that if the progress of the works is delayed by any event or occurrence set out in that sub clause, then the builder will within a reasonable time advise the owner of the cause and the reasonable estimated length of the delay and the builder will be entitled to a fair and reasonable extension of time for completion of the works. The events or occurrences include any variations under the contract, inclement weather or any condition as a result of inclement weather in excess of the days already allowed by the builder (in this case, in excess of 20 days), or any act, default or omission or breach of the contract or obstruction, interference or hindrance with the carrying out of the works by, or on the part of, the owner.

Evidence

5 July 2018

Mr Partl

53 Marjen commenced business in 1984. Mr Partl is a registered builder and at the time of commencement of works at the site, in addition to Mr and Mrs Partl, Marjen employees included their son, Shaun (qualified carpenter), Tammy (mature age apprentice), and Matt (fourth year apprentice carpenter).

54 Mr Roth purchased the land at the site. At some stage, Mr Partl looked at it with him. Some time after, Marjen provided a quote to him for the building

of a house and garage. This was prepared on the basis of works which would be performed by Marjen and did not include works which Mr Roth wanted to undertake himself or materials which Mr Roth himself wanted to supply. This initial quote was $231,300.

55 On the basis of this initial quote, Mr Roth applied for a loan which was rejected due to the proposed lender's concerns about the amount of work which Mr Roth wanted to undertake himself. Marjen then provided a fresh quote of $255,685 in the form of the scope of works which included the work Mr Roth wanted to do. However, it was on the basis that, if approved for a loan, Mr Roth would receive credits back from Marjen by way of variations when he had himself undertaken works or supplied materials. The loan was approved on the basis of the scope of works.

56 In addition to Shaun, Tammy and Matt, Mr Partl also worked at the site. Mr Roth had his own waterproofing business and intended to work on site in between his own jobs. A number of contract variations in addition to CV 11 had been included in documents supplied by Marjen. Some were for extra works performed, or goods supplied, by Marjen and others were credits for works performed, or goods supplied, by Mr Roth. None of these other variations were in dispute despite not having been signed by Mr Roth and despite being dated after the subject works had been performed or goods supplied. Numerous photographs were also provided by Marjen showing the progress of works with particular reference to the retaining walls.

57 There was a lot of rain when the building works were due to commence. This caused delays including when the excavator was on site, given slope and slippage. However, immediately after the initial site cut, Marjen commenced on the slab. Mr Partl admitted that he had some awareness of the need for a retaining wall before the inspection which resulted in the council direction.

58 According to Mr Partl, when providing the council direction, Mr Costoglou had regard to the road up top and to the close proximity of the bank and the site cut to the neighbour's fence. After the council direction, Mr Partl informed Mr Roth that 'a bit of a hiccup has occurred' and then told him about it. He informed Mr Roth that either the owner or builder had to build the retaining wall and that Marjen did not have any other work to commence. He further informed Mr Roth that if he wanted Marjen to undertake work on the retaining wall, he (Mr Roth) could assist. Marjen could bring materials to the site and he could work on the retaining wall on weekends. Marjen could otherwise start on the retaining wall and list on its job cards the work it performed and materials it supplied. Marjen would also keep its truck at the site when it was not using it for Mr Roth to use to assist him in the works that he undertook on the wall.

59 Mr Roth agreed and purchased sleepers and agricultural drainage pipes. Marjen hired the bobcat to perform the site cut and had to bring an excavator in to move the dirt as the operator had no turning circle.

60 In conversation with Mr Partl, Mr Roth then raised the possibility of building a retaining wall at the back of the site. Mr Partl agreed it would be preferable to do so while Marjen and machinery were there. Mr Roth then ordered more sleepers.

61 Marjen arranged for the architectural drawings and engineering computations for the retaining wall and submitted all documentation to the Council for the permit. Marjen undertook the majority of the work. Mr Roth visited the site regularly in between his own jobs. While he saw Marjen proceeding with works, he only helped with the wheelbarrow concrete pour. Despite opportunities to do so, and having the truck with keys and materials available, he did not assist with any other stages including installing and painting the posts, and laying stones, sleepers and drainage.

62 Mr Partl filled out the application for the retaining wall permit and arranged for Mr Roth to sign it. He acknowledged that he had made a dramatic error in showing the estimated value at $6500 and accepted that it was his fault and he took responsibility for it. He said it meant lower lodgement fees for Mr Roth, although Mr Roth has not reimbursed Marjen for them. Mr Partl also noted that Mr Costoglou had said the wall would cost more than $6000 but he still approved the permit application.

63 An explanation of the job cards supporting CV 11 was then provided by Mr Partl. In relation to labour, they contained a description of the nature and location of items of the works, the times they were started and completed and the times the workers making their entries for the day took breaks during the day such as for lunch.

64 I looked through the cards and, without doing so exhaustively, I queried aspects of some entries and collation. Mr and Mrs Partl examined the cards over the lunch break in relation to my queries. Further discussions then occurred after resumption. Other than acknowledging a likely discrepancy of around two and a half hours, they responded to the remainder of my queries.

Mr Roth

65 Mr Roth stated that he asked Mr Partl at the start of construction of the scope of works to forward to him contract variations as soon as they were incurred. However, only CV 1 was provided in this manner. Mr Roth regarded himself as having around $24,000 to spend on contract variations. This was the difference between the first and second quotes after taking into account the items for the house that he had already purchased and the work he was to undertake. He assumed that he therefore had sufficient capacity to also pay for a retaining wall.

66 Accordingly, before Marjen commenced the retaining wall, he asked Mr Partl for an estimate of the cost by way of a formal quote but Mr Partl simply shrugged his shoulders. This was in circumstances where there was

a shortfall already between his loan and the building contract price, which shortfall he had to pay himself.

67 The original cut according to the plans was 600mm but then it went down to 1800mm. He had to purchase the required sleepers. He was working full time in his own business throughout and he trusted Mr Partl. He agreed to the back retaining wall after Mr Partl raised the issue of also building it, but he again asked for a quote which he did not receive.

Mr Partl

68 I noted to Mr Partl that the scope of works excluded retaining walls. In response, he stated that this was standard unless the site was 'dead flat'.

14 December 2018

Mr Partl

69 Mr Bevan of Counsel appeared for Mr Roth. Mr Partl continued his evidence.

70 After he told Mr Roth about the council direction, discussions then took place between them about what he wanted to do about the retaining wall. Mr Partl then said to him that if Marjen undertook the work, Mr Roth would pay for the costs of what was on the job cards. Mr Roth asked if he could help and Mr Partl responded by confirming that he could do so provided it was within the parameters of the drawings which he then organised with Mr Roth's consent.

71 In relation to the estimated value of $6500 Mr Partl had inserted in the permit application, he reiterated that it was a mistake for which he apologised. He simply inserted a figure but he had no real idea as to the amount as he did not know how long the building of the retaining wall would take. Previously to that, Mr Roth had continued to ask him if Marjen could also build the back wall at the same time to which Mr Partl agreed. Mr Roth then confirmed he would purchase the sleepers and help with the work. However, while he constantly came on site and enquired how works were progressing, he did not assist. Marjen otherwise continued working.

72 Mr Partl then detailed delays and problems experienced as a result of the building of the retaining walls and problems Mr Roth had with the works that he was undertaking, particularly with the tiling. One of the issues encountered related to an organised delivery of stones directly from the quarry to the site. The supplier's truck found this task too difficult due to the slope of the block and refused to make any further deliveries which resulted in Marjen having to overcome that issue.

73 After the variation dispute had commenced, Mr Roth had complained that the labour cost was excessive as labourers could have been used. Mr Partl had explained to him that this was not correct as labourers could not be used where engineered retaining walls were involved and Mr Partl, not Mr

Roth, had to supervise. There were no discussions about charge rates. They would be set out on the job cards.

74 Reference was then made by Mr Partl to a letter sent by Marjen and dated 14 November 2018 denying the set off. It referred to clause 15.1 of the contract and the entitlements of Marjen to extensions of time based on any variation under the contract, inclement weather above the contract allowance and the works performed by Mr Roth which, by virtue of the extra time they were individually shown as having taken, constituted an obstruction, interference or hindrance by the owner with the carrying out of the works. Included with the letter were Bureau of Meteorology **(BOM)** records and calendar markings. The letter also recorded that Mr Roth resided without charge with Mr and Mrs Partl from 6 June 2016 to occupancy and that he had access for storage in the garage at the site prior to handover, the certificate of occupancy and the concreting of the driveway.

75 Mr Partl did not discuss with Mr Roth about the retaining wall when the site cut was undertaken as he did not foresee it. The council direction came as a complete surprise to him and he spoke to Mr Roth about it immediately after.

76 Mr Bevan then cross-examined Mr Partl. Mr Partl agreed that he knew that money was tight for Mr Roth. Mr Partl confirmed that the estimated construction period (including delays) in the building contract of 130 days included the works to be performed by Mr Roth himself.

77 He agreed that when he saw the site after Mr Roth had purchased the land, he regarded the only problems as being the slope and trees. His concern with the slope was in relation to water flow including possible erosion of the banks. He did not then mention the possibility of a retaining wall as while they discussed about where a house might sit, Mr Partl had no idea of what house was going to be built.

78 Mr Bevan referred to some photographs taken after the site had been levelled and trenches had been dug under the slab. He focussed on some slippage, due to rain, on a steep embankment and asked Mr Partl if he was aware at that stage of the need for a retaining wall. He agreed that he was aware but he never discussed it with Mr Roth. Marjen had a number of house designs and Mr Partl showed Mr Roth the various plans. Mr Partl also agreed that all of the designs would have required something like a retaining wall. However, he acknowledged that if he had included a retaining wall in the scope of works for which he quoted, the price would have increased dramatically. Mr Partl further conceded that CV 11 was a major variation as it did represent a 20% increase in the cost of the building contract. He also conceded that the only estimate was the $6500 in the permit application, which he again acknowledged was a mistake and in respect of which no calculations had been undertaken.

79 He denied that he suggested to Mr Roth that the back wall be built at the same time. He also denied both that Mr Roth had told him that he had around $25,000 available for all contract variations and that Mr Roth ever asked for a quote for the retaining wall works. He maintained that Mr Roth was happy and purchased sleepers straight away.

80 He acknowledged that dates and issues were not fully documented by, or on behalf of, Marjen because of their friendship.

81 Materials had arrived before commencement of the retaining wall construction. Works started on 8 February 2016 and the last wall job card was dated 25 May 2016. Construction of the walls took 27 days.

82 In relation to Marjen's letter of 14 November 2018 about delays in completion of the contract, Mr Partl acknowledged that he had only obtained BOM rain records and had not checked job cards to see if Marjen had worked at the site on the same days. It had been put to him by Mr Bevan that the records included reference to days when only a very small amount of rain had fallen for a short time and there were days when Marjen undertook only internal work. With regard to delays alleged to relate to Mr Roth's own works, Mr Partl acknowledged that dates were not recorded, estimates only were made, and on occasions it was possible for Marjen to also work at the site on the same days as Mr Roth.

83 Mr Partl denied that the reason for the further cut was to make it easier for Marjen staff and contractors to access the site and work with more available space and stated that it was to provide a pathway to the patio for Mr Roth.

84 Mr Partl acknowledged that he made a mistake in not complying with s 37 or s 38 of the Act, the requirements of which he knew. However, he had a friendship and bond with Mr Roth. He admitted that he would have told a client with whom he had not had the same relationship about a variation that cost $50,000. He is not a 'paperwork person'. He conceded that he did not give prior written notice of any variations and that is how he has conducted his business as he is 'old school'. He gives verbal notification of variations and gives the option that he can quote or proceed. After completion he then visits the clients with the variation invoices and supporting job cards and he has never had problems with this arrangement. He also reiterated that the retaining walls were excellent.

Adam Capper

85 In relation to the quantum meruit claim, Marjen then called Mr Capper, builder and owner of Wodonga Retaining Walls, to give evidence about the Wodonga Walls estimate.

86 Mr Capper confirmed that Mr Partl had given him copies of photographs and other documentation and had provided him with relevant information. Mr Capper explained that he costs on square meterage which is different to do and charge which requires the need to try to estimate labour hours. On the few occasions that he undertook do and charge costing, he generally

exceeded his quote. Mr Capper agreed with Mr Partl that it was necessary to follow the engineering recommendations. He supported the quality of Marjen's work on the walls. Additionally, like Marjen, he only employed tradesmen and for cost, quality and trust reasons, he also did not use labourers on retaining walls.

87 For a bigger wall similar to Mr Roth's, Mr Capper would normally provide an estimate only and if problems such as extra hard ground were encountered, he would stop and explain to his client that the costs would exceed the estimate. If no such issues arose, he would charge in accordance with the estimate. His practice for smaller jobs would be to provide a quote and then charge in accordance with it. If undertaking do and charge, he would cost labour at $85 per hour and generally confirm this in writing.

88 During cross-examination by Mr Bevan, Mr Capper stated that he tries to make a profit in his business of around $25 per employee per hour. With overheads including superannuation and allowing for downtime, he estimates his two full time employees each represent a business cost of Wodonga Retaining Walls of $50 to $60 per hour.

89 In cross-examination, Mr Capper had understood, from instructions provided to him, that a site cut had already been performed but then a further site cut had to be undertaken for the retaining wall construction or for some other reason. He had seen the Landscapability quote obtained by Mr Roth. He was not at all impressed with it and did not accept that an engineered retaining wall like Mr Roth's could be built for the estimated price.

11 April 2019

Mrs Partl

90 When a job was not priced, it was undertaken on do and charge. For this, job cards are completed. Mrs Partl confirmed that the Marjen job cards for any project contained details of materials and labour entries by each of the employees who worked on the job. They all went back to Mr Partl to make sure they were correctly completed and then they were handed to Mrs Partl to collate and process for client invoices. She did not make adjustments to the cards.

91 She was aware that Mr Roth was to help with works other than those which he was undertaking himself but it was her understanding that he did very little. He also focussed on his own business tasks. He would, however, regularly visit the site to see the progress of the works.

92 Normally if a client asked for variations, she would process the quote but on this occasion with the retaining walls, she was not asked to do so as Mr Partl had informed her that he and Mr Roth had agreed on do and charge. She completed the application necessary to obtain the building permit but Mr Partl had to complete the application for the retaining wall permit. This

was something he normally did not do but Mrs Partl was unable to undertake this task on this occasion due to the stressful family pressures.

93 Mrs Partl reiterated that due to their friendship, Marjen never recorded dates properly including when Mr Roth actually performed the works at the site which he was undertaking. She and Mr Partl did not see any need to keep such detailed records. They were aware that Mr Roth was trying to fit in with the work demands of his own business so they accommodated him and worked around him and tried to let him work at his own pace.

94 Mrs Partl completed the estimated delays shown in the building contract. This aspect was normally completed by calculating a reasonable amount for rain according to the time of year. In this instance, weather related days were greater than expected at the beginning of the contract due to the constantly "bucketing" rain and consequent difficulties with machinery on site. With hindsight, she should have allowed extra time for Mr Roth to undertake his own works but she believed she would probably have had difficulties in estimating this aspect accurately. She admitted that no extension of time notices were served but they did not want Mr Roth to be stressed when it was his own house. The first awareness she had of Mr Roth's claims for delay in completion was in this proceeding.

95 In relation to the scope of works accepted by the bank, she included the prices for Mr Roth's works and then took them out as credits.

96 Mr Bevan cross-examined Mrs Partl. She cannot recall any discussion about a retaining wall before drawing up the contract. Her roles in the business generally included typing up pricing and quotations in addition to collating job sheets. She never undertook any actual costings for quotes. She usually applied for the permits but to do so she had the contracts showing the costs of works in front of her.

97 Mrs Partl did not believe that Mr Roth was struggling to build the house on his budget. She is aware of s38 of the Act and the requirements upon a builder to provide written variations affecting prices. She disagreed that the do and charge arrangement was illegal in the circumstances. She also did not agree that Mr Partl had said in his evidence that Marjen never provided variations. However, as to when written variations were provided, her evidence was a little unclear as it initially seemed that they were said to be provided subject to the nature of the job and works but then it appeared that they were said to be normally provided. Due to lack of recorded dates, Marjen could not rebut Mr Roth's evidence about the periods for which storage and accommodation are claimed.

98 Mrs Partl neither saw the application for the retaining wall permit before it was lodged nor was she told by Mr Partl that he had put $6500 as the estimated value of the wall in it. She did not disagree with the proposition put to her by Mr Bevan that if Mr Roth was asked to sign the application as he did, then he would assume that was the price.

Mr Roth

99 Mr Roth separated from his wife in 2005 and was divorced in 2007. He wanted to buy or build a house to enjoy his access to his two children.

100 He purchased his waterproofing business and then purchased the block of land to build on. From his recollection, he believed the land had cost between $30,000 to $40,000 which he had mainly financed through his business with some assistance from an army pension. He wanted to build a house on it when he had enough money. When Mr Partl showed him the different sets of plans of Marjen, he found one of them to be suitable. Over a period of time, Mr Roth decided on some variations to the plans to extend the bedrooms and garage, and these became the basis for the original drawings for the building permit. In the meantime, prior to being in a position to apply for a loan, Mr Roth started to buy items for the house.

101 Around the time of applying for the loan, Mr Roth made it clear to Mr Partl that he had to have a budget as his business was still just building up and he had child support to pay. Before his loan was approved, he also had to apply for a draw down from his superannuation. When Mr Partl initially saw the land, he had informed Mr Roth that if he built on it, he would need to cut 600 mm into the land and to then use spoil to build up the other side and he could retain it using a retaining wall.

102 After the loan for $253.000 was approved, Mr Roth discussed the $2500 - $3000 shortfall with Mr and Mrs Partl. He finally decided that he could pay any shortfall on his credit card. He believed it would have been apparent to Marjen how tight his finances were and how acutely aware he was of the situation. Additionally, he provided Marjen with a copy of a letter from his finance broker advising that he could not exceed his loan of $253,000 given his lack of available funds otherwise.

103 Mr Roth remembered the work starting and the land being carved and levelled. Originally, he was going to build the retaining wall and he pre-purchased sleepers for a 600mm cut. When he saw the much deeper cut, he had to purchase extra sleepers to make up the difference.

104 He was working so hard with his business while trying to remain aware of the progress of the house construction, that he cannot remember the discussion with Mr Partl about the council direction. He identified his signature on the retaining wall permit application form. Despite the estimated cost of $6500 being shown on the form, no amount was actually discussed between him and Mr Partl.

105 He initially asked Mr Partl for a quote. In response, Mr Partl just shrugged his shoulders and said ‘yeah’. Mr Roth then reminded Mr Partl about the difference between his bank loan and the building contract price and explained that was why he needed the quote. He also informed Mr Partl that irrespective of the stage the retaining wall had reached, they were not to exceed $253,000 as the total cost of all works, as he did not have the money

to do so. He did not keep any records about the works. His only records were the withdrawals from his bank loan account. He also referred to his rent records (copy of tenant's ledger) and storage of items records in support of his set off.

106 The first time Mr Roth was asked by Marjen to pay $50128. 28 was on 27 July 2017 when he received CV 11. When the works under the building contract were due to start, he was verbally advised by Marjen that there was an initial delay as the contractor engaged to perform the site cut was still undertaking another job. Subsequently delays then continued due to wet weather problems. Other than again being advised verbally about these problems, Mr Roth was not otherwise told during the remaining works of wet weather delays or that his own works were in any way delaying completion.

107 In response to additional questions from Mr Bevan, Mr Roth stated that if he had initially known the costs now sought, he would not have authorised Marjen to build the retaining walls. Further, if he had known the extent of the required retaining wall at the very beginning, he probably would not have built the house. He could have lived with the 600mm cut as initially shown. He regards the current retaining walls as ugly. He could have built a 600 mm retaining wall himself as he had built retaining walls previously. He could possibly have built the 1800 mm wall but conceded it would have taken him much longer to do so.

108 Mr Roth questioned the accuracy and contemporaneity of the entries on the job cards.

Findings

109 Mann (1 and 2) involved a major building contract as defined in the Act which had been entered into between Mr and Mrs Mann as owners and the respondent builder for the builder to construct two townhouses for the owners. The contract provided for progress payments at the completion of specified stages of the works. During construction, the owners orally requested 42 variations. Neither the owners nor the builder provided written notice as required by section 38 of the Act for the variations. After the builder provided an invoice for the variations, the owners repudiated the contract refusing to let the builder back on site. The builder accepted the repudiation and the contract was terminated prior to completion of all works. The builder instituted VCAT proceedings for contractual breach damages or alternatively restitution on a quantum meruit. VCAT found for the builder in restitution. The owners' appeal was dismissed by both the Supreme Court and Court of Appeal (Mann 1) but was upheld by the High Court (Mann 2).

110 Mann 1 was referred to in both the respondent's submissions and the applicant's submissions in reply. Even without regard to Mann 2, I accept the respondent's submissions that Marjen cannot rely on a quantum meruit.

In this proceeding, there was no repudiation issue, the building contract was not terminated and the works were completed. The building contract is relevant. There is no basis to argue, as the applicant has contended, the existence of a collateral contract. The Act applies to the building contract. However, as both the builder and the owner have not complied with clauses 12 and 13 of the building contract relating to variations, this proceeding falls for determination under sections 37 and/or 38 of the Act.

111 I have covered in some detail the evidence and arguments of the parties. Mr Roth did not give a lot of evidence. Mr Partl, by contrast, gave a significant amount of evidence. Neither of the parties kept sufficient records of dates of significance about the history of the works. Further complications in deciding on matters of fact included the emotional impact on the parties of the breakdown of a previously long and valued friendship and their markedly differing versions on key points and issues. The applicant's submissions in reply also went well beyond the confined purpose of such a document, being a response to any issues raised by the respondent in his submissions. Instead, the applicant sought to raise additional issues not covered in its own submissions. However, in large part I found these to be unclear, contradictory and unsupported by evidence.

112 Neither party disputes that they each failed to comply with any obligations placed upon them by sections 37 or 38 of the Act. Each party's evidence appeared to be that it was the other party that wished to vary the plans or specifications. Although this may be regarded as somewhat of a moot point given that the exculpatory sections 37(3)(b)(i) and (ii) and 38(6)(b)(i) and (ii) are expressed in identical terms, it was the council direction which required the front retaining wall. In the circumstances of this direction, having considered the wording of section 37(2)(b), and the role assumed by Marjen in obtaining plans, specifications, drawings and permit for the retaining wall, I find that CV 11 is a builder's variation.

113 Accordingly, for Marjen to become entitled to recover any money in respect of CV 11, it must satisfy me under section 37(3)(b) that:

(i) there are exceptional circumstances or it would suffer significant or exceptional hardship if it did not become entitled to so recover; and

(ii) it would not be unfair for the owner to pay.

114 There is no definition of 'hardship' in the Act. In F G O'Brien Limited v Elliott [1965] NWSR 1473 at p. 1475 Asprey J. expressed the opinion that 'hardship' would comprehend any matter of appreciable detriment whether financial, personal or otherwise and that each case must depend on its own particular facts.

115 In Pratley Constructions v Racine [2004] VCAT 2035 **(Pratley)**, the member at 7.19 noted in the context of section 37(3)(b)(i) that the use of the word 'significant' when considering whether the builder in that case had suffered 'significant hardship' requires that it add something to the meaning

and purpose of the subsection. After considering dictionary meanings of 'significant', used in the context of subsection (3), he adopted a meaning of 'of consequence'. However, in trying to assess the impact of the adjective in 'significant hardship', the member conceded that it is a value judgment and dependent on the factual circumstances of each case.

116 Pratley, although clearly not a binding decision, has been referred to with apparent approval in a number of subsequent Tribunal decisions dealing with sections 37 or 38 of the Act. In particular, 7.21 of the decision in Pratley has been reiterated where the member stated:

> Where there is no discussion and agreement or there is no estimate of cost then it is not fair to expect the owners to pay:….

117 In a manner somewhat similar to Marjen's reply to Mr Roth's submissions, I found Mr Partl's oral evidence to be unclear, vague or contradictory on key issues, with particular reference to each of the sequence of events leading to, and the reasons for, the increased size of the cut from the original 600mm, 'the agreement' for the construction of the retaining walls and when Marjen foresaw the need for a retaining wall.

118 Following on from these findings, in the context of subsection 3 (b), I have to first consider whether there are exceptional circumstances in relation to the works, the subject of the variation. I am not satisfied that the circumstances were exceptional. While the council direction was given during the construction at the framing stage, on the preponderance of Mr Partl's evidence, particularly in the context of his early inspection of the block of land, I am satisfied that the likelihood of a retaining wall was contemplated by Marjen prior to entering into the building contract. The reasons given by Mr Costoglou for the council direction appeared to be unexceptional and undisputed.

119 I am also not satisfied that if Marjen was unable to recover any money, it would suffer significant or exceptional hardship. I regard 'exceptional', like 'significant' as adding something to the meaning and purpose of the subsection. It is an integral part of what is protective legislation as has been earlier noted and it requires the appropriate interpretation.

120 I certainly do not in any way trivialise the total amount of the variation claimed or even the lesser amount of expenses already outlaid by Marjen on materials and equipment hire and in connection with the retaining wall permit application.

121 However, the subsection contemplates builders being unable to recover such sums in the absence of compliance with sections 37 or 38 unless they can bring themselves within the exculpatory subsections of 37(3)(b) and 38(6)(b). A substantive basis of Marjen's contention for payment of the variation is the position it is in with monies owing to the ATO and creditors. I cannot find any evidence that the subject and amount of this variation placed Marjen in this position and I also note that from the evidence of Marjen the amount of these liabilities has reduced from the

time they were first relied upon in this proceeding. While I accept that there were extraneous reasons for the delay in providing Mr Roth with CV 11, the delay itself objectively does not assist this argument of Marjen's about hardship.

122 In respect of section 37(3)(b)(ii), I am also not satisfied that it would not be unfair to Mr Roth for Marjen to recover the variation. The circumstances of the 'agreement' for the construction of the retaining walls remains unclear. However, in contrast to submissions of Marjen, I cannot find Mr Roth to be the author of his own misfortune. He was entitled to rely on Marjen. I also accept his evidence that he requested a quote for each of the retaining walls. Additionally, I accept from his evidence, particularly when considered in the light of his bank and loan – related documentation, that his financial position was very tight and that he did have a clear budget ceiling which should have been apparent to Mr and Mrs Partl given their involvement in the two quotes and assisting him in finding a loan facility. The requirements of section 37 were known to Marjen. If they had been complied with, Mr Roth could have considered all options. While this may have included not proceeding with the retaining walls when they were constructed, or even at all, he would have had the opportunity to investigate the implications and consequences of taking or not taking the various options. Finally, from Marjen's own evidence, no estimates were given, no attempts were made to even provide a realistic figure, the only figure given of $6500 was, on any view, a significant error and a contract variation of around 20% of the building contract price is major.

123 I therefore do not need to consider the set off of Mr Roth in light of the dismissal of Marjen's claim.

124 My orders otherwise reflect the dismissal of the claim and provide a timetable for costs submissions.

B. Josephs
Member