

Mann v Paterson Constructions Pty Ltd [2018] VSC 119

FACTS

The Manns (**The Applicants**) entered into a written domestic building contract with Paterson Constructions (**the Respondent**) for the Construction of two double storey townhouses on their property for the sum \$971,000.00 including liquidated damages payable for delays of \$500 per week.

One unit was completed approximately four (4) months after practical completion, and before unit two was completed, the applicants asserted that the Respondent had repudiated the contract and purported to terminate the contract by accepting the alleged repudiation. Shortly thereafter, the Respondent asserted that the applicants conduct constituted a repudiation of the contract and purported to accept their repudiation.

The Respondent made an application to VCAT seeking relief on a quantum meruit basis or, in the alternative, sums allegedly due under the contract. Both forms of relief included the amounts for variations made orally to the works.

VCAT found that the applicants had orally requested the variations claimed by the respondent, that they had repudiated the contract by their purported termination and that the Respondent had determined the contract when it accepted the repudiation.

VCAT made orders that the Applicants pay the Respondent the quantum meruit sum of \$660,526.41, being the value of the work performed by the respondent (**VCAT order**). In reaching the decision, the VCAT order was less the sums already paid by the applicants and the cost of rectification of the defects

The Applicants appealed to the Supreme Court on the basis that VCAT had misunderstood or misapplied the principles relating to the valuation of the work on a quantum meruit basis and that VCAT had erred in allowing the respondent to recover for variations to the works on a quantum meruit basis.

The judge dismissed the appeal, however granted the Applicants leave to appeal for the limited purpose of correcting 'a minor mathematical error' in the VCAT order.

The Applicants seek leave to appeal against that decision on four proposed grounds.

ISSUES

- i. Ground 1 – whether the judge erred in holding that VCAT had applied the correct legal principles in valuing the Respondents work on a quantum meruit basis by going outside the value purported within the contract.
- ii. Ground 2 – contends that this proceeding affords a particularly good opportunity for this court to reconsider the correctness of the long-established principle that a builder who accepts an owner's repudiation and determines a building contract is entitled to sue the owner in quantum meruit.

- iii. Ground 3 and 4 – whether the judge erred in finding that s.38 of the Domestic Building Contracts Act 1995 did not prevent the Respondent from recovering the value of the work covered by the variations on a quantum meruit basis.

FINDING

In assessing Ground 1, the court relied on the principle established in *Renard Constructions v Minister for Public Works* where, in assessing a claim for quantum meruit, the court will ascertain the fair and reasonable value of the work performed, the measure of the restitution remedy available, and the value of the benefit conferred on the party which received it. The court found that this assessment can be done independently of the contract which has been rescinded.

“As Meagher JA said in Renard — that it would be ‘extremely anomalous’ if the defaulting party could invoke the contract which it has repudiated to impose a ceiling on the amounts recoverable”

In assessing Ground 2, the court dismissed this ground on the basis that it is unable to consider the correctness of the decision’s in the following cases that assess quantum meruit; Sopov, Renard and Iezzi.

In assessing Grounds 3 and 4, the judge considered s.38 and construed key words and phrases to assess whether recovery under s.38 is limited to claims for variations in contract, and not for claims for variations in quantum meruit.

In construing s.38, the judge found that s.38(2) is wide enough to accommodate an oral request for a variation, and does not confine it to writing, as well as “any money” to mean, any money claimed by a builder for a variation to include money on a cost-plus basis, as well as under contract

The judge held that although s.38 does not apply to this case regarding quantum meruit, the original judge did not err in finding that the respondent can attempt to recover in reliance on a variation.

The judge held that there is nothing in s.38 to construe the section as being confined to contractual claims for variations.

QUOTE

Their honours held that:

[73] It is clear from the authorities that, as a matter of law, in a quantum meruit claim, the actual costs incurred are not determinative and do not impose a ceiling on the amount that can be recovered.

[74] It follows from the above analysis that the administrative law distinction between permissible considerations and mandatory considerations on which the judge relied is not entirely apt when applied to conflicting evidence in a quantum meruit case. As we have said, evidence of the contract price and actual costs incurred by a builder is relevant and admissible but the weight to be given to it may vary depending on the circumstances of each case.

[145] Moreover, if claims in quantum meruit were excluded by the section, an anomalous result would follow. In the situation where the prohibition in s 38(6) applies but no contractual price has been agreed for the variation, s 38(7) is not attracted, for the reasons explained above. No part of s 38 would fill the gap by giving the builder an entitlement to payment. Accordingly, if claims in quantum meruit are within the scope of s 38(6), a builder in that situation could recover nothing at all. There is no apparent reason why the provision would pursue that objective, and no language suggesting such an outcome. The construction of s 38 that we have adopted would enable a builder to recover payment for a variation on a quantum meruit basis in the situation postulated above.

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IMPACT

This case shows that in assessing a claim in quantum meruit where one party has wrongly repudiated the contract, the court will not be bound by the contract price, or possibly the written contract, and will take into account all relevant evidence when determining the claim by the innocent party.

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