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Case Alert

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Mann v Paterson Constructions Pty Ltd [2019] HCA 32

17 OCTOBER 2019

AT A GLANCE

- The High Court has ruled a builder was not owed for variations for "work and labour done" after a building contract was terminated.
- The High Court unanimously found Section 38 of the *Domestic Building Contracts Act* 1995 (Act) excludes quantum meruit restitution for variations where the process does not comply with the Act's requirements.
- This decision shows that builders who fail to follow the formal variation process under the Act are at risk.

BACKGROUND

The case concerned a dispute between two owners, Mr and Mrs Mann, and their builder, Paterson Constructions Pty Ltd regarding a "major domestic building contract" for the construction of two townhouses.

During construction, the owners requested 42 variations to the contract without giving formal notice as required by section 38 of the Act. The builder completed the variations without giving written notice as required by the Act. The dispute arose when the builder sent an invoice to the owners for the variations work. The owners repudiated the contract and the builder terminated the contract by accepting that repudiation.

The builder sought to recover payment for its work, including the variations, under the building contract for quantum meruit restitution, being a claim for an amount that represents the benefit of the services provided. The claim for restitution, made before VCAT, was approximately $945,000. This amount was considerably greater than its alternative claim for approximately $447,000 under the building contract.

The builder was successful in VCAT in its claim for restitution and, after deductions for rectification of defective works, was awarded approximately $660,500. The decision was upheld on appeal to the Supreme Court of Victoria and the Court of Appeal.

THE HIGH COURT'S DECISION

The matter went to the High Court, with the issues on appeal being:

1. whether section 38 of the Act prevented the builder from claiming relief in the form of quantum meruit restitution in respect of variations to the building contract;
2. whether the builder was entitled to sue on a quantum meruit basis for the works carried out by it; and

3. if so, whether the price of the contract operated as a ceiling on the amount claimable under a quantum meruit claim.

The High Court held that:

- Section 38 of the Act prevented the builder from claiming relief in the form of quantum meruit restitution in respect of variations to the building contract,
- the builder's only right to recovery in respect of stages of work already completed by the time of termination was for the amount due under the contract for that stage. The builder could claim damages for breach of contract in respect of the uncompleted stages of the contract, and
- by majority (Nettle, Gordon and Edelman JJ):
  - the builder could elect to pursue restitution (instead of breach of contract) for the work and labour done in respect of uncompleted works under the contract (that were not variations), but that the amount recoverable would be determined by reference to "the rates prescribed by the contract", and
  - that recovery would be restricted to a "fair value calculated in accordance with the contract price or the appropriate part of the contract price".

IMPLICATIONS OF THE DECISION

The decision highlights the importance of contractual remedies available under building contracts. It also puts a spotlight on the formal variation process under the Act, which should be followed by all builders, architects, project managers and other contract administrators.

Insurers and insureds should not underestimate the consumer orientated nature of the Act. It is designed to provide a mechanism for the fair, swift, efficient and cheap resolution of domestic building disputes. Informal verbal variations are at odds with that objective, as they can give rise to lengthy and complicated dispute.

NEED TO KNOW MORE?

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