KREISSON

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"How Much is Your Work Worth?"

High Court revisits Quantum Meruit

QUANTUM MERUIT REVISITED

After a period of uncertainty, a recent High Court decision has provided some clarity in relation to the principles of quantum meruit.

In a decision of the High Court delivered 9 October 2019 in the matter of *Peter Mann & Anor v Paterson Constructions Pty Ltd* [2019] HCA 32[1], a majority of the judges found that a builder can no longer seek quantum meruit as compensation where the builder has accrued rights to payment under the contract.

Where a builder does not have accrued rights under a contract, the High Court said that claim for quantum meruit is available but the amount claimed cannot be more than the contract price for those works.

The case also dealt with a number of other matters including:

- The risks of oral agreements to vary works under a contract;
- Damages arising from wrongful contract termination; and
- The role of remedies such as quantum meruit.

FACTS AND BACKGROUND

The Contract

On 4 March 2014 Mr and Mrs Mann (the Owners) entered into a "major domestic building contract" with Paterson Constructions Pty Ltd (the Builder) for the construction of two double storey townhouses on the Owners' land at a fixed price of $971,000 (the contract). The contract provided for "progress payments" to be made at the completion of certain stages of the work.

Oral Variations

During the course of the work, the Owners orally requested 42 variations without giving any written notice in accordance with the contract and as required by s 38 of the *Domestic Building Contracts Act 1995* (Vic) (the Act), and the Builder carried out the requested variations, also without giving written notice as required by the contract or Act.

The Variation Claim

On 17 March 2015, the Builder issued an invoice claiming variations and/or extras in the sum of $48,844.92 in respect of Unit one, for which a certificate of occupancy had been obtained.

Allegation of Repudiation

In April 2015, the Owners alleged that the Builder refused to carry out further works until the invoice for the variation work was paid, and by doing this together with other alleged breaches, the Builder's conduct amounted to repudiation, which the Owners accepted.

The Builder, in reply denied that it had repudiated the contract and alleged that the Owners' conduct was itself repudiatory, which the Builder subsequently accepted.

Builder Claim

The Builder brought a claim in the Victorian Civil and Administrative Tribunal (VCAT) for damages for breach of contract or alternatively restitution for work and labour done and materials supplied.

VCAT Decision

VCAT upheld the Builder's claim to a restitutionary remedy on a quantum meruit basis of an amount reflecting the value of the benefit conferred on the Owners. That assessment was considerably more than the Builder might have recovered had

the claim been confined to one for breach of contract. VCAT held that s 38 of the Act did not apply to a claim for restitution and allowed the variations as part of the value of works to be assessed.

Appeal by Owners

An appeal by the Owners to the Supreme Court of Victoria was dismissed.

The Owners' further appeal to the Court of Appeal of Victoria was also dismissed, on essentially similar bases.

By grant of special leave, the Owners appealed to the High Court.

HIGH COURT DECISION

All of the Judges of the High Court were ultimately in agreement to allow the appeal of the Owners with costs. However, three separate decisions were delivered with differing views as to the question of damages following repudiation of the contract by:

- Kiefel CJ, Bell and Keane J
- Gageler J
- Nettle, Gordon and Edelman JJ

Each decision analysed the history of restitutionary relief and various international approaches to this area of law.

Ultimately Nettle, Gordon and Edelman JJ, and Gageler J (for narrower reasons separately delivered) formed the majority decision (**majority decision**).

The High Court made orders that the appeal was allowed with costs, set aside the decision of the Court of Appeal of Victoria and that the appeal be allowed with costs.

The matter was sent back to the Victorian Civil and Administrative Tribunal for further determination according to this decision as to the value of the moneys owed to the Builder.

HIGH COURT DECISION RE DAMAGES AFTER TERMINATION FOR REPUDIATION

The Majority Decision

As to the Builder's claim, excluding variations, the majority decision determined the Builder's right to recovery as follows:

1) for staged work completed up until the time of termination the only right to recovery was for the amount due under the contract on completion of that stage and any damages for breach of contract (but not on a quantum meruit basis); and

2) that, in respect of any incomplete stage of the contract at the time of termination, the Builder was entitled to claim:

   a) damages for breach of contract; or, in the alternative,

   b) for restitution on a quantum meruit basis;

   but that the amount so recoverable should not in this case exceed a fair value calculated in accordance with the contract price or the appropriate part of the contract price.

The Minority Decision

The minority decision took the position that in the facts of this case there was no reason for a remedy in restitution as there was a claim in contract. However, the majority decisions prevailed leaving a limited window for the Builder to elect damages be calculated on a quantum meruit basis for the incomplete stage work at the time of termination. The disclaimer being, however, that the contract price acts as a limitation on the sum recoverable.

Limitation on Sum Recoverable

Their Honours Nettle, Gordon and Edelman JJ summarised the reasons for limiting the sum recoverable for restitution to the contract value as follows:

> *"205 … where a contract is terminated for breach, it continues to apply to acts done up to the point of termination, and it remains the basis on which the work was done. There is, therefore, nothing about the termination of the contract as such that is inconsistent with the assessment of restitution by reference to the contract price for acts done prior to termination. The contract price reflects the parties' agreed allocation of risk. Termination of the contract provides no reason to disrespect that allocation…*
>
> *217 … in this matter, it was not suggested that there are circumstances sufficient to warrant departure from the prima facie position that a claimant should not achieve a better result by way of restitution than under the contract. It follows that VCAT was in error in assessing the amount of restitution otherwise than in accordance with the contract rates."*

WHAT DID THE HIGH COURT SAY ABOUT THE VARIATIONS

The High Court unanimously held that the Builder was not entitled to recover any money for variations other than in accordance with s 38 of the Act which requires variation to be in writing.

The Court excluded the availability of restitutionary relief for variations implemented otherwise than in accordance with that section.

The decision looked at the intention and context of the Act as a whole and found as follows[2]:

> *"By their text, context and purpose, ss 37 and 38 reflect a legislative intent to cover the field of the remuneration payable to builders for work and labour done in response to requested variations under major domestic building contracts. To permit any alternative form of recovery for work under such a variation – whether contractual or restitutionary and including pursuant to s 16 or s 53 – would have the effect of frustrating or defeating, or at least operating inconsistently with, that intent."*

This decision is a warning of the harsh consequences of failing to comply with statutory notice provisions. Builders must be vigilant in complying with statutory and contractual requirements in order to protect their rights to payment for all work undertaken.

SOME TAKEAWAY LESSONS

The High Court decision of Mann v Paterson has clarified the law on the calculation of damages flowing from termination of a contract and restricted the use of a quantum meruit in these types of cases.

There are a number of take away messages:

- This decision is limited to the context of the facts of a staged contract and will be relevant on restricted application as a result.
- There is still an outstanding question as to how the decision will apply to “on account” contracts for payment at the time of termination.
- The length (with these proceedings arising from a 2014 contract and 2015 termination) and cost (of three appeals) of this case serves as a warning to parties to be exceedingly careful in the termination of a contract and to seek advice as to their position.
- Builders should be aware of the contractual limitations on any claims flowing as a result of a wrongful termination.
- This case should encourage parties to place the even greater emphasis on contract negotiations and terms as well as compliance with contractual and legislative requirements for the fair payment of works performed.

For further information, please contact us.

CONTACT US

David Glinatsis (Director, Kreisson) and Catherine Lucas (Senior Associate). For more information, contact us at excellence@kreisson.com.au or on 02 8239 6500.

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1.http://classic.austlii.edu.au/au/cases/cth/HCA/2019/32.html

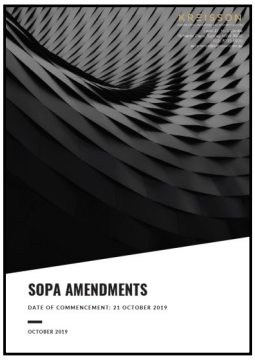
2.Per Nettle, Gordon and Edelman JJ at [158]

FOR ADDITIONAL READING—SEE OUR EBOOKS

Developer Building Bonds

Developers are now required to lodge a building bond with NSW Fair Trading to the value of 2 percent of the contract value for works to secure funding for the rectification of defective building work.

Click here to find out what you need to know



SOPA Amendments

The amendments to the Building and Construction Industry Security of Payment Act 1999 (NSW) commenced on 21 October, 2019; posing significant changes upon the building and construction industry.

Click here to find out what you need to know

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