

MANN & ANOR v PATERSON CONSTRUCTIONS PTY LTD (M197/2018)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2018] VSCA 231

Date of judgment: 12 September 2018

Special leave granted: 14 December 2018

In March 2014, the appellants entered into a written domestic building contract with the respondent for the construction of two townhouses on a property in Blackburn. The works were not completed by the due date of 17 December 2014. Unit 1 was completed and handed over to the appellants on 19 March 2015. On 16 April 2015, before Unit 2 was completed, the appellants asserted that the respondent had repudiated the contract and purported to terminate the contract by accepting the alleged repudiation. On 28 April 2015, the respondent asserted that the appellants' conduct constituted a repudiation of the contract and purported to accept their repudiation.

The respondent made an application to the Victorian Civil and Administrative Tribunal ('VCAT') in which it sought relief on a quantum meruit basis or, in the alternative, sums allegedly due under the contract. Both forms of relief included amounts for variations to the works. VCAT found that the appellants 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 that repudiation on 28 April 2015. The appellants were ordered to pay the respondent the quantum meruit sum of \$660,526.41, being the value of the work performed by the respondent, less the sums already paid by the appellants and the cost of rectification of defects.

The appellants sought leave to appeal against the VCAT order to the Supreme Court of Victoria. Cavanough J granted leave to appeal but dismissed the appeal other than correcting a minor mathematical error in VCAT's order.

In their unsuccessful appeal to the Court of Appeal (Kyrou, McLeish and Hargrave JJA) the appellants contended that the Court should 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; and that the trial judge erred in finding that s 38 of the *Domestic Building Contracts Act 1995* (Vic) ("the Act") did not prevent the respondent from recovering the value of the work covered by the variations on a quantum meruit basis.

The appellants submitted that the availability of quantum meruit in a case such as the present has been the subject of criticism and referred to the observations made by the Victorian Court of Appeal in *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510. The criticism rests on the following propositions:

1. When a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the

contract, but rights which have already been unconditionally acquired are not divested or discharged unless the contract provides to the contrary.

2. If there is a valid and enforceable agreement governing the claimant's right to payment, there is 'neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration'.
3. Accordingly, there is no room for a restitutionary remedy since the builder's claim to payment is governed by the contract under which the work was carried out up to the point of repudiation.

The Court in *Sopov* stated that unconstrained by authority, they might well have upheld the argument that the builder's only remedy was to sue on the contract. But they were heavily constrained by authority. They noted that the right of a builder to sue on a quantum meruit following a repudiation of the contract had been part of the common law of Australia for more than a century. It was supported by decisions of intermediate courts of appeal in three States. If that remedy was to be declared to be unavailable as a matter of law, that is a step which the High Court alone could take.

In the present case, the Court of Appeal endorsed the observations made by the Court in *Sopov*, finding that nothing has transpired in the nine years since those observations were made which lessened their force. In the absence of a submission by the applicants that *Sopov* and the other two decisions of intermediate courts of appeal were plainly wrong, however, no occasion arose for the Court to consider the correctness of those decisions.

With respect to the effect of s 38 of the Act, the Court held that, in accordance with the principle of legality, s 38 should not be construed as abrogating the right of a builder to sue on a quantum meruit following acceptance of an owner's repudiation of a contract, or significantly narrowing the scope of that right by excluding work performed under a variation, except by clear words or necessary intendment. They found there was nothing in s 38 which stated that it extended to claims in quantum meruit or which necessarily required that it be construed in that manner.

The grounds of the appeal include:

- The Court of Appeal erred in holding that the respondent builder, having terminated a major domestic building contract upon the repudiation of the contract by the appellants, was entitled to sue on a quantum meruit basis for the works carried out by it.