



HIGH COURT OF AUSTRALIA

9 October 2019

PETER MANN & ANOR v PATERSON CONSTRUCTIONS PTY LTD
[2019] HCA 32

Today the High Court unanimously allowed an appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria concerning remuneration for work and labour done under a contract to which the *Domestic Building Contracts Act 1995* (Vic) ("the Act") applied.

Mr and Mrs Mann ("the Owners") entered into a "major domestic building contract" (as defined in the Act) with Paterson Constructions Pty Ltd ("the Builder") for the construction of two townhouses on the Owners' land at a fixed price. The contract provided for "progress payments" to be made at the completion of certain stages of the work. 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 Act, and the Builder carried out the requested variations, also without giving written notice as required by s 38. Section 38 relevantly provides that a builder is not entitled to recover any money in respect of a variation unless the builder has complied with the notice requirements of the section (s 38(6)(a)) or the Victorian Civil and Administrative Tribunal ("VCAT") is satisfied: that there are exceptional circumstances or that the builder would suffer significant or exceptional hardship; and that it would not be unfair to the building owner for the builder to recover the money (s 38(6)(b)). After an invoice claiming an amount for variations was raised, the Owners repudiated the contract, and the Builder accepted the repudiation as bringing the contract to an end.

The Builder brought a claim in VCAT for damages for breach of contract or alternatively restitution for work and labour done and materials supplied. VCAT upheld the Builder's claim to a restitutionary remedy for an amount reflecting the value of the benefit conferred on the Owners, which was assessed as being the reasonable value of the work and materials requested and the benefit which the Owners received. That 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. An appeal by the Owners to the Supreme Court of Victoria was substantially dismissed, and the Owners' further appeal to the Court of Appeal of the Supreme Court of Victoria was dismissed, on essentially similar bases. By grant of special leave, the Owners appealed to the High Court.

The High Court unanimously held that s 38 of the Act excluded the availability of restitutionary relief for variations implemented otherwise than in accordance with that section, and thus that the Builder's only right of recovery for variations would be under s 38(6)(b) of the Act for the amounts prescribed by s 38(7). As to the remainder of the Builder's claim not in respect of variations, the Court unanimously held: (i) that the Builder's only right to recovery in respect of any stage of the contract completed by the time of termination was for the amount due under the contract on completion of that stage and any damages for breach of contract; and (ii) that, in respect of any uncompleted stage of the contract, the Builder was entitled to claim damages for breach of contract. A majority of the Court further held: (iii) that the Builder was entitled, in the alternative, to recover restitution for work and labour done and materials supplied in respect of uncompleted stages (other than for variations); but (iv) 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.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*