Construction Law Update

September 2018

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Legislative update

AUSTRALIA, NEW ZEALAND AND THE UK

National cladding update

Jeanette Barbaro | Bianca Pyers

A year on from the Grenfell tower tragedy, it is timely to again pause and revisit what is happening nationally and consider what small steps or great strides have been taken across Australia.

This is an overview of our latest *National Cladding September 2018 Alert*. It follows on from our *National Cladding September 2017 Alert* setting out what action has been taken nationally and in each State and Territory and gives an insight into what may be coming. At the beginning of each section of the *full Alert*, there is an 'at a glance' summary of the highlights, followed by a more in depth description of what each jurisdiction is doing and an insight into where we may be heading. Follow this link to read the *full Alert*.

Like the UK, Australian governments and regulators continue to grapple with how best to ensure such tragedies are not repeated. In the meantime, the Lacrosse building remains non-compliant. The Grenfell tower awaits demolition.

In Australia, we are starting to see real impacts on the industry fuelled largely by the response of insurers and property buyers whose increased awareness demands transparency before committing to buying property. In the background, regulators continue to investigate and take action.

In the UK, the *Independent Review of Building Regulations and Fire Safety Report* authored by Dame Judith Hackitt was released in May 2018 and voices a push towards a reconfiguration of the UK building industry. Further, the Housing, Communities and Local Government Committee (part of the UK House of Commons) recently released its response to Dame Hackitt's Report in the *Independent Review of Building Regulations and Fire Safety: Next Steps Report* which published its support for a ban on the use of combustible cladding materials. Ultimately, this second report has gone one step further than Dame Hackitt's Report which did not recommend a ban. In conjunction with these movements, a *public consultation* is underway which will receive submissions on how a ban may operate and within what parameters. Submissions closed on 14 August 2018. The submissions will be reviewed and the UK government will then release its response. Many expect that the UK outcome will guide the Australian response.

Jurisdictional overview at a glance

- **Commonwealth** – Inquiries and public consultation continue, with the States and Territories largely tasked with formulating solutions. A national approach to insurance to building practitioners is favoured.
- **Victoria** – Ministerial Guideline issued in relation to building permits for the use of Prescribed Combustible Products, the regulators powers have been increased and proposed legislation is before parliament seeking to establish a loan repayment scheme administered by municipal councils to assist building owners cover the cost of replacement cladding works.
- **Queensland** – The *Building and Other Legislation (Cladding) Amendment Regulation 2018* (Qld) has been introduced to implement a system of registration requiring private building owners to record the fire-safety of their buildings.
- **New South Wales** – The Fair Trading for NSW Commissioner has banned certain cladding products and the cladding taskforce has completed its assessment of over 1,500 buildings with 400 more to be assessed.
- **South Australia** – Audits continue with 77 buildings currently requiring further assessment to determine if they need remedial works.
- **Western Australia** – Audits continue with risk assessments to be performed over 242 buildings.
- **Tasmania** – Tasmania is proposing to strengthen its regulations to provide guidance on how cladding should be accredited, installed and used.

- **Canberra** – Audits continue with a review group established to help guide the ACT government on whether manner of installation poses an unacceptable risk to occupants.
- **UK** – Replacement cladding with a honeycomb structure (Vitracore G2 – largely used in Australia and overseas) has recently failed to pass a full-scale BS-8414 fire safety test in the UAE.
- **New Zealand** – Six CodeMark Certificates for cladding products suspended until manufacturers can provide evidence demonstrating the fire safety of each product.

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NEW SOUTH WALES

Section 48K is not a universal time-bar – alternative forums may still be available

Home Building Act 1989 (NSW) - section 48K

Andrew Hales

Limitation periods for building claims relating to building goods or services

In our *July 2018 edition of Construction Law Update*, we reported on *Tom v Jenkins* [2018] NSWCATCD 7 which dealt with the statutory time bar pursuant to section 48K(3) of the *Home Building Act 1989* (NSW) (**HBA**) to remove jurisdiction of the NSW Civil and Administrative Tribunal (**Tribunal**) for building claims lodged more than 3 years after the supply of the relevant building goods or services.

Alternative forums may still be available

We note that section 48K(3) deals only with the removal of the Tribunal's jurisdiction to hear these matters and does not apply to limit alternative forums of competent jurisdiction that are otherwise available.

In that regard, in *Vero Insurance Ltd v Buckle*; *Reynell v Buckle* [2008] NSWSC 73, Malpass AsJ remarked at [65] - [66] that:

> *'…[The relevant claim] has been instituted well out of time and [therefore] the Tribunal has no jurisdiction to entertain it.*
>
> *This conclusion does not necessarily mean that the Buckles may be without remedy. If they do have a viable claim, relief may be available to them in a court of competent jurisdiction.'*

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QUEENSLAND

Architects and engineers are now links in the chain of responsibility for non-conforming building products

Queensland Building and Construction Commission Act 1991 (Qld)

Michael Creedon | Petrina Macpherson | Hazal Gacka

Background

The *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**) was amended in November 2017 by the *Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017* (Qld) to, among other things, introduce various duties regarding building products upon supply chain participants in the 'chain of responsibility'.

In summary, the duties imposed on those participants include a primary duty to ensure that a building product is not a non-conforming building product for an intended use. See our previous analysis in the *November 2017 edition of Construction Law Update* for more detailed information on the amendments.

Recent amendments to the QBCC Act commenced on 11 September 2018

The second reading of the *Plumbing and Drainage Bill 2018* (**Bill**) on 4 and 5 September 2018 introduced amendments to the QBCC Act to include architects and engineers in the chain of responsibility and to clarify the broad application of the obligations in the non-conforming building product provisions of the QBCC Act. The Bill was passed on 5 September 2018 and assented to on 11 September 2018. Accordingly, the obligations under the QBCC Act with respect to non-conforming building products now apply to designers, manufacturers, importers, suppliers, installers, architects and engineers.

Further details of the amendments

The amendments include an express definition inserted for a 'responsible person, for a building product' to include:

- any person who designed, manufactured, imported or supplied the product;
- any person involved in the installation of the product; and
- an architect or engineer who, in designing a building, specified that the product be associated with the building.

Definitions for 'install' and 'installer' have been inserted to capture any person who personally installs, or engages, instructs or supervises others to install, a building product in a building.

The explanatory notes to the Bill state:

> *'The proposed amendments put it beyond doubt that the chain of responsibility is intended to apply to builders and those procuring the services of other contractors or tradespeople to install a building product.*
>
> *The role of architects and engineers is also critical in addressing incorporation of non-conforming building products in to our built environment. The proposed amendments are intended to include architects and engineers in the chain of responsibility for a building product, when they specify a building product as part of a building's design.'*

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VICTORIA

New Ministerial Directions for the efficient, economical and effective delivery of public construction procurement

Ministerial Directions for Public Construction Procurement in Victoria

Cameron Ross | Tom Kearney | Lucy Wang

The Ministerial Directions for Public Construction Procurement in Victoria (**Directions**) took effect on 1 July 2018 and supersede Ministerial Directions No.1, No.2 and No.4.

The Directions apply to public construction procurement undertaken by or on behalf of a department or public body. Public construction procurement is defined in the Directions as activities which relate to the engaging of suppliers to perform works or construction services.

The Directions identify their purpose as supporting the efficient, economical and effective delivery of public construction procurement in Victoria.

The Directions include guiding principles in relation to tendering, managing probity, transparency in procurement, panels, contracting, standards and accountability.

In accordance with the Directions the Department of Treasury and Finance (**DTF**) has published online a suite of Victorian public construction contracts and consultancy agreement which have been approved for use in public construction procurement in Victoria as well as a list of other contracts that have been approved for use by Departments and agencies.

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In the Australian courts

NEW SOUTH WALES

Don't wait to seek legal advice following an adverse adjudication!

In the matter of Powerpark Systems Pty Ltd [2018] NSWSC 793

Richard Crawford | Claire Laverick

Key Point

Parties must give prompt consideration to their rights to challenge an adverse adjudication to avoid being time-barred from making certain arguments. In NSW, a party has three months to seek judicial review of a resulting judgment on the basis of jurisdictional error.

Facts

The plaintiff, Powerpark Systems Pty Ltd (**Powerpark**), is an installer of solar panels. Powerpark engaged the respondent, Shoemark Electrical Pty Ltd (**Shoemark**), to undertake various supervisory roles on projects in NSW and Queensland.

Shoemark issued a payment claim under the B*uilding and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) for $44,811.11 in respect of services at two NSW sites and one Queensland site.

Powerpark responded with a payment schedule alleging defective work undertaken by Shoemark at one of the NSW sites, agreeing to pay $24,956.97 and noting that it would be pursuing Shoemark for rectification costs if the matter was not resolved.

Shoemark applied for adjudication of its claim, describing the project location as 'Sydney, Central Coast' but the project name as 'Sunny Queensland LAFHA' – an apparent reference to a disputed Queensland project which is outside of the jurisdiction of the SOPA.

On 11 October 2017, the adjudicator determined that the amount payable by Powerpark to Shoemark was $44,811.11 but it was clear from the adjudicator's reasons that he proceeded on the basis that Shoemark's claim was for construction work at project sites within NSW. Powerpark subsequently issued invoices to Shoemark for the rectification costs of the alleged defects in the work performed by Shoemark.

On 25 October 2017, Shoemark served a creditor's statutory demand on Powerpark for $48,230.74 and, on 27 November 2017 judgment pursuant to section 25 of the SOPA was entered in the Local Court for Shoemark in respect of that demand for the amount of $48,230.74 (comprising the adjudicated amount, adjudication fees and interest).

Basis of action against Shoemark

Powerpark sought an order under section 459G of the *Corporations Act 2001* (Cth) (**CA**) to set aside the demand on three grounds:

(1) there was a 'genuine dispute' about the existence or amount of debt pursuant to section 459H(1)(a) of the CA because one of the contracts was performed in Queensland, which is outside of the jurisdiction of the SOPA, thus affecting the adjudication certificate and subsequent judgment by jurisdictional error;

(2) this jurisdictional error constituted 'some other reason' why the demand should be set aside pursuant to section 459J(1)(b) of the CA; and

(3) there was also an offsetting claim against Shoemark pursuant to section 459H(1)(b) of the CA for its defective work and for Powerpark's loss of profits.

Decision

Gleeson JA held that Powerpark had failed to establish that the statutory demand should be set aside on the basis of the first and second grounds . However, there were some glimpses of sun for Powerpark as it was successful in establishing an offsetting claim resulting from Shoemark's defective workmanship. The demand was reduced from $48,230.74 to $21,483.14.

No 'genuine dispute'

Notwithstanding a concession from counsel for Shoemark that the SOPA did not apply to the work performed in Queensland, his Honour held that once the adjudication certificate had been filed pursuant to section 25 of the SOPA, the resulting judgment was not void.

His Honour pointed out that as such a judgment may be quashed by judicial review on the basis of jurisdictional error, but since Powerpark had not made such an application (or an application to extend the time for commencing such proceedings), it was out of time to commence such proceedings (the relevant limitation period in NSW being three months from the date of the decision).

'Some other reason' to set aside the claim

His Honour referred to previous authority which held that the power under section 459H(1)(b) of the CA should not be activated unless the decision to do so is supported by a sound or positive ground or good reason relevant to the purpose of the power. His Honour remarked that generally there will not be 'some other reason' for setting aside the statutory demand if to do so would have the practical effect of granting a stay of the judgment. However, his Honour did accept on authority that there was no rigid rule to confine the scope of exercising this power.

In the present case, his Honour was not persuaded to exercise this power as Powerpark had not applied to stay the judgment in the local court or applied for an extension of time to commence proceedings for judicial review seeking relief to quash the adjudicator's determination.

Further, no evidence had been led relevant to the exercise of the court's power to grant an extension of time for the commencement of judicial review proceedings.

Offsetting claim

The test for an offsetting claim is whether the court is satisfied that there is a serious question to be tried where there is such a claim, or that the claim is not frivolous or vexatious.

His Honour held that there was a plausible, cogent and quantifiable offsetting claim for defective work carried out by Shoemark.

However, Powerpark failed to adduce evidence beyond bare assertion to make out a claim for additional offset damages arising from the loss of chance for deprivation of commercial opportunity on other projects arising from Shoemark's defective work, hence the partial reduction of the demand amount rather than the dismissal of the whole demand.

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Director reprimanded for company's failure to comply with rectification orders

Younan v Commissioner for Fair Trading [2018] NSWCATOD 9

Richard Crawford | Misha Chaplya | Athena Chambers

Key Point

The director of a licensed construction company has been reprimanded under the *Home Building Act 1989* (NSW) (**Act**) for the company's failure to comply with a rectification order.

Significance

Directors and other office holders of a company can be held personally liable for a company's failure to comply with a Fair Trading rectification order.

Facts

Nazero Constructions Pty Ltd (**Company**) received a rectification order from the Commissioner for Fair Trading, Department of Finance, Service and Innovation (**Fair Trading**) in respect of a leak in a residential apartment complex that they had constructed. Mr Wardy Younan (**Director**), in his capacity as director of the Company, was responsible for complying with this rectification order.

Although the Company attempted to rectify the defect on a number of occasions, those attempts were ultimately unsuccessful and Fair Trading fined the Director $3,000 under section 54 of the Act.

The Director appealed this decision arguing that he had used all due diligence to prevent the non-compliance which is a statutory defence.

Decision

The Tribunal ultimately held that the Director was liable for the Company's failure to comply with the rectification order. This was despite the fact that he had made arrangements for the defect to be remedied, and that it could not be established that the Company was responsible for the defect.

However, the Tribunal held that imposing a monetary penalty was not appropriate in the circumstances and substituted Fair Trading's decision to fine the Director with a decision to reprimand him.

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QUEENSLAND

Subcontractor's ability to enforce its charge over moneys payable to head contractor is uncertain when head contractor goes insolvent

Crib Insulation Pty Ltd v The Ashtay Group Pty Ltd (In Liquidation) & Anor [2018] QDC 185

Michael Creedon | Petrina Macpherson | Emma Page

Key Point

The enforceability of a charge in favour of a subcontractor, over moneys payable to the head contractor, may be limited in circumstances where the head contractor goes insolvent during the project and the owner claims a set-off against moneys that it owes to the head contractor.

Significance

Courts will not readily enforce, on a summary basis, a charge in favour of a subcontractor where a head contractor goes insolvent and there is a live issue as to whether the owner owes the head contractor moneys, to which the charge can attach. Such circumstances require a trial.

The trial of this matter will consider whether a charge under the *Subcontractor's Charges Act 1974* (Qld) (**SC Act**) takes priority over a set-off under the *Corporations Act 2001* (Cth). The practical implications of any trial decision will be potentially far reaching. We will provide a further update in due course.

Facts

Between November 2016 and February 2017, Crib Insulation Pty Ltd (**Subcontractor**) carried out works under a subcontract with The Ashtay Group Pty Ltd (**Head Contractor**).

The Head Contractor was put into liquidation on 2 March 2017. In respect of the charge in its favour that arises pursuant to section 5 of the SC Act (**charge**), the Subcontractor served a valid notice of claim on the Head Contractor and the owner of the site, Annerley Views Developments (**AVD**) pursuant to section 10 of the SC Act.

The Subcontractor commenced proceedings to enforce the charge and filed an application for the following relief:

- summary judgment against AVD on the basis that AVD had either:
  - no real prospect of successfully defending the claim and there was no need for a trial; or
  - failed to discharge its disclosure obligations; or
- in the alternative to summary judgment against AVD:
  - certain paragraphs of AVD's defence be struck out; or
  - the summary judgment application be adjourned with orders placing the matter on the Commercial List and the delivery of particulars and further disclosure by AVD; and
- default judgment against the Head Contractor.

AVD opposed the relief sought and contended it was entitled to a set-off against any amount payable to the Head Contractor and further that any amount payable to the Head Contractor could not be determined until construction works were complete. The Head Contractor did not defend the application.

The Subcontractor and AVD were in dispute as to the relevant facts and as to whether AVD was entitled to a set-off under its contract with the Head Contractor, under common law or under section 553C of the *Corporations Act 2001* (Cth).

Decision

The court dismissed both of the Subcontractor's applications for summary judgment against AVD on the basis that the Subcontractor's claim involved complex questions of fact and law.

Instead, directions were made and the matter was placed on the Commercial List to proceed to trial.

The court did, however, grant default judgment against the Head Contractor despite the live dispute between the Head Contractor and AVD.

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Asbestos contamination – Warranties under standard form REIQ contract

Intensia Pty Ltd v Nichols Constructions Pty Ltd [2018] QCA 191

Julie Whitehead | Allie Flack | Sam Rafter

Key Point

The contamination warranties in the standard form Real Estate Institute Queensland (**REIQ**) Contract for the Sale of Land are point-in-time warranties as at the date of the contract and generally do not apply to contamination discovered after the date of contract.

Facts

On 2 October 2012, in respect of three existing freestanding dwellings on three adjoining parcels of land respectively, Nichols Constructions Pty Ltd (**Nichols Constructions**) obtained a building assessment report and a notice that its development application for the demolition of the dwellings had been approved. The building assessment report advised that the land may have asbestos and therefore contained a condition that all removal of asbestos be carried out by a person holding an 'A' class licence under the *Workplace Health & Safety Regulation 1997* (Qld).

On 10 October 2012, Nichols Constructions engaged a builder to demolish the three dwellings. The builder engaged an asbestos removal contractor to remove the asbestos, timber and windows. The asbestos contractor had a 'B' class licence which only allowed him to remove bonded asbestos. The asbestos contractor began the asbestos removal on 10 October 2012 and found no unbonded asbestos during the removal.

On 12 October 2012, Intensia Pty Ltd (**Intensia**) and Nichols Constructions entered into a contract for the sale of land in the form approved by the REIQ and Queensland Law Society (**Contract**) for the sale of all three adjoining parcels of land for a purchase price of $1,725,000. A deposit of $172,500 for the parcels of land (**Deposit**) was paid 3 days later.

Under clause 7.4(3)(a)(ii) of the Contract, Nichols Constructions warranted that, except as disclosed in the Contract or a notice given by Nichols Constructions to Intensia under the *Environmental Protection Act 1994* (Qld) (**EPA**), at the Contract date, Nichols Constructions was not aware of any facts or circumstances that may lead to the land being classified as contaminated land within the meaning of the EPA.

On 15 October 2012, the demolition commenced and the land was contaminated with asbestos either during or after the demolition. The land was not contaminated with asbestos on the date of the Contract. Also, despite not knowing at the time of entry into the Contract that Nichols Constructions had intended to demolish the dwellings, Intensia still elected to affirm the Contract notwithstanding the demolition.

On 21 December 2012, Intensia obtained a report that showed the land was contaminated with unbonded asbestos.

On 11 January 2012, four days before the Contract was due to settle, Intensia purported to terminate the Contract alleging a breach of the warranty contained in clause 7.4(3)(a)(ii) of the Contract arising from non-disclosure of the asbestos contamination.

On the settlement date, Nichols Constructions purported to terminate the Contract and forfeit the Deposit on account of Intensia's failure to settle.

Nichols Constructions then commenced proceedings claiming a declaration that it had effectively rescinded the Contract and it was entitled to forfeit the Deposit and interest.

Intensia counterclaimed for a declaration that it had validity terminated the Contract and was entitled to the repayment of the Deposit and to interest and damages.

The District Court found for Nichols Constructions and ordered the Deposit and interest to be released to Nichols Constructions. Intensia appealed this decision.

Decision

The Court of Appeal found that Nichols Constructions had not breached clause 7.4(3)(a)(ii) of the Contract. Therefore, Intensia had no right to terminate the Contract and Nichols Constructions was entitled to forfeit the Deposit. Despite there being no provision in the EPA for land to be 'classified as contaminated land' as outlined in clause 7.4(3)(a)(ii) of the Contract and adopted, the Court of Appeal gave clause 7.4(3)(a)(ii) a commercial interpretation as requiring the land be listed as contaminated land on the contaminated land register.

The Court of Appeal found that at the date of the Contract, Nichols Constructions had no basis to form the view that the land might become contaminated by a hazardous contaminant which would oblige it to report that contamination to the administering authority under the statutory EPA process.

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Poor cousins - interstate insolvency can lead to a builder's licence cancellation

Midson Construction (Qld) Pty Ltd & Ors v Queensland Building and Construction Commission & Ors [2018] QSC 199

Andrew Orford | Laura Berry | Hugh Pegler

Key point and significance

The insolvency of a related entity interstate can lead to the cancellation of a Queensland company's builder's licence by the QBCC.

Facts

On 3 January 2018, Midson Construction (NSW) Pty Ltd (**Midson NSW**) was placed into liquidation. As a result, the builder's licence of Midson Construction (Qld) Pty Ltd (**Midson Qld**) was cancelled pursuant to sections 56AF and 56AG of the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Act**).

Midson Qld sought judicial review of the decision. The application was limited to three defined issues:

- whether Midson NSW was a construction company within the meaning of section 56AC of the QBCC Act;
- whether section 56AC of the QBCC Act was constitutionally invalid; and
- whether the decision ought to be quashed on the basis that the delegation to the decision maker, Licence Entitlement Officer Mark Wilson (**Wilson**), was ineffective.

Decision

The Supreme Court of Queensland dismissed the application.

Whether Midson NSW was a construction company pursuant to section 56AC of the QBCC Act

Section 56AC(7) of the QBCC Act defines a construction company as *'a company that directly or indirectly carries out building work or building work services in this or another state'*. The court looked at the plain and ordinary meaning of these words and rejected an assertion that the provision could not apply to an interstate company. In order to protect consumers of building work in Queensland, the QBCC Act has to be interpreted in such a way that consumers are protected from interstate companies that do not meet certain requirements.

Constitutional validity of section 56AC of the QBCC Act

Midson Qld argued that the QBCC was acting outside its jurisdiction by purporting to regulate conduct in another state. Crow J rejected this argument, and held the section is constitutionally valid. The QBCC Act only regulates the conduct of building work in Queensland. In part, this is done by providing a mechanism for the cancellation of a Queensland builder's licence. The financial stability of a licensee is a necessary consideration for the exercise of this power.

Delegation issue

Midson Qld argued that the delegation to Wilson was ineffective for five reasons:

- the delegation was to a range of positions;
- the ultimate delegate was not ascertainable;
- the delegation cannot be implied;
- the delegation was to 'give a notice' rather than to 'consider' status pursuant to sections 56AF(1) and 56AG(1) of the QBCC Act; and
- Wilson was not appropriately qualified.

Each of these assertions was readily dismissed. The first two points were dismissed with reference to the *Acts* Interpretation *Act 1954* (Qld), the second two points with reference to the QBCC's delegation manual and the final point with reference to Wilson's employment history and qualifications.

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VICTORIA

Court of Appeal faced with deciding the availability of quantum meruit following repudiation of a building contract

Mann v Paterson Constructions Pty Ltd [2018] VSCA 231

Peter Wood | Christian Camilleri

Key point

Nine years ago, the Supreme Court in *Sopov v Kane* (2009) 24 VR 510 in 2009 (**Sopov**) highlighted judicial and academic criticisms of the common law position that a builder is entitled to sue on a quantum meruit for the fair and reasonable value of work performed following a repudiation of the building contract. Ultimately, the Supreme Court found itself bound by prevailing authority supporting that position in the absence of High Court intervention.

Significance

In refusing special leave to appeal the decision of *Sopov*, albeit constrained by the manner in which the parties in that case had pleaded the matter before the Supreme Court, the High Court of Appeal in effect confirmed the common law position.

Now, in the case of *Mann v Paterson Constructions Pty Ltd*, the Supreme Court has echoed its observations in *Sopov*, citing that the passage of time had not lessened their force. The case affirms the entitlement of a builder to make a claim for the fair and reasonable value of the work (quantum meruit) under a contract after terminating for repudiation, but it serves as a potential avenue for appeal to the High Court for reconsideration of the common law position.

Facts

Peter and Angela Mann (**owners**) and Paterson Constructions Pty Ltd (**builder**) entered into a contract to build two double-storey town houses on the owners' property for $971,000.

The owners purported to terminate the contract during construction based on the builder's alleged delay in carrying out works and purported suspension and refused the builder access to return to the property. The builder, in turn, asserted that the owners' purported termination and refusal to allow the builder onto site amounted to a repudiation and accepted that repudiation.

The builder brought a claim at the Victorian Civil and Administration Tribunal (**VCAT**) against the owners seeking relief and was awarded damages of $660,526.41 on the basis that this was an amount representing the fair and reasonable value of the work, rather than the contract amount.

The owners appealed the decision to the Supreme Court which at first instance dismissed the appeal save for correction of a minor mathematical error in quantum. The owners further appealed that decision to the Supreme Court of Appeal on a number of grounds.

Three key questions to be determined by the Court of Appeal were:

- Can a builder seek damages on the basis of the fair and reasonable value of the work after terminating a contract following an owner's repudiation?
- Did the contract price limit the builder's claim for the fair and reasonable value of the work?
- Did section 38 of the *Domestic Building Contracts Act 1995* (Vic) (**Act**) prevent the builder from claiming damages for variations on the basis of the fair and reasonable value of the work?

Decision

In a joint judgment, Kyrou, McLeish and Hargrave JJA held in favour of the builder and dismissed the appeal. The builder was able to recover the amount assessed by VCAT as fair and reasonable value for the work outside of the contractual framework.

Builder's entitlement to make a claim for the 'fair and reasonable value' of work

The owners relied on the court's observations in *Sopov* regarding the proposition that a builder can claim the fair and reasonable value of the work when a contract is terminated for repudiation. The owners contended that the court, in this case, was presented with *'a particularly good opportunity for the controversy as to the appropriateness of the availability of quantum meruit upon the termination [of a building contract to be further considered judicially'*.

The court held that it was bound by the prevailing authority. However, in coming to this decision, the court reiterated its earlier comments regarding criticism of this approach and deferring the position at law as a matter for the High Court to determine.

We understand that the owners may be considering whether to appeal the decision.

Contract price does not cap the 'fair and reasonable value'

It was held that the contract price has little impact on the assessment of the fair and reasonable value of the work. In coming to this decision, the court noted that in some instances the contract price is of little assistance in assessing the value of the work, as the work that is actually carried out by a builder can vary substantially from the work under the contract. It was also emphasised that the assessment of the value of the works does not necessarily reflect the costs incurred in carrying out the works but is based on the benefit conferred to the owner.

Claiming 'fair and reasonable value' of variations

The court held that section 38 of the Act does not impede the builder's ability to claim for the fair and reasonable value of variations to the contract that are carried out. Section 38 of the Act prevents a builder from claiming 'any money' for variations unless the parties agree on a price, or the builder complies with the notice requirements in that section.

The court interpreted section 38 narrowly to apply to claims in contract only. It was held that the section did not prevent a builder from recovering an amount representing the fair and reasonable value of that variation. In coming to this decision, the court had regard to the phrasing of a number of other sections as well as the history and purpose of the Act.

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