SVENSON BARRISTERS

Presentation (Joel Silver), 1 March 2019 (Shepparton)

Case Citations

Mann v Patterson Constructions [2018] VSCA 231

Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510

Ian Street Developer v Arrow International [2018] VSCA 294

Probuild Constructions v Shade Systems [2018] HCA 4

Maxcon Constructions v Vadasz [2018] HCA 5

H Buildings (formerly Hickory Group) v Owners Corporation [2017] VSC 802

Lacrosse Ruling 3 [2018] VCAT 1448

Mercuri v TCM Building Group Pty Ltd [2018] VSC 604

Mann v Patterson Constructions

Quotes

Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510

[21] *It is because the quantum meruit remedy rests on the fiction of the contract's having ceased to exist ab initio that the contract can have no 'continuing influence' when the value of the work is being assessed on a quantum meruit. It is because this alternative remedy does ignore the bargain which the parties struck, and does ignore the rights accrued under the contract up to the date of termination, that the availability of quantum meruit in the alternative is now seen as anomalous. But, for reasons we have already given, those incongruities are as entrenched as the remedy itself. It is true that the contract price is relevant on a quantum meruit, but not because of any 'continuing influence' of the contract. The price is merely a piece of evidence, showing what value the parties attributed — at a particular time — to the work which the builder was agreeing to perform*.

[25] *Nor is the contract price 'the best evidence' of the value of the benefit conferred. As counsel for Kane pointed out, the contract price is struck prospectively, based on the parties' expectations of the future course of events.* ***The quantum meruit, on the other hand, is assessed with the benefit of hindsight, on the basis of the events which actually happened****.*

[26] *[I]t is well established that the value of the work done can be proved by evidence of costs actually incurred ... The (reasonable) cost of constructing a building seems a perfectly sensible measure of the value of the benefit conferred. Ex hypothesi, the owner would have incurred that cost had it undertaken the construction itself*.

[43] If *the work the subject of the variations has been carried out — and there was no dispute here that it had been — the only question is the fair and reasonable value of the work. It is irrelevant*

whether or not the work fell outside the original contractual scope. All that matters is that the performance of the work has conferred a benefit on the owner, for the reasonable value of which the builder should be remunerated.

Quotes from Decision

[128] *In our view, the phrase '[i]f subsection (6) applies' in s 38(7) refers to a situation where the prohibition in s 38(6) applies. Where an exception to the prohibition applies and the parties have agreed to a contractual price for a variation, there is no need for s 38 to confer on a builder an entitlement to be paid on a 'cost plus profit' basis. It would be surprising if s 38 were to have such an operation, which would displace the builder's statement under s 38(3)(a)(iii) of the cost of the variation and the effect it would have on the contract price. Such an anomaly should be avoided. But the alternative construction makes commercial sense so that, where the prohibition in s 38(6) does operate, s 38(7) serves to fill a gap by stipulating the builder's entitlement to payment*.

***Domestic Building Contracts Act* 1995 (Extracts)**

38 Variation of plans or specifications—by building owner

(1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.

(2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

(3) In any other case, the builder must give the building owner either—

  (a) a notice that—

    (i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

    (ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

    (iii) states the cost of the variation and the effect it will have on the contract price; or

  (b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

(4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).

(5) A builder must not give effect to any variation asked for by a building owner unless—

  (a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or

  (b) subsection (2) applies.

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—

(a) the builder has complied with this section; or

(b) [VCAT] is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

Probuild Constructions v Shade Systems/Maxcon Constructions v Vadasz

***Building and Construction (Security of Payment) Act 2002*, sub-s 13(2)**

'pay when paid provision of a construction contract means a provision of the contract

*(a) that makes the liability of one party (the **first party**) to pay money owing to another party (the **second party**) contingent on payment to the first party by a further party (the **third party**) of the whole or any part of that money; or*

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract'

Case Quotes

Gaegler J

[34] '*The scope of the authority conferred on an adjudicator by s 22(1) of each Act – to make a valid determination despite adopting reasoning that is mistaken in law – leaves no room for the exercise by either Supreme Court of supervisory jurisdiction to make an order in the nature of certiorari to quash a determination merely on the basis of an error of law in the reasons for the determination.* '

[35] '*The reasoning underlying my negative answer to the third question requires more elaboration. There are, of course, "mistakes and mistakes.*"

[36] '*The particular mistake of law which the Full Court found the adjudicator to have committed was a misinterpretation of a definition in the construction contract. The Full Court went on to find that the misinterpretation caused the adjudicator to mischaracterise a provision of the construction contract as*

a "pay when paid provision"… and, by reason of that mischaracterisation, wrongly to treat that provision as having no effect...'

[37] '*The question of whether the error of law found by the Full Court was a jurisdictional error therefore becomes a question of whether the authority conferred by [the Act] is conditioned by a requirement that the adjudicator not incorrectly apply[ing the definition of 'pay when paid']… I answer that question in the negative because the authority conferred… is not expressly so conditioned and because I am unable to see anything in the scheme of the Security of Payment Act to support a conclusion that the authority is impliedly so conditioned*.'

H Buildings (formerly Hickory) v Owners Corporation

Case Quotes

[137] *[G]iven the extensive residential apartment component which forms part of the development, the Works to be undertaken under the Contract were not in the nature of a structure within the meaning of the term 'residential hotel'. In my view, the term 'residential hotel' is intended to describe premises designed to provide transitory occupants with temporary public accommodation, food, and refreshment. The term 'residential hotel' does not, in my view, encompass a home in the nature of residential apartments designed and intended for permanent habitation, irrespective of the right of access of those residing in such apartments to hotel facilities at the Torquay Resort.*

[138] *[T]he occupant of a residential hotel ordinarily has no kitchen or laundry facilities, is not the owner of the part of the hotel which he or she occupies, and occupies on a non-permanent basis as a mere licensee.*

[139] *In the subject development, I also observe that each residential apartment, whether a dual key apartment or the owner/occupier type of apartment, amongst other features, consists of a separate entry, kitchen and laundry facilities, separate metering of power and other utilities, indeed all the indicia of a long-term residence, and one permanently occupied by the owner of that residence.*

[140] *Accordingly, although part of the development may be characterised as a residential hotel, on the evidence in this application, a substantial part of it is not.*

SVENSON BARRISTERS

Lacrosse (No 3) Timeframe

Date	Court Event	Gardner Group Event
October 2017	Trial date set	
29 May 2018	Expert reports ordered for 18 June	
18 June 2018		Fails to file and serve expert report
Early July 2018		Commences negotiating with owners to conduct destructive testing on site
26 July 2018	Time to file and serve expert report (Gardner Group) extended to 10 August	
10 August 2018		Fails to file and serve expert report
13 August 2018		Files expert report of Hughes-Brown.
14 August 2018	Directions hearing, Woodward J sets down questions for conclave to consider in joint report	
17 August 2018		On site destructive testing takes place
21 August 2018		Occurrence of testing disclosed to other parties
22 August 2018		Hughes-Brown instructed to prepare further report, based on destructive testing
24 August 2018	Conclave (Day 1)	
27 August 2018	Conclave (Day 2)	
31 August 2018		Hughes-Brown supplementary report finalised, application for leave to file and serve
3 September 2018	First day of hearing	

Lacrosse No 3

[32] *[T]he success of the conclave depends on each of the experts entering the process on a level footing in respect of the information and instructions available to them…*

[33] *The vice in introducing the Supplementary Report after the conclave and the joint report (and when there is no realistic prospect of a further conclave), is that Mr Hughes-Brown's findings in that report will not be subjected to the benefits of the peer debating and weighing process described. Instead, his findings will be presented to each of the experts during concurrent evidence. Thus their consideration of the findings will occur under the harsh scrutiny of a public adversarial hearing. And the articulation of their observations will be closely directed and controlled by respective Counsel for the parties.*

[34] *It is also likely that… the Supplementary Report [will] become… the benchmark for the consideration of the issues discussed in the report, with each of the other expert fire engineers (and other witnesses) asked to give their evidence by reference to Mr Hughes-Brown's findings. In my view, this would work to the advantage of the Gardner Group and (in effect) thus reward them, both for entering the process late and for making the forensic decision to play their cards close… until they knew the result was favourable.*

Mercuri v TCM Building Group Pty Ltd
Quote from *Vero Insurance* (2007) 26 VAR 354 (Gillard J)

(i) *The prima facie rule* [in the VCAT] *is that each party should bear their own costs of the proceeding.*

(ii) *The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.*

(iii) *In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.*

Case Quotes

[101] *Section 112 of the Act not only supplements s 109 of the Act, it provides an alternative avenue by which a party to a proceeding at VCAT can obtain an order for costs against an unsuccessful party. One might expect there to be many instances where a successful party does not qualify for a costs order under s 109 (say, for example, where the proceeding is*

short and/or straightforward). However, in such a case, a party which makes an offer to settle a proceeding which is not bettered at trial has the benefit of s 112 of the Act, which confers a presumption that a favourable costs order would be made if the offeree fails to achieve a better result at trial.

[105] *The submission that it was reasonable to reject the offer because the owner believed her evidence supported her position, and the parties' evidence could only be properly tested at trial, ignores the intent of provisions such as s 112 of the Act, and the principles enunciated in Hazeldene's,70 and applied in courts and tribunals on a routine basis. Any offer to settle a proceeding prior to trial, or even prior to judgment, or any evaluation of any offer, is made, or takes place in circumstances where the evidence and submissions of those parties is untested. That is, settlement negotiations take place in an environment where there is imperfect information. However, the law requires that,* ***where a party is considering a settlement offer, that party must undertake a sober and realistic assessment of the risks of proceeding to trial, and there are consequences if that assessment is unduly erroneous or dismissive****.*

SVENSON BARRISTERS

Ian Street Timeframe

Date	**Event**	**Actor**
31 May 2017	Payment Claim	Builder
14 June 2017	Payment Schedule	Developer
28 June 2017	Adjudication Application	Builder
30 June 2017	Adjudicator Appointment Takes Effect	Adjudicator
7 July 2017	Extension	Adjudicator/Builder
14 July 2017	Original Date for Determination	Adjudicator
21 July 2017	5 Business Days from Original Date	
28 July 2017	Determination Brought Down	Adjudicator