SUPREME COURT OF NSW OPENS THE DOOR TO CHALLENGING ADJUDICATION DETERMINATIONS ON THE BASIS OF AN ERROR OF LAW

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Real Estate Alert

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On 15 June 2016, in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770, the Supreme Court of New South Wales (NSW) decided that adjudication determinations made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act) can be judicially reviewed for an error of law on the face of the record. This decision may have significant impacts on the building and construction industry.

THE FACTS

Probuild argued that the Adjudicator had made an error of law on the face of the record by concluding that the onus was on Probuild to demonstrate that Shade Systems was in default before it was entitled to liquidated damages. Probuild argued that because of that error the determination should be set aside pursuant to section 69 of the *Supreme Court Act* (NSW).

THE DECISION

In *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, the Court suggested that relief under section 69 of the Supreme Court Act by way of judicial review was not available unless a determination was affected by jurisdictional error. The Court in Probuild found that these suggestions were obiter dicta.

Relying on the decision of the High Court of Australia in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 the Court concluded that non-jurisdictional errors of law on the face of the record can be subject to review. The Court found that in order to exclude the power of judicial review under section 69 of the Supreme Court Act, the SOP Act would need to use 'express language' and that there was nothing specific in the SOP Act to exclude this jurisdiction.

The Court concluded that the Adjudicator had made an error of law on the face of the determination. The onus of proof did not lie with Probuild to establish its entitlement to liquidated damages. Consequently, the Court ordered that the determination be quashed and that the matter of the adjudication be remitted to the Adjudicator for further consideration according to the law.

The *Probuild* decision reflects the position in Victoria where it was first held in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156 and later confirmed in *Grocon Constructors v Planit Cocciardi Joint Venture (No. 2)* [2009] VSC 426 that a party may challenge an adjudicator's determination for both jurisdictional error and error of law on the face of the record. The reasoning underpinning those decisions, similar

to the reasoning in *Probuild*, was that challenging an error of law is not excluded either expressly or by implication under the Act in Victoria.

Hickory and Grocon have resulted in calls for legislative amendment on the basis that the ability to challenge an adjudicator's determination for an error of law is contrary to the object of the Act.

WHAT THIS MEANS FOR YOU

The *Probuild* decision confirms that a new avenue of challenge is available in NSW to set aside adjudication determinations made under the SOP Act. A Court may order that a decision be set aside and may make an order to remit the matter to the adjudicator for further determination – this last order is notable as the SOP Act does not envisage the adjudicator re-determining an application after the expiry of the time for making a determination.

Widening the bases of challenge from jurisdictional errors of law, to any error of law, will almost certainly result in an increase in applications to set aside adjudication determinations and lead to more determinations being quashed. This is particularly so in circumstances where not all adjudicators are lawyers.

We note that in a related proceeding (*Probuild Construction (Aust) Pty Ltd v Shade Systems Pty Ltd (No 2)* [2016] NSWSC 878) Shade Systems has indicated that it will file an application for leave to appeal the decision.

KEY CONTACTS

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