

THE HIGH COURT WEIGHS IN ON ADJUDICATION DETERMINATIONS - ERRORS OF LAW ARE NOT REVIEWABLE

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Australia Real Estate Alert

By: Sandra Steele, Michael O'Callaghan

The High Court has unanimously confirmed in the decision of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (*Probuild*) that Courts do not have the power to review adjudication determinations made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Security of Payment Act) on the basis that the determination contains an error of law. In doing so, the Court has confirmed that an adjudication determination may only be subject to judicial review when it is established that an adjudication determination is affected by a jurisdictional error.

An Adjudicator will commit jurisdictional error when he or she purports to exercise a power beyond the power given to the Adjudicator under the Security of Payment Act, or if an Adjudicator fails to comply with the "basic and essential requirements" of the Security of Payment Act. For example, it would be a jurisdictional error for an Adjudicator to make a determination on the basis of materials not put before him or her by the parties.

Conversely, non-jurisdictional errors of law refer to situations where an Adjudicator may make an error in interpreting the facts or law presented in the materials. For example, the misinterpretation of a time bar provision in a construction contract would be a non-jurisdictional error.

Recently, there has been a high degree of uncertainty regarding the basis upon which an Adjudicator's determination can be challenged.

PROBUILD – FIRST INSTANCE AND COURT OF APPEAL

In the first instance decision (*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770), the Supreme Court of New South Wales decided that adjudication determinations under the Security of Payment Act could be judicially reviewed for an error of law.

At first instance, Probuild argued the Adjudicator had made an error in interpreting the liquidated damages clause in the relevant construction contract (i.e. an error of law on the face of the record). Probuild contended that the Adjudicator had incorrectly determined that the onus was on it to demonstrate that Shade Systems was in default before it was entitled to liquidated damages.

The Supreme Court held that the Adjudicator made an error in determining liquidated damages under the relevant construction contract and that the error could be judicially reviewed for an error of law on the face of the record.

Our previous alert on the first instance decision is available [here](#).

Shade Systems appealed the decision to the New South Wales Court of Appeal and asserted that that the Court had no power to intervene in a case where the only errors identified were non-jurisdictional errors of law. The Court of Appeal unanimously held that the Security of Payment Act did not permit review of the determination of an Adjudicator otherwise than for jurisdictional error. Our previous alert on the Court of Appeal's decision is available [here](#).

THE HIGH COURT'S DECISION

In *Probuild*, the High Court unanimously dismissed an appeal from the Court of Appeal of the Supreme Court of New South Wales. The High Court held that the Supreme Court of New South Wales does not have the jurisdiction to quash a determination of an Adjudicator for an error of law.

In making the decision, the High Court considered the purpose of the Security of Payment Act and the authority of Adjudicators. The Court noted that:

1. the Security of Payment Act was enacted to "reform payment behaviour in the construction industry" by establishing a system and regime that is "coherent, expeditious and self-contained"
2. the Security of Payment Act is "not concerned with finally and conclusively determining the entitlements of parties to a construction contract". The statutory entitlements created by the Security of Payment Act are separate from (and in addition to) entitlements under a construction contract
3. the Adjudication process is designed to operate quickly and the timeframes imposed are "brutally fast". These processes and timeframes are imposed on the understanding that cash flow is "the lifeblood of the construction industry"
4. the Security of Payment Act permits informal procedures (for example, an Adjudicator can call a conference of the parties, which is to be conducted informally and without any entitlement to legal representation)
5. the Security of Payment Act does not contain an express right of appeal – which was a "deliberate" omission which is consistent with the understanding that the Security of Payment Act is to provide "speedy and effective means of ensuring cash flow to builders from the parties with whom they contract."

In considering the above, the High Court held at [82] that the Security of Payment Act:

"would be internally contradictory, and the authority granted to the adjudicator to go wrong in law would be illusory, were the determination made by the adjudicator validly in the exercise of the authority conferred by s 22⁽¹⁾ susceptible of being quashed by an order in the nature of certiorari in every case where the adjudicator in fact went wrong in law on the basis of an error of law appearing in the reasons for the determination on the face of a record which the adjudicator is statutorily obliged to create under s 22⁽³⁾."

Further, the High Court noted at [83] that authority of an Adjudicator conferred to him or her by the Security of Payment Act allows:

"an adjudicator to make a determination notwithstanding that the determination is based on a legally erroneous interpretation of a construction contract, in my opinion, necessarily entails that s 22⁽¹⁾ is properly interpreted as ensuring that the adjudicator's misinterpretation provides no basis on which the determination is susceptible of being quashed or otherwise reviewed."

Similarly, in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 (*Maxcon*) the High Court unanimously dismissed an appeal from the Full Court of the Supreme Court of South Australia. Consistent with the decision in *Probuild*, the High Court held that the Supreme Court does not have jurisdiction to quash determinations on the basis of non-jurisdictional error.

WHAT THIS MEANS FOR YOU

The High Court's decisions confirm that the scope for the Court to review adjudication determinations made under the Security of Payment Act is confined to circumstances of jurisdictional error only. If an Adjudicator makes an error of law or fact a party will not be able to seek review from the Court.

The decisions provide a higher level of certainty for the building and construction industry by confirming the scope for a Court to review adjudication determinations made under the Security of Payment Act. We anticipate that these decisions will be viewed positively by the building and construction industry and alleviate concerns of an increase in the number of challenges to adjudication determinations.

Notes:

1. Section 22(1) of the NSW Security of Payment Act prescribes the matters that an Adjudicator is to determine in an adjudication determination
2. Section 22(3) of the NSW Security of Payment Act prescribes the form and content of an adjudicator's determination

KEY CONTACTS



SANDRA STEELE
PARTNER

SYDNEY
+61.2.9513.2528
SANDRA.STEELE@KLGATES.COM

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