

Latest Developments in Security of Payment Law (2)

Recent cases on judicial review of adjudication decisions, including *Shade Systems v Probuild Constructions (No 2)*

Two days after the *Southern Han*¹ decision was published by the High Court, the NSW Court of Appeal handed down its decision in *Shade Systems v Probuild Constructions (No 2)*² (*Shade Systems*). This was definitely a strike back for protection of the adjudication system from interference by the Courts.

In *Shade Systems*, Probuild Constructions subcontracted Shade Systems to supply and install external louvres at a development in Chatswood, NSW. Shade Systems served a payment claim (under the NSW Act), and Probuild responded with a nil payment schedule, on the basis of a set off for liquidated damages.

The subcontractor applied for adjudication. The adjudicator allowed most of the claim, and rejected the respondent's set off for liquidated damages on the basis that the liquidated damages could not be calculated in accordance with the subcontract, the respondent could not benefit from their own wrong, and the liquidated damages were a penalty.

At first instance the Supreme Court of NSW set aside the determination³, holding that the adjudicator erred in finding that the respondent was not entitled to liquidated damages⁴. This seemed to be a significant extension of the Court's reach into a Security of Payment adjudication.

Shade Systems appealed to the NSW Court of Appeal, claiming that the NSW Supreme Court had no power to quash a decision on the basis of an adjudicator's non-jurisdictional error of law. In the appeal, there was no dispute that:

- the adjudicator erred when he rejected the set-off for liquidated damages; and
- that error was a non-jurisdictional error.

The Court of Appeal held that the NSW Act did not permit review of adjudication determinations otherwise than in respect of jurisdictional error. The Court revisited the scope of judicial review of adjudication determinations and concluded, consistently with *Brodyn v Davenport*⁵, that relief is not available to quash an adjudicator's determination on a ground other than jurisdictional error.

The NSW Court of Appeal unanimously allowed the appeal, holding that the adjudicator had authority to determine the scope and operation of the construction contract, although he incorrectly disallowed the set off for liquidated damages.

Following this decision, it can now be said that in NSW, adjudicator's determinations are reviewable only on the ground of jurisdictional error. The Court of Appeal has reversed the widening of judicial review which had been signaled by the first instance decision in the Supreme Court.

On 12 May 2017, the High Court granted Probuild special leave to appeal to the High Court from the decision of the Court of Appeal, and at the same time it granted leave to appeal in a similar case from South Australia called *Maxcon Constructions Pty Ltd v Vadasz*. If the High Court allows these appeals, it could "open the floodgates" on judicial review applications of adjudication decisions, which might substantially undermine the whole intent of the legislation, which is to protect contractors. This could add impetus to Commonwealth legislative intervention in the area (explained further in my next article).

¹ *Southern Han Breakfast Point v Lewence Construction* [2016] HCA 52

² [2016] NSWCA 379

³ *Probuild Constructions v Shade Systems* [2016] NSWSC 770

⁴ Note that this raises a difference between the NSW and Victorian Acts – damages (which will include liquidated damages) are specifically excluded from calculation of progress payments in Victoria: section 10B of the Victorian Act

⁵ [2004] NSWCA 394

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Victoria

The analysis in Victoria is somewhat different. The Victorian Act does not contain the express words required by section 85(5)(a) of the *Constitution Act 1975* to exclude the prerogative writ of certiorari, so despite *Shade Systems*, judicial review for error on the face of the record, which can include non-jurisdictional error, remains open⁶. This is amply demonstrated in two very recent cases in the Supreme Court of Victoria⁷

While an exploration of the differences between jurisdictional and non-jurisdictional errors is beyond the scope of this paper, the above cases provide one good example of an error of each type, as follows:

- In *Southern Han*, the existence of a reference date was held to be a jurisdictional fact which must exist as a precondition to an adjudication determination. An adjudication determination based on an erroneous finding with respect to a reference date is liable to be set aside by a Court.
- In *Shade Systems*, the adjudicator's rejection of the respondent's set off for liquidated damages was agreed to be a non-jurisdictional error, and held to be not reviewable by the Court.

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⁶ *Hickory Developments v Schiavello* [2009] VSC 156; *Metacorp Australia v Andeco Construction* [2010] VSC 199

⁷ *Melbourne Steel Erectors v M&I Samaras* [2017] VSC 308 and *Minesco v Anderson Sunvast* [2017] VSC 299

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