

HIGH COURT REJECTS REVIEW OF SOP ACT ADJUDICATION DETERMINATIONS FOR NON-JURISDICTIONAL ERROR

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The High Court of Australia has held that courts do not have the power to review adjudication determinations made under Building and Construction Industry Security of Payment Act 1999 (NSW) (the **SOP Act**) for non-jurisdictional error of law on the face of the record.

The High Court affirmed the decision of the NSW Court of Appeal that the availability of judicial review to quash an adjudication determination under the Act was limited to cases of jurisdictional error.

Only the second occasion on which the High Court has considered the SOP Act, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 represents a key decision in SOP Act jurisprudence in that it finally resolves recent uncertainty as to the availability of judicial review of adjudication determinations.

In a separate decision released at the same time as *Probuild*, the High Court also determined that judicial review is limited to cases of jurisdictional error under the South Australian Security of Payment legislation.

Analysis

Prior to 2010, the commonly accepted position in NSW was that the SOP Act precluded judicial review except where an adjudication determination failed to comply with certain "basic and essential requirements" of the SOP Act. This was the position stated in the Court of Appeal's decision in 2004 in *Brodyn Pty Ltd v Davenport* [2004] 61 NSWLR 421.

That position changed in 2010 when the decision of the NSW Court of Appeal in *Chase*

Oyster Bar v Hamo Industries [2010] NSWCA 190 (**Chase Oyster Bar**). *Chase Oyster Bar* removed any doubt that the Supreme Court could at least quash a determination which was infected with jurisdictional error, that is an error which goes to the authority or power of the decision maker (in this case, a SOP Act adjudicator) to make his or her decision. However, the decision in *Chase Oyster Bar* did not determine whether review might be available for non-jurisdictional errors of law on the face of the record.

This is the question now determined by *Probuild*, namely whether the Court's power under section 69(3) of the Supreme Court Act 1970 (NSW) to quash a determination for a non-jurisdictional error of law on the face of the record was available in the case of SOP Act adjudications determinations or whether Parliament had intended that it be excluded.

Following a detailed consideration of the regime created by the SOP Act, the Court found that the SOP Act should be understood to exclude review for non-jurisdictional error of law on the face of the record.



Relevant considerations identified by Court in support of this conclusion included that the SOP Act:

- was "enacted to reform payment behaviour in the construction industry" and provide claimants with the ability to recover progress payments promptly;
- is "not concerned with finally and conclusively determining the entitlements of parties to a construction contract";
- provides very short timeframes which are "not conducive to lengthy consideration by an adjudicator of detailed submissions on all questions of law";
- permits informal procedures in the conduct of an adjudication, such as a conference of the parties; and
- deliberately omits any right of appeal from an adjudicator's determination.

What does this decision mean for construction industry participants?

Essentially the High Court has held that the regime of the SOP Act empowers an adjudicator to make a determination in spite of the possibility that the determination might be based on a wrong legal interpretation of the construction contract in question.

The Probuild decision will be welcome news for claimants under the SOP Act as it significantly narrows the available grounds for challenge to adjudication determinations. The misapplication or incorrect construction of a contractual provision will no longer leave a determination at risk of being quashed.

For respondents to adjudication applications, the inability to challenge a determination in court for a non-jurisdictional error reinforces the already apparent importance (following Chase Oyster Bar) of identifying jurisdictional error as a means of challenging a determination. This will require respondents to carefully scrutinise the compliance of the claimant and the adjudicator with all procedural requirements of the SOP Act so as

to identify any non-compliances which might give rise to jurisdictional error on the part of the adjudicator.

Maxcon

Along with the decision in Probuild, the High Court also handed down its judgment in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5, an appeal from the Full Court of the Supreme Court of South Australia which had been heard together with Probuild.

Maxcon also raised the question of whether review for an error of law on the face of the record was available under the South Australian Security of Payment legislation.

Similarly, the High Court held that adjudication determinations made under the Building and Construction Industry Security of Payment Act 2009 (SA) were not subject to review for non-jurisdictional errors of law on the face of the record.

Interestingly, in *Maxcon* the High Court also held that a provision in a subcontract which provided that the retention sum was to be released upon the issue of a certificate of occupancy under the Development Act 1993 (SA) constituted a "pay when paid" provision within the meaning of the South Australian Security of Payment legislation, as the issue of the certificate of occupancy was contingent upon Maxcon completing the building works under the head contract.

This determination could have significant implications for head contractors who rely on retention sums as security, particularly if the retention sum is to be retained by the head contractor during the defects liability period under the head contract.

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