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HIGH COURT DECISION - SOP ACT - ADJUDICATOR'S DETERMINATION FOR NON-JURISDICTIONAL ERROR

INTRODUCTION

The Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") aims to ensure that any individual is entitled to quickly receive and be able to recover progress payments for carrying out construction work (or for providing related goods or services).

Last week the High Court of Australia held that this scheme excluded the Supreme Court of New South Wales from quashing an adjudicator's determination for a non-jurisdictional error of law when it heard the case of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4.

CASE SUMMARY

Shade Systems served Probuild under section 13 of the Act, claiming that a progress payment was due for the supply and installation of louvres.

After Probuild demonstrated that it had no intention of paying, Shade Systems applied for an adjudication determination under section 17 of the Act. The adjudicator determined that the amount of \$277,755.03 was payable.

Probuild then successfully appealed the determination before the Supreme Court, wherein the primary judge held that the adjudicator erred in its rejection of Probuild's liquidated damages claim because the adjudicator (a senior legal practitioner) had misinterpreted the interpretation and application of the liquidated damages clause in the construction contract.

Namely, it was erroneous to maintain the position that entitlement to liquidated damages was barred until actual completion of the work under the subcontract, or termination of the subcontract between the parties.

DECISION

The High Court subsequently upheld the Court of Appeal's decision by affirming that the availability of judicial review to quash an adjudication determination under the Act was limited to cases of jurisdictional error.

Weight was given to the context of the Act, specifically, its intention to improve payment patterns concerning projects completed under construction contracts.

Also relevant to the High Court's conclusion was the Act's allowance of informal procedures to be adopted in order to efficiently address applications for progress payments.

Further, the procedure for recovering progress payments (implemented through strict timeframes under Part 3 of the Act) was thoughtfully designed to complement the nature of the construction industry, whereby cash flow must not be interfered with if the possibility of financial jeopardy is to be averted.

The deliberate omission of any right to appeal an adjudicator's determination under the Act was also recognised as aligning with the objective of promptly resolving payment issues and thus, excluding judicial review in respect of non-jurisdictional errors of law.

CONCLUSION

Only the second occasion on which the High Court has considered the Act, this case represents a key decision in Security of Payment jurisprudence.

Prior to this decision, courts have been debating non-jurisdictional error and the ability of parties to appeal an adjudicator's decision on this basis.

"There is jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction."

(Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57, [162] (Hayne J); Also Re Minister for Immigration and Multicultural Affairs; Ex parte Miah [2001] HCA 22.)

Where there are disputes concerning non-jurisdictional errors, parties are expected to accept the decision handed down by the adjudicator. As in this case, this means accepting an adjudicator's decision even if the adjudicator has erred in the legal interpretation of the construction contract.

A jurisdictional error, therefore, is a decision by the adjudicator which is made outside the limits conferred by section 22 of the Act.

For example, if an adjudicator does not make a finding as to the amount of work done and the value of the work under a construction contract and merely just says it prefers the evidence of the claimant, then this would not amount to a reasonable performance of the adjudicator's statutory function (section 22 of Act) and the adjudicator's decision can be quashed on this basis if appealed (see *Richard Crookes Construction Pty Ltd v CES Projects (AUST) Pty Ltd (No.2) [2016] NSWSC 1229 (2 September 2016)*).

However, if the adjudicator attempts to 'apply' the construction contract, and in that attempt makes an error (no matter how significant) then the parties can not appeal that decision.

In this circumstance, the only available recourse to the losing party would be to commence civil proceedings for damages. In the meantime, the losing party must 'pay up'.

The decision is a win for supporters of the original objectives of the Act – 'on account cash flow' – and any serious arguments can only be made following the conclusion of the construction project.

For more information

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