



## Post-Dated Evidence and Procedural Fairness in Security of Payment Adjudications

**Case Note: *Slade v Kongstruction Pty Ltd* [2026] NSWSC 606**

### Executive Summary

Recent case law has made it harder to overturn adjudication decisions, under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOPA), however, the Supreme Court of NSW has found a challenge can still succeed.

In *Slade v Kongstruction*, the Adjudicator refused to consider the Owners' supporting evidence on the basis that those documents were prepared after the date of the payment schedule. As discussed in more detail below, Parker J held that this was a denial of procedural fairness amounting to jurisdictional error (that is, serious enough to invalidate the decision). Because the error only affected one of three issues in dispute, Parker J did not overturn the entire determination. Instead, his Honour severed the offending issue and reduced the award from roughly \$217,000 (award plus fees) to around \$84,000.

### Facts

The Owners engaged the Builder under a standard HIA residential building contract to construct a new dwelling at Roseville. The contract price was \$718,500 and the works were divided into ten stages, each carrying a percentage of the price.

The project was met with delay. The Owners refused the Builder's extension of time claims, the Builder suspended work, and in March 2025 the relationship broke down. The Owners purported to terminate, the Builder disputed the termination, and the Owners engaged replacement contractors to finish the build and rectify alleged defects.

Nine months later the Builder served a payment claim. The Owners' payment schedule allowed nothing, asserting the works were incomplete and defective and that the cost of completion (around \$597,000) far exceeded anything

owed. The Adjudicator awarded the Builder \$195,389 plus \$22,000 in fees. The Owners applied to the Supreme Court to set the determination aside.

### Issue

Whether the Adjudicator made a jurisdictional error or denied the Owners procedural fairness by:

- construing section 22(2)(d) of the SOPA to mean that any documents served with the adjudication response that postdated the payment schedule were not "duly made"; and
- excluding the Owners' documents on a ground which had not been the subject of prior argument by the parties, and without hearing from either party as to the validity of such documents.

- If such an error was identified in the decision, whether that error was material to the outcome of the determination.

## Supreme Court Decision

The Supreme Court held that the Adjudicator's rejection of the Owners' material on the ground that it post-dated the payment schedule was a denial of procedural fairness in circumstances where the Adjudicator failed to seek further submissions from the parties.

## Reasoning

With their adjudication response the Owners relied on several documents prepared after the payment schedule, including expert costings and statements from replacement contractors. The Adjudicator refused to consider this material, reasoning that because the documents post-dated the payment schedule they had not been "duly made" under s 22(2)(d) of the SOPA. Both sides accepted in Court that this reasoning was wrong. As held in *Miller v LMG Building Pty Ltd* [2023] NSWSC 995, there is a difference between a new reason for withholding payment (which a respondent cannot introduce after the payment schedule) and further material that supports a reason already given. Documents created after the payment schedule are not automatically excluded merely because of their date, provided they do not raise a fresh reason for non-payment.

Following the Court of Appeal in *Builtcom Constructions Pty Ltd v VSD Investments Pty Ltd (No 2)* [2025] NSWCA 134, a wrong decision about whether a submission was "duly made" is generally within the Adjudicator's power to get wrong and is not, by itself, a jurisdictional error.

The Adjudicator however, excluded the Owners' material on a basis that neither party had argued. It was a point that evidently occurred to him while writing his determination, without giving anyone a chance to respond. That amounted to a denial of procedural fairness because there was a reasonable possibility it affected the defective works allowance. The Adjudicator

had relied on the Owners' evidence being "uncontested" when, in fact, they had provided documents contesting it.

In considering the materiality of the Adjudicator's error, the Court applied the reasonable possibility test from *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506. That is, whether there was a "reasonable possibility" of a different result. The Court ultimately found that the Adjudicator's decision to reject the documents was material to the defect allowance issue.

Rather than voiding the entire determination, the Court used its severance power under s 32A of SOPA. It identified the "ambit of the dispute" on the affected issue, the difference between the Builder's \$28,770 and the Owners' best case of \$153,854, being \$125,084, and confirmed the balance of \$70,305 plus interest. Adjudication fees, previously awarded entirely to the Builder, were reset to the statutory 50/50 starting point.

## Key Takeaways

Challenging an adjudication determination on "duly made" grounds alone is difficult, because an adjudicator is entitled to be wrong about admissibility. The real vulnerability arises where the Adjudicator decides a point that no one argued without giving the parties a chance to respond.

Evidence prepared after the payment schedule can be relied on in the adjudication response, so long as it supports a reason already raised in the payment schedule rather than introducing a new one.

The test for materiality is not necessarily tied to a monetary amount. Rather, the test is whether there is a reasonable possibility a different result had there been no breach of natural justice.

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