# High Court Confirms Limited Scope of Review From Adjudicator Determinations

## Introduction

Two recent decisions heard in the High Court of Australia – *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 and *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 – provide certainty as to when Australian courts may overturn an adjudication determination for non-jurisdictional errors of law, in the context of security of payments.

Although these cases involved the security of payment legislation in South Australia, under the Building and Construction Industry Security of Payment Act 2009 (SA) (SA Act), and New South Wales, under the Building and Construction Industry Security of Payment Act 1999 (NSW) (NSW Act), the decisions confirm the Western Australian position under the Construction Contracts Act 2004 (WA), in that there is no right to appeal an adjudicator's determination, save for review by the State Administrative Tribunal on the basis of procedural or other nominated grounds.

## Cases

### Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4 *(Probuild)*

Probuild Constructions and Shade Systems Pty Ltd (Shade) were parties to a subcontract under which Shade agreed to supply and install external louvres for an apartment development. Shade served Probuild Constructions with a payment claim amounting to AU$294,849.33 (excluding GST). Probuild Constructions issued a payment schedule under the NSW Act, disputing the entire amount claimed due to an entitlement to set off. Shade referred the dispute to adjudication under the NSW Act. The adjudicator rejected Probuild Constructions' set-off argument and found in favour of Shade.

Probuild Constructions applied for judicial review of the adjudicator's determination, claiming that there was an error of law and sought for the adjudicator's decision to be overturned pursuant to s.69 of the Supreme Court Act 1970. The Supreme Court of New South Wales granted the order and overturned the adjudicator's decision on the basis that the adjudicator had made an error of law when he found that there was no entitlement to liquidated damages until "practical completion". Shade successfully appealed to the New South Wales Court of Appeal. Probuild Constructions then appealed to the High Court.

### Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5 *(Maxcon)*

Maxcon Constructions and Mr Vadasz were parties to a design and construction contract. Vadasz submitted a payment claim to Maxcon Constructions for the amount of AU$204,864.55 (including GST). Maxcon Constructions issued a payment schedule for the amount of AU$141,163.55 (including GST), having deducted a retention sum and administration charges. Vadasz referred the payment dispute to adjudication. The adjudicator found in favour of Vadasz, on the basis that Maxcon Constructions was not entitled to deduct the retention sum because the retention provisions were "pay when paid" provisions and, therefore, ineffective.

Maxcon Constructions appealed to the Supreme Court of South Australia to set aside the adjudicator's determination. Stanley J dismissed Maxcon Constructions' application on the basis that although the adjudicator erred in concluding that the retention provisions were "pay when paid" provisions, the error did not vitiate the determination because it was not jurisdictional.

Maxcon Constructions' appeal to the Full Court was also dismissed. They then appealed to the High Court.

## Decision

The High Court dismissed the appeals in both cases, on account of the fact that the purpose of the NSW Act and the SA Act is to provide an inexpensive and informal way of settling payment disputes between parties.

In *Probuild,* the High Court unanimously held that the NSW Act clearly intends to prevent the Supreme Court from reviewing any alleged errors of law arising from adjudications. Their Honours, in their reasoning, held that the NSW Act was clearly intended to "stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers" by way of adjudication to ensure that "each party knows precisely where they stand at any point of time".[1] On this basis, their Honours concluded that to permit potentially costly and time-consuming judicial review proceedings for errors of law would frustrate the operation and purpose of the statutory scheme.[2]

In coming to their decision, their Honours also referred to the fact that the disputing party, by being denied a judicial review, had not been denied pursuing civil proceedings for a final determination.

In *Maxcon*, their Honours held that they were obliged to follow the New South Wales Court of Appeal's conclusion in *Probuild* that the SA Act excludes the Supreme Court from reviewing determinations of an adjudicator for non-jurisdictional errors of law.

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[1] *Probuild*, [36].

[2] *Probuild*, [48].

## Implications

The High Court confirmed that the legislation prevents a court's ability to overturn a determination, on the basis that it would frustrate the purposes of an expedient security of payment process if every non-jurisdictional error of law was able to be appealed for determinations that ultimately do not constitute an end to a dispute.

These two High Court decisions align with Western Australia's position under the Construction Contracts Act 2004 (WA) that there is no right to appeal an adjudicator's determination for non-jurisdictional errors of law. Accordingly, parties seeking to overturn a determination will need to show that a jurisdictional error of law has been made, which may be a time-consuming and costly exercise involving an investigation of the adjudicator's compliance with the relevant act.

The High Court authorities also highlight the importance of ensuring that any legal submissions provided to the adjudicator are presented in a clear but comprehensive manner, to decrease the likelihood of an adjudicator making a non-jurisdictional error of law in a determination.

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