

NEW SOUTH WALES COURT OF APPEAL

***Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)***

[2016] FICR 38; [\[2016\] NSWCA 379](#)

Bathurst CJ, Beazley P, Basten, Macfarlane and Leeming JJA

6, 23 December 2016

*Construction – Security of Payment – Review of determinations – Error of law on face of record – Not available – Only jurisdictional error – Building and Construction Industry Security of Payment Act 1999 (NSW) – Supreme Court Act 1970 (NSW), ss 69, 69(3)*

Summary

This was an appeal from a decision of the Supreme Court that a determination under the [Building and Construction Industry Security of Payment Act 1999 \(NSW\)](#) could be reviewed for error of law on the face of the record: [\[2016\] NSWSC 770](#).

Facts

Parties to determination under the [Building and Construction Industry Security of Payment Act 1999 \(NSW\)](#) agreed that the adjudicator had committed errors of law on the face of the record within the meaning of [s 69\(3\)-\(5\)](#) of the *Supreme Court Act 1970 (NSW)* which said:

- (3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.
- (4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.
- (5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

Emmett AJA quashed the determination, holding that determinations under the Act could be reviewed for error of law on the face of the record. The applicant for the determination appealed, arguing that the question had been decided to the contrary by the Court of Appeal in *Brodyn Pty Ltd v Davenport* [\(2004\) 61 NSWLR 421](#); [\[2004\] NSWCA 394](#), that if it had not, the reasoning in that case was binding or highly persuasive or correct in any case. A five member Court of Appeal was assembled to consider the question.

*Held*, (per Basten JA, other members agreeing) allowing the appeal:

- (1) As a matter of construction of the *Building and Construction Industry Security of Payment Act 1999* (NSW) judicial review of a determination of an adjudicator is precluded except for jurisdictional error. [1] , [73], [85]
- (2) To a significant extent, the coherent and expeditious procedure provided by Act would be undermined if a determination were to be subject to judicial review in the supervisory jurisdiction of the Court for any error of law which might be identified in the reasons given by the adjudicator. [67]

*Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856; 20 BCL 452; *Attorney-General for the Northern Territory v Emmerson* (2014) 253 CLR 393; [2014] HCA 13; *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190; *Coco v The Queen* (1994) 179 CLR 427; *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229; 21 BCL 364; *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228; *Craig v South Australia* (1995) 184 CLR 163; *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49; *Downey v Acting District Court Judge Boulton (No 5)* (2010) 78 NSWLR 499; [2010] NSWCA 240; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40; *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385; [2005] NSWCA 49; *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112; [2009] VSC 156; *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA 1; (2010) 246 FLR 285; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290; [2001] HCA 14; *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2016] SASC 156; *McNab Developments (Qld) Pty Ltd v MAK Constructions Services Pty Ltd* [2015] 1 Qd R 350; [2014] QCA 232; *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34; *Musico v Davenport* [2003] NSWSC 977; *New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22; *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2; *Potter v Minahan* (1908) 7 CLR 277; *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459; [2016] HCA 8; *R J Neller Building Pty Ltd v Ainsworth* (2009) 1 Qd R 390; [2008] QCA 397; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23; *The King v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404; *United States v Fisher* [1805] USSC 18; 6 US 358; *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2013] 2 Qd R 75; [2012] QCA 276; *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29, considered.

### Representation

Appellant: Mr M Christie SC and Mr D Hume instructed by Moray & Agnew.  
 First respondent: Mr S Robertson and Mr P Santucci instructed by Maddocks.  
 Second respondent: Submitting appearance filed by Gadens Lawyers.

CAMERON FORD