

Supreme Court
New South Wales

Case Name: Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd

Medium Neutral Citation: [2016] NSWSC 770

Hearing Date(s): 3 May 2016

Date of Orders: 15 June 2016

Decision Date: 15 June 2016

Jurisdiction: Equity - Technology and Construction List

Before: Emmett AJA

Decision: (1) Order that the matter of the adjudication under the Security of Payment Act in respect of the entitlement of Shade Systems to a progress payment under the Payment Claim, as served on Probuild by Shade Systems on 23 December 2015, be removed into the Supreme Court.
(2) Order that the Determination, made by the Adjudicator on 15 February 2016, be quashed.
(3) Order that the matter of the adjudication be remitted to the Adjudicator for further consideration and determination according to law.
(4) Order Shade Systems to pay Probuild's costs of the proceedings.

Catchwords: BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 – adjudication determination – whether determination void – denial of natural justice – error of law on the face of the record

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW)
Civil Procedure Act 2005 (NSW)
Home Building Act 1989 (NSW)

Supreme Court Act 1970 (NSW)
Supreme Court Rules 1970 (NSW)

Cases Cited:

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd
(2010) 78 NSWLR 393
Kirk v Industrial Court of New South Wales (2010) 239
CLR 531
Musico v Davenport [2003] NSWSC 977
Project Blue Sky Inc v Australian Broadcasting
Authority (1998) 194 CLR 355
Owners of the Ship "Shin Kobe Maru" v Empire
Shipping Company Inc (1994) 181 CLR 404

Category:

Principal judgment

Parties:

Probuild Constructions (Aust) Pty Ltd (Plaintiff)
Shade Systems Pty Ltd (First Defendant)
Doron Rivlin (Second Defendant)

Representation:

Counsel:
S Robertson (Plaintiff)
S Goldstein (First Defendant)
Submitting Appearance (Second Defendant)

Solicitors:
Maddocks Lawyers (Plaintiff)
Moray & Agnew (First Defendant)

File Number(s):

2016/64368

Publication Restriction:

Nil

JUDGMENT

- HIS HONOUR:** These proceedings are concerned with the validity of a determination made on 15 February 2016 (**the Determination**) by the second defendant, Mr Doron Rivlin (**the Adjudicator**), of an adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Security of Payment Act**). The Determination was made following an application by the first defendant, Shade Systems Pty Ltd (**Shade Systems**), for adjudication of a payment claim served by Shade Systems on the plaintiff, Probuild Constructions (Aust) Pty Ltd (**Probuild**). The payment claim was made under an agreement entered into on 14 October 2014 between Probuild,

as head contractor, and Shade Systems, as subcontractor, whereby Shade Systems agreed to supply and install external louvers to the façade of an apartment complex situated in Chatswood NSW (**the Subcontract**).

- 2 By the Determination, the Adjudicator determined that Probuild owed the amount of \$277,755.03 (including GST) to Shade Systems by way of progress payment under the Subcontract. The Adjudicator determined that the due date for payment was 12 February 2016 and that the rate of interest under s 101 of the *Civil Procedure Act 2005* (NSW) applies. The Adjudicator also determined that Probuild must pay 100% of the adjudication fees.
- 3 By summons filed in the Technology and Construction List on 29 February 2016, Probuild claimed an order under s 69 of the *Supreme Court Act 1970* (NSW) (**the Supreme Court Act**) quashing the Determination. The primary basis upon which Probuild seeks relief is its contention that, in making the Determination, the Adjudicator committed jurisdictional error in that he denied Probuild procedural fairness. Alternatively, Probuild contends that the Determination involved an error of law on the face of the record, having regard to the basis on which the Adjudicator rejected Probuild's claim that it is entitled to liquidated damages from Shade Systems. Shade Systems does not accept that there was a denial of procedural fairness and says that, if there was, relief should be refused. Shade Systems also denies that there was an error of law and contends that, in any event, judicial review is not available for error of law on the face of the record. Before dealing with the issues in the proceedings, it is desirable to say something about the scheme of the Security of Payment Act

Scheme of the Security of Payment Act

- 4 Part 2 of the Security of Payment Act, which consists of ss 8 to 12A, deals with "Rights to Progress Payments", and Part 3, which consists of Division 1 to Division 4, deals with "Procedure for Recovering Progress Payments". Division 1 of Part 3, which consists of ss 13 to 16, and Division 2 of Part 3, which consists of ss 17 to 26, are relevant for present purposes. It is desirable to say something briefly about the relevant provisions.
- 5 Under s 8(1), a person who has undertaken to carry out construction work under a construction contract is entitled to a progress payment on and from

each reference date under the construction contract. It is common ground that the Subcontract is a construction contract and that work to be performed by Shade Systems under the Subcontract is construction work for the purposes of the Security of Payment Act. There is no issue in these proceedings as to the relevant reference date.

- 6 Under s 13, a person who is, or who claims to be, entitled to a progress payment (**claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (**respondent**). A payment claim must identify the construction work to which the progress payment relates and must indicate the amount of the progress payment that the claimant claims to be due.
- 7 Under s 14, a respondent may reply to the claim by providing a payment schedule to the claimant. A payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment, if any, that the respondent proposes to make. If the amount indicated is less than the claimed amount, the payment schedule must indicate why the amount indicated is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reason for withholding payment.
- 8 Section 14(4) relevantly provides that, if a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule to the claimant within the time specified, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates. Under s 15(2), where a respondent becomes liable to pay the claimed amount to the claimant under s 14(4), as a consequence of having failed to provide a payment schedule within the time allowed and fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment, the claimant may recover the unpaid portion as a debt due to the claimant in any court of competent jurisdiction. Under s 15(4), if the claimant commences proceedings pursuant to that provision, to recover the unpaid portion, the respondent is not, in those proceedings, entitled to bring any cross-claim against the claimant or to raise

any defence in relation to matters arising under the construction contract. That operates as a privative provision to that limited extent.

- 9 Under s 16(2), where a claimant serves a payment claim on a respondent, the respondent provides a payment schedule, the payment schedule indicates a scheduled amount that the respondent proposes to pay and the respondent fails to pay the whole or any part of the scheduled amount on or before the due date for payment, the claimant may recover the unpaid portion of the scheduled amount from the respondent as a debt due to the claimant in any court of competent jurisdiction. Under s 16(4), if the claimant commences proceedings under that provision to recover the unpaid portion of the scheduled amount, the respondent is not entitled in those proceedings to bring any cross-claim against the claimant or to raise any defence in relation to matters arising under the construction contract.
- 10 Section 17 provides that a claimant may apply for adjudication of a payment claim if the respondent provides a payment schedule but the amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim. An adjudication application must be in writing, must be made to an authorised nominating authority chosen by the claimant, must be made within 10 business days after the claimant receives the payment schedule, must identify the payment claim and the payment schedule to which it relates and may contain such submissions relevant to the application as the claimant chooses to include. A copy of the adjudication application must be served on the respondent concerned.
- 11 Under s 17(6), the authorised nominating authority to which an adjudication application is made is required to refer the application to an adjudicator as soon as possible. Under s 19(1), if an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent. On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.
- 12 Section 20 relevantly provides that the respondent may lodge with the adjudicator a response to the adjudication application at any time within a

specified period. The adjudication response must be in writing, must identify the adjudication application to which it relates and may contain such submissions relevant to the response as the respondent chooses to include. However, the respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant. A copy of the adjudication response must be served on the claimant.

13 Under s 22(1), an adjudicator is required to determine the amount of the progress payment, if any, to be paid by the respondent to the claimant, the date on which any such amount became or becomes payable and the rate of interest payable on any such amount. Under s 22(2), in determining an adjudication application, the adjudicator is required to consider the following matters only:

- (a) the provisions of the Security of Payment Act;
- (b) the provisions of the construction contract from which the application arose;
- (c) the payment claim to which the application relates, together with all submissions that have been made by the claimant in support of the claim;
- (d) the payment schedule to which the application relates, together with all submissions that have been duly made by the respondent in support of the schedule; and
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

An adjudicator's determination must be in writing and must include the reasons for the determination, unless the claimant and the respondent have both requested the adjudicator not to include such reasons in the determination.

14 Under s 23(2), if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant, relevantly, on a day determined by the adjudicator. Under s 25(1), if the respondent fails to pay the whole or any part of the adjudicated amount, the claimant may request the authorised nominating authority to provide an adjudication certificate. An adjudication certificate may be filed as a judgment for debt in any court of competent jurisdiction and is enforceable accordingly.

Under s 25(3), if the affidavit that must accompany an adjudication certificate indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

- 15 Section 25(4) then provides that, if the respondent commences proceedings to have the judgment set aside, the respondent is not, in those proceedings, entitled to bring any cross-claim against the claimant, or to raise any defence in relation to matters arising under the construction contract in question, or to challenge the adjudicator's determination. Further, a respondent who commences proceedings to have such a judgment set aside is required to pay into court, as security, the unpaid portion of the adjudicated amount pending the final determination of such proceedings.
- 16 Section 27(1), provides that a claimant may suspend the carrying out of construction work under a construction contract if at least two business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under ss 15, 16 or 24. Where s 15 applies, the claimant may serve notice on the respondent of the claimant's intention to suspend carrying out construction work under the construction contract¹. Similarly, where s 16 applies, the claimant may serve notice of intention to suspend carrying out construction work². Finally, under s 24(1), if the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with s 23, the claimant may serve on the respondent notice of intention to suspend carrying out construction work under the construction contract.
- 17 The right under s 27(1), to suspend the carrying out of construction work under a construction contract, exists until the end of a period of three business days immediately following the date on which the claimant receives payment for the amounts payable. Section 27(3) provides that a claimant who suspends construction work in accordance with the right conferred by s 27(1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work during the period of suspension.

¹ Building and Construction Industry Security of Payment Act 1999 (NSW), s 15(2)(b)

² Ibid, s 16(2)(b)

The Dispute

- 18 On 23 December 2015, Shade Systems served a payment claim on Probuild (**the Payment Claim**). By the Payment Claim, Shade Systems stated that it claimed that a progress payment of \$324,334.26 (**the Claimed Amount**) was due under the Subcontract. While the Payment Claim made reference to a sum for retention (**Retention**) of \$77,317.77 (**the Retention Amount**), that sum was not taken into account in calculating the Claimed Amount. The significance of that fact will become apparent.
- 19 On 11 January 2016, Probuild served a payment schedule on Shade Systems by way of response to the Payment Claim (**the Payment Schedule**). By the Payment Schedule, Probuild indicated that it did not propose to make any payment in relation to the Payment Claim. A significant contention raised in the Payment Schedule was that Probuild was entitled to liquidated damages of \$1,089,900, a sum significantly in excess of the Claimed Amount. No mention of Retention was made in the Payment Schedule.
- 20 On 25 January 2016, Shade Systems applied, under s 17 of the Security of Payment Act, for adjudication of the Payment Claim (**the Adjudication Application**). The Adjudication Application conceded a number of the matters raised in the Payment Schedule and indicated that, by reason of those concessions, the amount claimed was revised to \$214,680.88 (**the Revised Claimed Amount**). Importantly, for present purposes, Shade Systems deducted the Retention Amount in calculating the Revised Claimed Amount.
- 21 On 3 February 2016, Probuild lodged a response to the Adjudication Application (**the Adjudication Response**). The Adjudication Response made no substantive submissions in relation to the matters that had been conceded by Shade Systems in the Adjudication Application. In particular, it made no mention of Retention. The Adjudication Response attached submissions in support of its contention that the Adjudicator should determine that Shade Systems had no entitlement to a progress payment. In particular, it relied on its claimed entitlement to liquidated damages of \$1,089,900.
- 22 By the Determination, which was made on 15 February 2016, the Adjudicator determined that the amount of the progress payment to be paid by Probuild to

Shade Systems was \$277,755.03 (the **Adjudicated Amount**), being \$63,074.15 more than the Revised Claimed Amount. As will appear below, in arriving at the Adjudicated Amount, the Adjudicator did not deduct the Retention Amount, which Shade Systems had deducted in arriving at the Revised Claimed Amount. Before making the Determination, the Adjudicator did not give the parties notice of his intention to make a determination in a sum greater than the Revised Claimed Amount; nor did the Adjudicator afford the parties any further opportunity to make submissions in relation to the matter of Retention.

- 23 On 26 February 2016, Probuild wrote to the Adjudicator, making an application under s 22(5) of the Security of Payment Act for correction of the Determination, on the ground that the Adjudicator's decision to award Shade Systems more than the Revised Claim Amount constituted an error from an accidental slip or omission or a material miscalculation of figures. Probuild made no complaint in its letter that it had been denied procedural fairness. Shade Systems opposed Probuild's application, saying that it was within the Adjudicator's jurisdiction to decide whether an amount was incorporated into an adjudicated amount, even if amounts were conceded or deducted by either party. On 1 March 2016, the Adjudicator rejected Probuild's application for a correction of the Determination. As I have said, Probuild commenced these proceedings on 29 February 2016.

Contentions

- 24 Probuild contends that the Determination should be quashed because it was made in circumstances amounting to a denial of procedural fairness. It relies on the proposition that, where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of procedural fairness that a party to a dispute must have a reasonable opportunity of learning what is alleged against it and of putting forward its own case in answer to it³.

³ Musico v Davenport [2003] NSWSC 977, [108]

- 25 Shade Systems responds that, although greater than the Revised Claimed Amount, as shown in the Adjudication Application, the Adjudicated Amount was not in excess of the Claimed Amount, as shown in the Payment Claim. Shade Systems contends that there was no procedural unfairness because the task of the Adjudicator was to adjudicate on the Payment Claim and that is what he did. In any event, Shade Systems contends, having regard to the application made by Probuild to the Adjudicator to correct the Determination, procedural fairness was afforded to Probuild.
- 26 Alternatively, Probuild contends that the Determination should be quashed because there was an error of law on the face of the Determination, albeit a non-jurisdictional error. Shade Systems responds, first, that the Adjudicator made no error of law. Secondly, it says, even if there was an error of law on the face of the record, the Court has no jurisdiction to quash the Determination, unless the error amounts to jurisdictional error. I shall deal separately with each basis upon which Probuild claims relief.

Denial of Procedural Fairness

- 27 The thrust of Probuild's first complaint is that the Adjudicated Amount exceeded the Revised Claimed Amount. The reason that it did so is that, in arriving at the Adjudicated Amount, the Adjudicator did not deduct the Retention Amount, which had been deducted by Shade Systems in the Adjudication Application. While the Retention Amount was referred to in the Payment Claim, it was not deducted from the Claimed Amount.
- 28 In calculating the Revised Claimed Amount, the Retention Amount was partly offset by a sum of \$19,976.73, representing an amount that was apparently under claimed in the Payment Claim but was brought into account in calculating the Revised Claimed Amount in the Adjudication Application. In making the Determination, the Adjudicator rejected the claim for the additional sum of \$19,976.73 and Shade Systems accepts that it is not entitled to that amount. The issue, therefore, is the failure by the Adjudicator to give effect to the deduction by Shade Systems of the Retention Amount in calculating the Revised Claimed Amount in the Adjudication Application.

- 29 The essence of the response given by Shade Systems is that the Retention Amount should never have been brought into account in the calculation of the progress payment to which it claims to be entitled. It is therefore necessary to explain how the Retention Amount was introduced into the calculation of the amount of progress payment to which Shade Systems is entitled. One begins with the Payment Claim.
- 30 The Payment Claim contained two spreadsheets. The first spreadsheet described nine separate items, although the amount claimed in respect of two of the items was nil. The first spreadsheet relevantly contained, in respect of each item, a description of the item, the contract value for the item and the amount claimed for that item. The total of the amounts claimed was \$294,849.33. The Claimed Amount was arrived at by adding GST.
- 31 The second spreadsheet set out the five payment claims that had been made by Shade Systems under the Subcontract and the amounts said by Shade Systems to have been paid by Probuild. In respect of each payment claim, the spreadsheet showed the amount of the payment claim, the amount said to have been paid and the amount withheld. The total of the five claims was shown as \$368,052.21, the total paid was shown as \$290,734.44 and the total of "retention held" was shown as \$77,317.77. A further table showed the total contract value under the Subcontract as \$782,497.03 and the total amount remaining, after deducting the sum of \$368,052.21, as \$491,762.59. However, none of those figures was taken into account in calculating the Claimed Amount.
- 32 In the Payment Schedule, Probuild asserted that the amount that Probuild proposed to pay was a negative, namely, "\$-1,208,989.69". A narrative attached to the Payment Schedule asserted, relevantly for present purposes, that Probuild claimed liquidated damages under clause 48.6 of the Subcontract. A spreadsheet attached to the Payment Schedule showed, relevantly, in relation to each of the nine items of the Payment Claim, the contract value, the amount previously paid, Probuild's assessment of the value completed and Probuild's assessment of the amount payable. The spreadsheet also contained the reasons why the amounts payable differed from the

amounts claimed. The total amount payable for the nine items was shown in the Payment Schedule as \$63,575.80. The total of amounts previously paid was stated to be \$477,904.62.

- 33 In addition, the Payment Schedule spreadsheet set out 13 items in respect of which Probuild asserted that it was entitled to a credit. In particular, item C10 claimed a credit for the sum of \$1,089,900 in respect of liquidated damages for 63 days at \$17,300 per day. The Payment Schedule made no mention of Retention. Specifically, it did not assert any entitlement to a deduction for Retention.
- 34 The front page of the Adjudication Application, which appears to be a preprinted form, referred to the Claimed Amount of \$324,334.26 and stated that the amount in the Payment Schedule was "\$0.00." The front page made no mention of the Revised Claimed Amount. However, submissions in support of the Revised Claimed Amount were contained in the Adjudication Application. After dealing with "Details of Claim", "Project Issues" and "Payment Schedule", the submissions addressed the nine items in the Payment Claim. The heading in respect of each item described the item and set out the contract amount and the amount of Probuild's assessment of the value completed, as stated in the Payment Schedule. At the end of the narrative in relation to each item, the amount said to be "withheld" by Probuild was set out. That amount was, in fact, the difference between the amount claimed for that item in the Payment Claim and the amount allowed for that item in the Payment Schedule.
- 35 After addressing the 13 credit items in the Payment Schedule, including the claim for liquidated damages, Shade Systems' submissions then said as follows:

Paid to Date

77 [Probuild] shows in its spreadsheet ... a paid to date amount of \$477,904.62+GST. That is grossly overstated. The Adjudicator is referred to ... for all payments received to date ...: \$364,094.53+GST.

Retention

78 [Shade Systems] has allowed \$77,317.77 for retention.

Shade Systems' submissions then stated that Shade Systems arrived at the Revised Claimed Amount of \$195,164.44 plus GST as follows:

Total value of work: \$678,920.59 plus GST
Total deduction (for 4 of the 9 items): \$42,343.85
Less paid to date: \$364,094.53 plus GST
Less Retention: \$77,317.77 plus GST
Revised Claimed Amount: \$195,164.44 plus GST, namely, \$214,680.88

36 In the Determination, the Adjudicator dealt separately with each of the nine items in the Payment Claim. The Adjudicator allowed the amounts claimed by Shade Systems in relation to each of the items, less a deduction conceded by Shade Systems in the Adjudication Application, in relation to four of the items, as well as a concession made by Shade Systems in the Adjudication Application in relation to one of the 13 credit items claimed by Probuild in the Payment Schedule. That is to say, the Adjudicator allowed all of the amounts claimed by Shade Systems in the Adjudication Application less the deductions conceded by it. The net result of that determination by the Adjudicator was the figure of \$252,504.57. The Adjudicator then determined the Adjudicated Amount of \$277,755.03, being the sum of \$252,504.57 plus GST of \$25,250.46.

37 In dealing with Retention in his reasons the Adjudicator said as follows:

204 At paragraph 78 of the Adjudication Application [Shade Systems] states that it has allowed \$77,317.77 for retention. However it has not included any amount for retention in the Payment Claim and [Probuild] has not made any claim for retention. I will therefore not include an amount for retention in my determination of the Adjudicated Amount.

38 The essence of Probuild's complaint is that the Adjudicator made the Determination by dealing with each of the nine items in the Payment Claim and the 13 credit items in the Payment Schedule, without reference to the apparent concession made by Shade Systems in the Adjudication Application, that Probuild was entitled to a deduction of the Retention Amount. The Adjudicator did so on the basis that, while the Retention Amount was deducted in calculating the Revised Claimed Amount, no claim was made for Retention by Probuild in the Payment Schedule. Probuild contends that, by not accepting the concession made by Shade Systems in that regard, the Adjudicator denied Probuild procedural fairness, in that it had the effect of denying Probuild the opportunity of making submissions in support of an entitlement to deduction of the Retention Amount.

39 The Adjudicator assessed all of the nine items of the Payment Claim, considered Probuild's response in the Payment Schedule to each of those nine items and addressed each of the 13 items claimed by Probuild as credits in the Payment Schedule. However, the Adjudicator did not deduct the Retention Amount, which Shade Systems had deducted in calculating the Revised Claimed Amount. Apart from failure to deduct the Retention Amount, and apart from Probuild's alternative claim, which I shall address below, Probuild could have no complaint about the approach adopted by the Adjudicator. The essence of Probuild's complaint of denial of natural justice is that the Adjudicator reached a result that was greater than the Revised Claimed Amount, as shown in the Adjudication Application, because he did not deduct the Retention Amount, which had not been claimed by Probuild in the Payment Schedule and which was not the subject of any submission in the Adjudication Response.

40 It is correct, as Probuild asserts, that the Adjudicated Amount as allowed in the Determination exceeds the Revised Claimed Amount. Probuild asserts that, had the Adjudicator given it the opportunity of dealing with the failure to allow deduction of the Retention Amount, further submissions may have been made in relation to the other issues thrown up by the Adjudication Application and the Adjudication Response. However, it is significant that no submissions have been made by Probuild in support of any contention that the Retention Amount should have been deducted. Indeed, no suggestion has been made by Probuild that it was entitled to withhold any amount for Retention.

41 The question of Retention was a false issue raised by Shade Systems in its submissions in support of the Adjudication Application. As I have said, the cover page of the Adjudication Application does not mention the Revised Claimed Amount. It simply refers to the Claimed Amount in the Payment Claim and the fact that the Payment Schedule refers to "\$0.00". It is only in the submissions that any mention is made of deducting an amount for Retention. While the Retention Amount was shown in the Payment Claim, no deduction for Retention was made in the Payment Claim in that amount or any other amount.

- 42 The function of the Adjudicator was to determine, in the light of the Payment Claim and Payment Schedule, the amount of the progress payment, if any, that should be made by Probuild to Shade Systems under the Subcontract. Under s 20(2B) of the Security of Payment Act, a respondent cannot include in an adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant. As I have said, there was nothing in the Payment Schedule to suggest that Probuild was entitled to any amount for Retention. It was therefore not open to Probuild to include in the Adjudication Response, as a reason for withholding payment from Shade Systems, a claim to be entitled to an amount for Retention. The somewhat confusing calculations contained in the Adjudication Application should not be taken to exclude the operation of s 20(2B).
- 43 The Adjudicator concluded that, since Shade Systems had been successful on the majority of its claims, and had been required to make the Adjudication Application, Probuild was liable to pay 100% of the adjudication fees. Probuild contends that, had the Adjudicator dealt appropriately with the amount of Retention, it is possible that the Adjudicator may have reached a different conclusion in relation to the exercise of this discretion as to the liability for adjudication fees. I do not consider that that is a rational possibility.
- 44 The Adjudicator, in dealing with the merits of the nine items in the Payment Claim and the 13 credit items in the Payment Schedule, accepted the position adopted by Shade Systems rather than that adopted by Probuild, save for the five concessions made in the Adjudication Application in relation to four of the nine claims and one of the credit claims. The deduction for Retention was rejected, in circumstances where it had not been sought by Probuild. In the circumstances, I do not see any basis upon which one could conclude that, had the Retention Amount not been deducted by Shade Systems, there would have been a different exercise of discretion by the Adjudicator in relation to adjudication fees.
- 45 No claim for Retention was ever made by Probuild. The task of the Adjudicator was to resolve the dispute raised by the Payment Claim and the Payment

Schedule on the grounds raised by the Payment Schedule. In all of the circumstances, I do not consider that, on a fair reading of the Payment Claim, the Payment Schedule, the Adjudication Application, and the Adjudication Response, Probuild was denied procedural fairness.

46 In those circumstances, it is not necessary to decide the alternative contention advanced on behalf of Shade Systems that the Adjudicator, in effect, afforded procedural fairness to Probuild by dealing with its application of 26 February 2016 for correction of the Determination under s 22(5) of the Security of Payment Act. However, the letter of 26 February 2016 was not a complaint about a failure to be given the opportunity to make submissions in support of the deduction of the amount of Retention. The letter, on its face, asserted that the Determination contained an error from an accidental slip or omission or a material miscalculation of figures, that being a basis upon which a correction might be made under s 22(5). The letter was not a submission in support of deduction of the amount of the Retention.

47 On 1 March 2016, the Adjudicator sent a communication to the parties saying, relevantly:

This is an unusual situation in so far as the reason for the adjudicated amount being more than the amount stated in paragraph [78] of the Adjudication Application is due in part to the inclusion of the "Paid to date" and "Retention" amounts by [Shade Systems]. I did consider the issues of "Paid to date" at paragraphs [72 to 76] and Retention at [204] of the Determination. However, in my view, those paragraphs have been correctly determined and there is no suggestion otherwise from [Probuild] in its correspondence to me. I consider therefore that the issue raised by [Probuild] does not fall within the slip rule under section 22(5)(b) and (c) of the [Security of Payment Act].

48 In paragraphs [72] to [76] of the reasons supporting the Determination, the Adjudicator said that, in the Payment Claim, Shade Systems indicated that it had been paid an amount of \$290,734.44 for claims 1 to 5 and that in the Adjudication Application, Shade Systems submitted that the Payment Schedule indicated that Probuild had paid \$477,904.62 and that Shade Systems disputed that, claiming that it had been paid \$364,094.53.

49 The Adjudicator then observed that the Payment Schedule included a column headed "previously paid", which itemised an amount against each of the nine items in the Payment Claim, indicating a total amount previously paid of

\$477,904.62. The Adjudicator observed that Probuild had not made any submissions specifically on the amount that it had previously paid to Shade Systems and did not address Shade Systems' submission in the Adjudication Application that it had overstated the amount previously paid.

50 The Adjudicator said that he did not accept Probuild's position that the column could be relied upon as evidence that Shade Systems had achieved completion up to the amount paid. The Adjudicator said that, if Probuild wished to rely on the column, it needed to provide evidence to demonstrate that it had paid each of the amounts in the "paid to date" column as part of the payment of \$477,904.62. The Adjudicator said that Shade Systems had provided evidence that suggested that a much lesser amount had been paid than contended by Probuild and that that made Probuild's "paid to date" column unreliable for the reasons explained. In any event, that conclusion led nowhere, since the Adjudicator did not make the Determination on a basis that involved an analysis of amounts actually paid by Probuild to Shade Systems.

51 In his reasons, the Adjudicator referred to the fact that, in support of the Adjudication Application, Shade Systems stated that it had allowed \$77,317.77 for Retention but that that was not included in any amount for Retention in the Payment Claim and Probuild had not made any claim for Retention. For that reason, the Adjudicator did not include an amount for Retention in the Determination. No attempt was made by Probuild, upon receipt of the Adjudicator's letter of 1 March 2016, to support a claim for Retention.

52 It is clear enough, in my view, that the Adjudicator was not inviting submissions as to the merits of allowing an amount for Retention and Probuild made no submissions to that effect. In the circumstances, I would not have been disposed as to conclude that the exchanges that took place after the making of the Determination remedied any denial of procedural fairness, if there had been such a denial.

53 Following the completion of oral argument, I granted leave to Shade Systems to formulate an offer concerning the enforcement of the Determination. An undertaking in the following terms was then proffered to the Court on behalf of Shade Systems:

Upon the basis that the Court declines to grant the relief sought by the plaintiff in proceedings 2016/64368, the first defendant undertakes that it will not seek to obtain judgment from the plaintiff for an amount greater than the sum of:

1. \$175,186.70 plus GST in respect of the adjudicator's determination; and
2. such percentage of \$16,280 plus GST in respect of the adjudicator's fees as the Court determines appropriate.

The amount which is held by the Court should be distributed on the basis set out above.

Any amount of interest which has accrued during the period in which the monies have been held by the Court should be distributed to the parties in the same proportions as the payments out of court.

- 54 The effect of compliance with the undertaking is that Probuild would have the advantage of deduction of the Retention Amount. In those circumstances, Shade Systems contends, there would be grounds for declining relief. Probuild, however, contends that, if there was a denial of procedural fairness, the Determination was a nullity and it is entitled to have the Determination quashed. It says that it should not be subjected to any liability arising out of a void determination. Having regard to the conclusion that I have reached, it is not necessary to resolve that question.

Judicial Review for Error of Law

- 55 Where the Supreme Court previously had jurisdiction to grant any relief or remedy by way of writ, including Prohibition, Mandamus and Certiorari, the Court has jurisdiction to grant such relief or remedy by way of judgment or order made under the Supreme Court Act and the *Supreme Court Rules 1970*⁴. In particular, 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 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 proceedings⁵. For that purpose, the face of the record relevantly includes the reasons expressed by the tribunal for its ultimate determination⁶.
- 56 The process of adjudication in Part 3 of the Security of Payment Act involves the exercise of public powers, in that it is a statutory power conferred by

⁴ Supreme Court Act 1970 (NSW), s 69(1)

⁵ *Ibid*, s 69(3)

⁶ *Ibid*, s 69(4)

legislation. Accordingly, in principle, a determination by an adjudicator is amenable to judicial review under s 69 of the Supreme Court Act and there is no reason why the Court would not have power to quash a determination by an adjudicator that involves an error of law⁷.

57 However, the provisions of s 69 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 provisions, effective to prevent the Court from exercising its powers to quash or otherwise review a decision⁸. Thus, if one can find a clear legislative intention to exclude the availability of judicial review in the case of non-jurisdictional error on the face of the record of a determination made by an adjudicator under the Security of Payment Act, relief under s 69 would not be available to quash the determination. Shade Systems contends that, on the proper construction of the Security of Payment Act, relief under s 69 of the Supreme Court Act is not available to Probuild, even if the Adjudicator made such an error of law.

58 Shade Systems relies on observations made by Hodgson JA in *Brodyn Pty Ltd v Davenport*⁹. In that case, Hodgson JA acknowledged that there is some tension between an approach that says that relief will not lie for non-jurisdictional error of law on the face of the record and the language of s 69 of the Supreme Court Act. His Honour considered that s 69 would suggest, at least *prima facie*, that if relief in the nature of quashing was available at all, it would include jurisdiction to quash on the basis of error of law on the face of the record. However, his Honour considered that the scheme of the Security of Payment Act appeared strongly against the availability of judicial review on the basis of non-jurisdictional error of law¹⁰.

59 Thus, Hodgson JA said, the Security of Payment Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. Further, his Honour said, the

⁷ *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393

⁸ Supreme Court Act 1970 (NSW), s 69(5)

⁹ (2004) 61 NSWLR 421

¹⁰ *Ibid*, [49]-[51]

payments themselves are only payments on account of a liability that will be finally determined otherwise. The procedure under the Security of Payment Act contemplates a minimum of opportunity for court involvement and the remedy provided by s 27, of ceasing work, his Honour said, can only work if a claimant can be confident of the protection afforded by s 27(3), which provides that a claimant is excused from performance if the amount determined by an adjudicator is not paid.

60 However, Hodgson JA went on to observe that it was plain that, for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as being essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination from any of the provisions of the Act and it will be void and not merely voidable. A court of competent jurisdiction could, in those circumstances, grant relief by way of declaration or injunction, without the need to quash the determination¹¹.

61 Hodgson JA then went on to examine the conditions laid down for the existence of an adjudicator's determination. His Honour then said that a question arises whether any noncompliance with any of those requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. His Honour suggested that the approach of asking whether an error by the adjudicator in determining whether any of those requirements is satisfied is a jurisdictional or non-jurisdictional error "tended to cast the net too widely". His Honour considered that it was preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination¹².

62 Hodgson JA expressed the opinion that the reasons that he had stated for excluding judicial review on the basis of non-jurisdictional error of law justified the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements of the Security of Payment Act was essential to the existence of a determination¹³. His Honour said that what was intended to

¹¹ Ibid, [49]-[52]

¹² Ibid, [53]-[54]

¹³ See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390-391

be essential was compliance with the basic requirements, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power, and no substantial denial of natural justice that the Security of Payment Act requires to be given. If the basic requirements are not complied with, his Honour said, or if the purported determination is not a bona fide attempt or if there is a substantial denial of the relevant measure of natural justice, a purported determination will be void because there will not then have been satisfaction of the requirements that the legislature has indicated as essential to the existence of a determination¹⁴.

- 63 Hodgson JA then observed that the circumstances that the legislation required notice to the respondent and an opportunity to the respondent to make submissions confirmed that natural justice is to be afforded to the extent contemplated by those provisions. Such is the importance generally of natural justice, his Honour said, that one can infer a legislative intention that that is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of those provisions, the determination will be a nullity¹⁵. His Honour formulated the question as being whether there is available a remedy to quash a determination, in circumstances where the determination is not void by reasons of defects of a kind to which his Honour referred. His Honour expressed the opinion that there was not, because the availability of the remedy of quashing in such circumstances would not accord with the legislative intention disclosed in the Security of Payment Act that those provisional determinations be made and given effect to with minimum delay and minimum court involvement; and because it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in question lies. His Honour concluded that relief by way of judicial review was not available to quash a determination that is not void¹⁶.
- 64 Mason P and Giles JA agreed with Hodgson JA without comment. However, the correctness of certain propositions advanced by Hodgson JA have now

¹⁴ Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421, [55]

¹⁵ Ibid, [57]

¹⁶ Ibid, [58]-[59]

been put substantially in doubt by the High Court. That is to say, legislation that would take away from the Supreme Court a power to grant relief on account of jurisdictional error is beyond the legislative power of the New South Wales Parliament¹⁷. Further, while I would be very slow to depart from observations made by such a distinguished jurist as Hodgson JA, his Honour's observations are not strictly binding, quite apart from the doubt cast on his Honour's analysis by the High Court.

65 Nevertheless, according to the strict rules of precedent and the doctrine of *stare decisis*, the case is only authority for the proposition that a person who contracts to do work without a licence in contravention of s 4 of the *Home Building Act 1989* (NSW) is not precluded from receiving progress payments under the Security of Payment Act. Hodgson JA held that there was in fact no error of law and, accordingly, the observations made by his Honour as to whether relief by way of judicial review is available under s 69 of the Supreme Court Act were strictly *obiter dicta* and the question therefore remains open.

66 There are quite cogent reasons for concluding that an assumption underlying the scheme of the Security of Payment Act is that the determination by an adjudicator will be final as regards the entitlement to the payment of a progress payment. The scheme of the Security of Payment Act tends to militate against the availability of judicial review on the basis of non-jurisdictional error of law. Thus the legislation discloses an intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. Importantly, the payments themselves are only payments on account of a liability that is not finally determined and falls to be determined finally elsewhere. Further, s 3(4) provides expressly that the Security of Payment Act is not intended to limit any other entitlement that a claimant may have under a construction contract or any other remedy that a claimant may have for recovering any such other entitlements.

67 Perhaps more significantly, s 32 provides that nothing in Part 3, dealing with the procedure for recovering progress payments, affects any right that a party

¹⁷ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531

to a construction contract may have under the contract or may have apart from the Security of Payment Act in respect of anything done or omitted to be done under the contract. Further, nothing done under or for the purposes of Part 3 affects any civil proceedings arising under a construction contract, whether under Part 3 or otherwise.

68 In addition, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal must allow for any amount paid to a party to the contract under or for the purposes of Part 3 in any order or award it makes in the proceeding. In such proceedings, the court or tribunal may make such orders as it considers appropriate for the restitution of any amount so paid and such other orders as it considers appropriate, having regard to its decision in those proceedings.

69 The regime established by the provisions just summarised suggests an analogy between proceedings under Part 3 and an application for interlocutory relief, in that the making of an interlocutory order does not finally determine any dispute. Further, it is arguable that the remedy provided by s 27 can only work if a claimant can be confident of the protection given by s 27(3). If a claimant faced the prospect that an adjudicator's determination could be quashed on a ground involving doubtful questions of law or doubtful questions of fact, the risks involved in action under s 27 could be prohibitive. Section 27 could, in those circumstances, operate as a trap¹⁸.

70 However, a provision conferring jurisdiction on or granting powers to a court should not be construed by implying or imposing limitations that are not found in the express words of the provision¹⁹. Against the quite cogent reasons for excluding the operation of judicial review, as outlined above, it is clear that there is nothing in the Security of Payment Act that directly addresses the possibility of proceedings for judicial review in respect of a determination made by an adjudicator.

71 The only provision of the Security of Payment Act that could operate as a privative provision, to exclude judicial review of a decision of an adjudicator, is

¹⁸ Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421, [51]

¹⁹ Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc (1994) 181 CLR 404, 421

s 25. While s 15(4) and s 16(4) operate as privative clauses to some extent, s 25 goes slightly further, in so far as it also denies any entitlement to challenge an adjudicator's determination. Significantly, however, s 25 says nothing about excluding jurisdiction to grant judicial review under s 69 of the Supreme Court Act.

72 Section 25(4) is limited to proceedings brought to set aside a judgment and steps would have to be taken before judgment is entered. The respondent would therefore have notice of those steps and thus have an opportunity to challenge the determination before judgment was entered. An adjudication certificate can only be obtained where the respondent has failed to pay the amount as adjudicated within the time limited. The obligation to pay runs from a date that is at least five business days after the date on which the determination is served on the respondent. Thus, the provisions do not preclude a respondent from seeking, by other proceedings, to prevent the registration of judgment before it occurs. That indicates that there is no clear intention to prevent judicial review of an adjudicator's determination.

73 Section 25(4)(a)(iii) uses the word "challenge", which should not be construed narrowly. However, the provision appears to be directed to a challenge to the correctness of an adjudicator's determination in terms of the factors set out in s 22. The language is not apt to protect a determination that involves an error of law. Further, any privative clause is likely to give rise to the need to reconcile its effect with the language of other provisions of the relevant statute constraining the power in question, and that involves an exercise in statutory construction. The process of reconciliation must take account of the objects of the statute, which are undoubtedly to provide a simple and speedy process to ensure progress payments are made in a timely fashion. However, as a general rule, a constraint on jurisdiction expressly conferred on the court will require express language or at least a clear and unambiguous implication²⁰.

74 I do not consider that there is a clear indication or implication to be found in the Security of Payment Act that the jurisdiction conferred by s 69 of the Supreme Court Act is intended to be excluded. It is by no means clear that a claimant

²⁰ See generally the observations made by Basten JA in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, [85]-[95]

who has not been paid the adjudicated amount and who has served a notice of intention to suspend work, and then takes that step, would be liable for any loss or damage from which the claimant would otherwise be protected by s 27(3). In circumstances where the determination is later quashed by the court in the exercise of the jurisdiction conferred by s 69, the inference, if any, that may be drawn from the language of s 27(3) is insufficient to demonstrate an intention to remove the court's jurisdiction²¹. I consider, on balance, that judicial review under s 69(3) is available to quash a determination made by an adjudicator where an error of law that leads to an adjudicated amount that is different from the amount that would have been determined but for the error of law appears on the face of the record.

Error of Law by the Adjudicator

75 Probuild says that two errors appear on the face of the record of the proceedings that led to the Determination, in that the errors appear in the reasons that form part of the Determination and the reasons form part of the relevant record, by virtue of section 69(4) of the Supreme Court Act. The errors of law are as follows:

- (1) On the proper construction of clause 42.1(a)(ii) of the Subcontract, Probuild is entitled to liquidated damages for delay for every day after the date for practical completion to and including the date that the Subcontract is terminated with the result that liability for liquidated damages accrues from day to day, whereas the Determination was made on the basis that, on the proper construction of clause 42.1(a)(ii) of the Subcontract, Probuild could not be entitled to any liquidated damages for delay prior to the date of practical completion or until the Subcontract was terminated.
- (2) On the proper construction of clause 42.1(a)(ii) of the Subcontract, and as a matter of law generally, it is not incumbent upon Probuild to demonstrate that any delay for which it claims liquidated damages was the fault of Shade Systems, whereas the Determination was made on the basis that it was incumbent upon Probuild to demonstrate that any delay for which it claimed liquidated damages under clause 42(1)(a)(ii) was the fault of Shade Systems.

76 Clause 42.1(a)(ii) of the Subcontract relevantly provides that, if Shade Systems fails to reach practical completion by the date for practical completion, it is indebted for liquidated damages for every day after the date of completion up

²¹ *Ibid*, [95]

to and including whichever first occurs of the date for practical completion or the date the Subcontract is terminated. I consider that, on the proper construction of clause 42, liquidated damages accrue from day to day. So long as the date for practical completion has passed, liquidated damages accrue. The reference to the date of completion or termination of the Subcontract does no more than fix a final date beyond which liquidated damages cease to accrue.

- 77 Shade Systems contends that that construction should be rejected because of the anomalous situation that would arise if there were an extension of time after the date for practical completion had passed. However, the Subcontract addressed that possibility expressly. Thus, clause 42.3 provides that, if the time for completion is extended after Shade Systems has paid, or Probuild has deducted, liquidated damages, Probuild is required to repay the liquidated damages to Shade Systems.
- 78 In concluding that Probuild had the obligation of proving default on the part of Shade Systems before being entitled to the liquidated damages, the Adjudicator made an error of law. While some default on the part of Probuild could well be an answer to a claim by Probuild for liquidated damages, Shade Systems would have the onus of establishing that default. Merely asserting default is not sufficient. A fair reading of the Adjudicator's reasons indicates that he assumed, wrongly, that the onus was on Probuild to demonstrate that the failure to achieve practical completion by the date for practical completion was caused by default on the part of Shade Systems. That was an error of law and it appears on the face of the record of the proceedings leading to the Determination.
- 79 Had the Adjudicator not made the error of law described above, he may well have allowed the claim by Probuild for liquidated damages, such that the Adjudicated Amount should have been nil. Alternatively, the Adjudicator should have given consideration to the question of whether any fault on the part of Probuild caused the date for practical completion to have passed before practical completion was achieved. I consider that there was an error on the

face of the record of the Determination and that, in the circumstances, Probuild is entitled to relief under s 69 of the Supreme Court Act.

Conclusion

80 I have concluded that there was no denial of procedural fairness on the part of the Adjudicator. However, I consider that there was an error of law on the face of the record of the Determination and that the Court has jurisdiction to grant relief by way of judicial review in respect of that error. Accordingly, I propose to make orders as follows:

- (1) Order that the matter of the adjudication under the Security of Payment Act in respect of the entitlement of Shade Systems to a progress payment under the Payment Claim, as served on Probuild by Shade Systems on 23 December 2015, be removed into the Supreme Court;
- (2) Order that the Determination, made by the Adjudicator on 15 February 2016, be quashed;
- (3) Order that the matter of the adjudication be remitted to the Adjudicator for further consideration and determination according to law;
- (4) Order Shade Systems to pay Probuild's costs of the proceedings.

Amendments

16 June 2016 - 16 June 2016 - Par 8 - replaced 'about' with 'amount'; and 'court with competent jurisdiction' to 'court of competent jurisdiction'

16 June 2016 - Par 63 - Supreme Court Act changed to Security of Payment Act

22 June 2016 - 22 June 2016 - Par 80(2) - replaced 3 with 15