

## Article Information

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# SOP in the High Court again - “Special Leave Granted” A review of the grounds of judicial review for adjudication decisions

**Ted Williams, Partner and Andrew MacGillivray, Senior Associate discuss.**

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### Background

Historically, adjudication decisions in Queensland, New South Wales, Victoria, Tasmania and South Australia were only reviewable for jurisdictional error. This position has been challenged in Australia’s highest Court.

In late 2016, the New South Wales Court of Appeal handed down the decision of *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (**Shade Systems**).

This decision was followed in early 2017 by the Full Court of the South Australian Supreme Court decision of *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2017] SASFC 2 (**Maxcon**), each concerning their relevant security of payment legislation. These decisions confirmed that each SOP Act did not permit judicial review on a basis other than for jurisdictional error.

Significantly, the decision in *Maxcon* found that it is possible to sever an adjudication decision whether infected by jurisdictional error or error of law on the face of the record.

### How did we get here?

#### Shade Systems Decision

Probuild Constructions (Aust) Pty Ltd (**Probuild**) entered into a contract with Shade Systems Pty Ltd (**SS**). The parties proceeded to adjudication, where the adjudicator decided that an amount was payable by Probuild to SS.

Probuild sought to review the decision. The Court found that the adjudicator had made “*an error of law on the face of the record*” and consequently quashed the adjudicator’s decision.

#### *NSW Court of Appeal*

SS then lodged an appeal arguing that the Court erred in finding that the adjudicator’s decision could be quashed on the basis of an error of law on the face of the record.

The Court considered section 69 of the *Supreme Court Act 1970* (NSW), particularly:

1. sub-section (3) which provides that a certiorari order permits the Court to quash a decision if there is an error of law on the face of the record of that proceeding; and
2. sub-section (5) which provides that a provision in an Act that prevents the Court from exercising its powers to quash or review a decision is not affected by section 69.

The NSW SOP Act did not contain a privative clause that might indicate that review on the ground of an error of law was prohibited, but it also did not say that it could be reviewed on that ground.

The Court ultimately followed the decisions of McDougall J in *Musico v Davenport* [2003] NSWSC 997 and *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, which it considered to be authorities for the position **that a error of law on the face of the record was not a ground of review.**

The Court remarked that a contrary view would undermine the purpose of the NSW SOP Act, namely the fast resolution of payment disputes.

#### Maxcon Decision

Maxcon entered into a contract with Mr Vadasz (**Vadasz**). Vadasz served a payment claim pursuant to the SA SOP Act. The parties proceeded to adjudication where Vadasz was awarded the full amount claimed.

Maxcon sought a review of the decision. Although there were two issues for determination, only one was subject to the appeal to the High Court. In respect of that issue, the Court found that the adjudicator made an error of law in a finding regarding a retention clause in the contract.

However, that error was neither a jurisdictional error nor an error of law on the face of the record.

#### *Full Court of the Supreme Court*

Maxcon appealed the decision. In respect of the retention clause issue, Blue J (with whom Lovell J agreed) found, that the:

1. adjudicator did not make a jurisdictional error in construing the contract's retention clause; and
2. adjudicator's error was an error of law on the face of the record, however this did not render the adjudicator's decision void.

Whilst Blue J indicated that he was not able to conclude that the SA SOP Act excluded judicial review of an adjudication decision on the ground of error of law on the face of the record [at 186], his Honour followed the decision of *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 as the decision was not "plainly wrong" [at 208]."

His Honour concluded that the SA SOP Act impliedly excluded *certiorari* in respect of an adjudication decision on the ground of an error of law on the face of the record [at 209].

Blue J further remarked that if the adjudicator had made a jurisdictional error, the determination could be severed, by holding Maxcon liable for only the amount that was not affected by the jurisdictional error.

#### **High Court**

Probuild and Maxcon both appealed the decision to the High Court. As the decisions raised the same point of law, the High Court heard the special leave applications together.

#### Arguments for Special Leave

##### *Appellants grounds*

Maxcon sought leave from the High Court on the following grounds:

1. **Ground 1** - Whether the adjudicator's error in construing section 12 of the NSW SOP Act (which had been held to be an error of law) was a **jurisdictional error**. Counsel pointed out the judgments of Basten J (in NSW) and Blue J (in SA) as to the effects of allowing *certiorari* to lie in respect of jurisdictional error and error of law on the face of the record. Reference was also made to Hinton J's (in NSW) dissenting judgment, particularly his conclusion that the adjudicator's decision was a jurisdictional error because NSW SOP Act which contained the provision which the adjudicator misconstrued (s 12 of the NSW SOP Act) also gave the adjudicator the power to make the adjudication decision.

Counsel submitted that consideration of this issue would also clarify whether the SOP Act impliedly excludes an error of law on the face of the record.

2. **Ground 2** - Counsel also raised the issue of what relief should be granted if the Court had the power to grant *certiorari*, whether on the basis of jurisdictional error or an error of law on the face of the record where that error affects part, but not all of the adjudicator's decision. Counsel for Maxcon referred to Blue J's judgment (in SA) where his Honour considered that the Court would have a power to sever an adjudicator's determination if it were affected by either jurisdictional error or an error of law on the face of the record. It was argued that this position

was incorrect because the nature of the adjudicator's power was 'a singular exercise of power' and therefore it would be wrong to sever the adjudicator's determination, by invalidating the part of the decision affected by an error and remitting the other part of the decision.

### *Respondents*

Counsel for the respondents, submitted that both of the cases were "*unsuitable as vehicles for special leave*". In respect of both cases, counsel argued that special leave should not be granted as the legal costs of the litigation outweighed the monetary amount that was the subject of the dispute.

In the Maxcon case, the amount in question was a mere \$30,000.

In respect of the Probuild case alone, counsel argued that if special leave were granted and the appeal were allowed, that would not be the end of the dispute about the interim payment because the original orders involved remitting the matter to the adjudicator.

The High Court granted special leave.

### **What now?**

The implication of this decision will be significant for the construction industry.

Any finding contrary to the existing line of authority (which is consistent in each state) will affect adjudication determinations not only in South Australia and New South Wales, but also Queensland, Victoria and Tasmania.

If the High Court does permit *certiorari* for error of law on the face of the record, we can expect that there will be a significant increase in the number of adjudication decisions that will be reviewed.