

Article Information

Service: Projects & Construction

Sector: Infrastructure

SOP Act decision clarifies scope for judicial review of adjudication determination after entry of judgment

The decision in *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor [2015] VSC 233 (2 June 2015)* clarifies that s28R(5) of the Building and Construction Industry Security of Payment Act 2002 (Vic) does not prohibit the judicial review of an adjudication determination on grounds of jurisdictional error. Associate, Pei Yau looks at the decision.

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Facts

On 18 November 2014, Asta Developments (Aust) Pty Ltd (Asta) obtained an adjudication determination against Amasya Enterprises Pty Ltd (Amasya). Pursuant to s28R of the *Building and Construction Industry Security of Payment Act* (SOP Act), Asta entered judgment on the basis of that adjudication determination.

Amasya sought a judicial review of the adjudication determination on grounds of jurisdictional error and an order that the summary judgment be set aside.

In opposing Amasya's application, Asta submitted, inter alia, that there could not be any challenge to the summary judgment by reason of s28R(5)(a)(iii). That section provides that "[i]f a person commences proceedings to have the judgment set aside, that person...is not, in those proceedings, entitled...to challenge an adjudication determination or a review determination..."

Decision

His Honour Justice Vickery held in relation to s28R(5)(a)(iii) that:

- it is a privative provision which operates when a proceeding is commenced to set aside a judgment entered under s28R
- its operation is however limited by Chapter III of the Australian Constitution
- it cannot be applied to take from the Supreme Court of Victoria power to grant relief on the basis of jurisdictional error
- it is confined to denying relief where the error is an error on the face of the record (not jurisdictional error).

In arriving at the conclusions above, His Honour referred to the decision of the *High Court in Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA 43* observing that the making of an order in the nature of certiorari on grounds of jurisdictional error is entrenched in the Commonwealth Constitution, while error of law on the face of the record is not.

The distinction between jurisdictional error and error on the face of the record becomes crucial to the operation of S28R(5)(a)(iii).

Comments

The procedure for obtaining summary judgment under the SOP Act is different from those under the security of payment

legislations in New South Wales and Queensland where the adjudication certificate itself is filed as a judgment for a debt, making the adjudication certificate enforceable 'as it were a judgment of a court' rather than 'the product of the exercise of judicial power'. The ability to challenge an adjudicator's determination in New South Wales and Queensland must be viewed in this different statutory context.

The decision in *Amasya* is in line with authorities confirming that to the extent of any inconsistencies, the Commonwealth Constitution and legislation prevail over any State Constitution and legislation.

For example, the decisions handed down in NSW (most recently In the matter of *Douglas Aerospace Pty Ltd [2015] NSWSC 167*) and Victoria (most recently *Scrohn Pty Ltd v Newearth Constructions Pty Ltd [2015] VSC 254*) in which the courts have consistently held that the relevant security of payment legislation does not preclude a genuine offsetting claim to a statutory demand where the offsetting claim arises under the same contract under which a judgment has been obtained pursuant to that legislation.

The Victorian court has also recently created further difficulties for liquidators with its decision in *Facade Treatment Engineering Pty Ltd (in liquidation) v Brookfield Multiplex Constructions Pty Ltd [2015] VSC 41*, in which it held that certain provisions of the SOP Act were inconsistent with the right to set-off under s553C of *Corporations Act 2001* and therefore, pursuant to s109 of the Commonwealth Constitution, the SOP Act was invalid to the extent of the inconsistency. As a result of this decision, it will be difficult for liquidators in Victoria to be able to avail themselves of the rights conveyed by the SOP Act to obtain payment.