



HIGH COURT OF AUSTRALIA

14 February 2018

PROBUILD CONSTRUCTIONS (AUST) PTY LTD v SHADE SYSTEMS PTY LTD & ANOR
[2018] HCA 4

Today the High Court unanimously dismissed an appeal from the Court of Appeal of the Supreme Court of New South Wales. The High Court held that the Supreme Court of New South Wales does not have jurisdiction to make an order in the nature of certiorari to quash a determination made by an adjudicator appointed under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Security of Payment Act") for a non-jurisdictional error of law on the face of the record.

The Security of Payment Act relevantly grants, to any person who undertakes to carry out construction work under a construction contract, an entitlement to a "progress payment" and sets out a procedure for recovering such a payment. A person who is or claims to be entitled to a progress payment may make a payment claim. Disputed payment claims may be referred to an adjudicator for determination. The adjudicator must determine the amount of the progress payment (if any) to be paid. In doing so, the adjudicator is to consider, among other things, the provisions of the Security of Payment Act and the construction contract.

The appellant ("Probuild") and the first respondent ("Shade Systems") were parties to a construction contract. Shade Systems served on Probuild a payment claim stating that a progress payment was due. Probuild responded that it did not propose to pay any of the amount claimed, because it claimed to be owed a considerably higher amount for liquidated damages. Shade Systems applied for adjudication of its payment claim. The adjudicator rejected Probuild's liquidated damages claim and determined an amount payable by Probuild.

Probuild commenced judicial review proceedings in the Supreme Court, seeking an order in the nature of certiorari quashing the adjudicator's determination. The primary judge made the order sought on the basis that the adjudicator had made errors of law that appeared on the face of the record, which included the reasons for the determination. On appeal to the Court of Appeal, Shade Systems successfully argued that the Security of Payment Act excluded the jurisdiction of the Supreme Court to quash the determination for non-jurisdictional error of law on the face of the record.

By grant of special leave, Probuild appealed to the High Court. The High Court held that the Security of Payment Act ousted the jurisdiction of the Supreme Court to make an order in the nature of certiorari quashing an adjudicator's determination for non-jurisdictional error of law on the face of the record. Although the Security of Payment Act did not contain an express statement providing that the jurisdiction was ousted, the scheme of the Act disclosed an intention that such review would not be available having regard to the fact that the Act creates an interim entitlement that is determined informally, summarily and quickly, and then summarily enforced without prejudice to parties' common law rights. Accordingly, the appeal was dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*