



## HIGH COURT OF AUSTRALIA

14 February 2018

MAXCON CONSTRUCTIONS PTY LTD v MICHAEL CHRISTOPHER VADASZ  
(TRADING AS AUSTRALASIAN PILING COMPANY) & ORS  
[2018] HCA 5

Today the High Court unanimously dismissed an appeal from the Full Court of the Supreme Court of South Australia. The Court held that an adjudicator appointed to resolve a disputed payment claim under the *Building and Construction Industry Security of Payment Act 2009* (SA) ("the Security of Payment Act") did not make an error of law, and that in any event the Supreme Court's jurisdiction to quash non-jurisdictional errors of law on the face of the record had been ousted by the Security of Payment Act.

Maxcon Constructions Pty Ltd ("Maxcon") and Mr Vadasz were parties to a construction subcontract under which Mr Vadasz agreed to design and construct piling for a development. Certain "retention provisions" in the subcontract required Mr Vadasz to provide a sum of money as security. Maxcon was required to release the retention sum within a certain time after a certificate of occupancy for the development was issued under State planning legislation.

In 2016 Mr Vadasz served on Maxcon a payment claim under the Security of Payment Act, stating that a progress payment was due. Maxcon responded that it was entitled to deduct the retention sum and other administrative charges from the amount in the payment claim. Mr Vadasz applied for adjudication of his payment claim. The adjudicator concluded that the retention provisions made release of the retention sum contingent or dependent on the operation of another contract, namely the head contract between Maxcon and the owner of the land. The retention provisions were therefore found to be "pay when paid provisions" which were ineffective by reason of the Security of Payment Act, and Maxcon was not entitled to retain the retention sum.

Maxcon commenced judicial review proceedings in the Supreme Court, alleging that the adjudicator was wrong to decide that the retention provisions were "pay when paid provisions", and seeking an order setting aside the adjudicator's determination. The primary judge dismissed the application for judicial review. By majority, the Full Court dismissed Maxcon's subsequent appeal, following the decision of the Court of Appeal of the Supreme Court of New South Wales in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 344 ALR 355 on the basis that the decision dealt with uniform national legislation and was not plainly wrong.

By grant of special leave, Maxcon appealed to the High Court. The Court unanimously concluded, consistently with the decision in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4, that the Security of Payment Act ousted the jurisdiction of the Supreme Court to make an order in the nature of certiorari quashing the adjudicator's determination for error of law on the face of the record that is not a jurisdictional error.

The High Court further held that the adjudicator did not err in law in determining that the retention provisions were "pay when paid provisions". Under the subcontract, the due dates for payment of the retention sum depended on the issue of a certificate of occupancy, which in turn

required satisfactory completion of the head contract. Therefore, the due dates for payment of the retention sum were contingent or dependent upon the operation of the head contract.

- *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.*