

PROBUILD CONSTRUCTIONS (AUST) PTY LTD v SHADE SYSTEMS PTY LTD & ANOR (S145/2017)

Court appealed from: New South Wales Court of Appeal
[2016] NSWCA 379

Date of judgment: 23 December 2016

Special leave granted: 12 May 2017

Shade Systems Pty Ltd (“Shade Systems”) was a subcontractor of Probuild Constructions (Aust) Pty Ltd (“Probuild”). On 23 December 2015 it served a payment claim on Probuild pursuant to the provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Security of Payment Act”). On 11 January 2016 Probuild denied that claim. That dispute was then referred to an adjudicator (“the Adjudicator”) who found in favour of Shade Systems. A progress payment of \$277,755 was then allowed.

Probuild then sought to review the Adjudicator’s determination in the Equity Division of the Supreme Court. It alleged that there had been a denial of procedural fairness in the adjudication process constituting jurisdictional error. Probuild also alleged error of law arising from the Adjudicator’s written reasons. The primary judge, Justice Emmett, rejected the claim of procedural unfairness. His Honour however held that the Court’s supervisory jurisdiction was still available to review non-jurisdictional errors of law on the face of the record. Having found such an error, Justice Emmett then quashed the Adjudicator’s determination and remitted the matter for redetermination according to law.

Upon appeal, Shade Systems submitted that there was no power to intervene in a case where the only errors identified were non-jurisdictional errors of law. It further submitted the cases of *Brodyn Pty Ltd v Davenport* and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* were binding authority for that proposition. Probuild however disputed that assessment and a five judge bench was then constituted to decide the matter.

On 23 December 2016 the Court of Appeal (Bathurst CJ, Beazley P, Basten, Macfarlan & Leeming JJA) unanimously allowed Shade Systems’ appeal. Their Honours found that the Security of Payment Act did not permit a review of an adjudicator’s decision other than for jurisdictional error.

The ground of appeal is:

- The NSW Court of Appeal erred in holding that the NSW Supreme Court’s power to make orders in the nature of certiorari for error of law on the face of the record is ousted in relation to determinations under the Security of Payment Act.