IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY No S145 of 2017

PROBUILD CONSTRUCTIONS (AUST) PTY LTD
Appellant

SHADE SYSTEMS PTY LTD
First Respondent

DORON RIVLIN
Second Respondent

APPELLANT'S REPLY

PART I – PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – REPLY

2. The argument advanced by the First Respondent is, in truth, an argument in favour of limiting or excluding the grant of interlocutory relief in proceedings alleging error of law on the face of a SOP Act determination. It is not an argument which supports the asserted conclusion that there is an "*unmistakable, implicit parliamentary intention that there be no review for non-jurisdictional error of law on the face of the record*"[1].

3. While it may be accepted that one of the objects of the SOP Act is to promote prompt payment of building contractors,[2] the First Respondent correctly acknowledges that the payments required by the SOP Act are "*interim*" in the sense that they might be required to be repaid if a determination is later found to be erroneous.[3] Some authorities have described this feature of the SOP Act as ordinarily requiring principals to "*pay now, argue later*".[4]

4. In other words, the rights conferred by the SOP Act are **defeasible** by proper proceedings.

5. There is nothing in the text, context or objects of the SOP Act which supports a conclusion that the SOP Act should be construed as permitting determinations to be "*argue[d]*" or negatived by way of private law proceedings[5] but not through public law proceedings seeking to quash a determination for error of law on the face of the record.[6]

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[1] Cf First Respondent's Submissions filed 7 July 2017 (**RS**) at [59].

[2] See RS at [34]-[42], [48]. The overseas authorities referred to in RS at [49]-[50] are, with respect, of limited assistance in the absence of an analysis of the statutory text and approaches to judicial review applying in those jurisdictions.

[3] RS at [43].

[4] *Multiplex Constructions v Luikens* [2003] NSWSC 1140 at [96]. See also, eg, *John Holland v Roads and Traffic Authority* [2007] NSWCA 140 at [44]; *Hickory Developments v Schiavello* (2009) 26 VR 112 at 121 [44]; *Stowe Australia v Denham* [2014] ACTSC 402 at [54]; *Maxcon v Vadasz* [2016] SASC 148 at [15].

[5] See *John Holland v Roads and Traffic Authority* (2006) 66 NSWLR 624 at 633-634 [33]-[37] for a discussion as to the nature of such proceedings.

[6] Cf RS at [33].

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6. The absence of a right of appeal from adjudication determinations certainly does not support such a conclusion.[7] In light of this Court's decision in *Hockey v Yelland* (1984) 157 CLR 124 (an authority not addressed at all in the First Respondent's submissions), even if the SOP Act expressly provided that determinations could not be appealed, that would not operate to prevent a party dissatisfied with a determination from seeking an order quashing the determination for error of law on the face of the record.

7. The First Respondent is also wrong to suggest that the SOP Act should be construed as excluding review for error of law on the face of the record as a matter of necessary intendment because the contrary view might cause the SOP Act to be "*stultified and frustrated*" through "*the proliferation of litigation*".[8]

8. As already observed, it is inherent to the SOP Act that adjudication determinations may be negatived through proper curial or arbitral proceedings. For example, SOP Act determinations may be challenged by proceedings seeking a declaration that an amount awarded by an adjudicator was not payable on a correct understanding of the facts or law and/or by seeking orders requiring restitution of amounts paid as a result of a SOP Act determination.[9] Such proceedings may be pursued in relation to each and every determination[10] and may be pursued with the benefit of the panoply of procedures available in private law proceedings such as discovery, subpoenas and cross-examination.

9. Given the availability of this facility for challenging SOP Act determinations by private law proceedings (as well as the fact that the SOP Act does not, as a matter of construction,[11] prohibit public law proceedings alleging jurisdictional error), there is no proper basis for concluding that the SOP Act would be "*stultified and frustrated*" by the retention of an additional (but relatively limited and inexpensive) facility for challenging SOP Act determinations for error of law on the face of the record.[12]

10. Such a submission does not "*verge on impermissibly contending that errors of law under the Act should be characterized as jurisdictional*"[13] or deny that adjudicators may make errors within jurisdiction.[14] Rather, the submission acknowledges that the "*fast track interim progress payment adjudication vehicle ... must necessarily give rise to many adjudication determinations which will simply be incorrect*"[15] and seeks to preserve the courts' historical power to quash such determinations in "*strictly limited*"[16] circumstances.

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[7] Cf RS at [44].

[8] Cf RS at [46.1].

[9] See, eg, *Falgat Constructions v Equity Australia* (2005) 62 NSWLR 385 (NSWCA) at 389 [21]. Cf RS at [51].

[10] Cf RS at [48], [51].

[11] See AS at [50]. See also *Chase Oyster Bar* (2010) 78 NSWLR 393 (NSWCA) at 407-408 [58]-[59], [85]-[91], [287].

[12] Cf RS at [46].

[13] Cf RS at [52].

[14] Cf RS at [53].

[15] RS at [47] quoting *Brodyn v Davenport* [2013] NSWSC 1019 at [14].

[16] *Hockey v Yelland* (1984) 157 CLR 124 at 142.

11. In considering this issue, it is important to recognise that a claimant (as much as a respondent) may wish to challenge an adjudication determination for error of law on the face of the record.

12. For example, if an adjudicator rejects a substantial aspect of a claimant's payment claim on a basis which is manifestly erroneous in law (but not amounting to a jurisdictional error), a claimant may wish to avail him, her or itself of the (relatively inexpensive and swift) facility for challenging that determination for error of law on the face of the record.

13. There is no reason to read the SOP Act as limiting the claimant's rights in such circumstances to commencing and prosecuting private law proceedings (which in almost all cases will be more expensive and take more time to resolve than public law proceedings limited to a review of the record).

14. This is particularly so given the prevailing view that adjudication determinations create issue estoppels binding in subsequent adjudications.[17] If the power to review for error of law on the face of the record is unavailable, a claimant may forever lose the ability to vindicate an entitlement to be "*pa[id] now*" under the statutory scheme if an adjudicator makes a determination which is manifestly erroneous in law but followed in subsequent adjudications.

15. Reading the SOP Act as excluding the power to review for error of law on the face of the record also cannot be justified by reference to the possibility that a court might, in aid of judicial review proceedings, grant interlocutory relief preventing enforcement of a SOP Act determination.[18]

16. The argument to the contrary by the First Respondent fails to explain why the power to review for error of law on the face of the record should be regarded as excluded in all circumstances including where no interlocutory injunction is sought (such as where the determination is challenged by the claimant or where it is challenged by the respondent but on the basis that the respondent is content to pay the adjudicated amount immediately and seek restitution of that amount in the event that the challenge is successful – that is, "*pay now, argue later*").

17. The correct view is that the aspects of the text and context of the statutory scheme relied on by the First Respondent[19] do not support a conclusion that judicial review for error of law on the face of the record is excluded by the SOP Act. Rather, those aspects of the statutory scheme are relevant to the question of the circumstances (if any) in which it is permissible and appropriate for a court to grant interlocutory relief in aid of proceedings seeking to quash a SOP Act determination for error of law on the face of the record.

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[17] *Dualcorp v Remo* (2009) 74 NSWLR 190 (NSWCA) at 205-206 [68]-[69].

[18] Cf RS at [46.2].

[19] See, in particular, RS at [34]-[45], [47]-[50].

18. That is a question which does not arise for determination on the present appeal because, at first instance, the First Respondent voluntarily undertook not to seek to enforce the determination the subject of this appeal in exchange for the Appellant paying the adjudicated amount into court, giving the usual undertaking as to damages and undertaking to prosecute the judicial review proceedings with due expedition and diligence.

19. It may be observed, however, that there is a body of case law which regards the "*pay now, argue later*" nature of the SOP Act as a factor to be taken into account when interlocutory relief preventing the enforcement of an adjudication determination is sought in aid of proceedings under a construction contract[20] or in aid of an appeal from a first instance decision refusing to quash or declare invalid a purported determination for jurisdictional error.[21]

20. That body of case law may provide a useful analogy as to the approach to be taken to a contested application for an interlocutory injunction in aid of proceedings seeking to quash a determination for error of law on the face of the record.

21. The point for present purposes is that it cannot properly be said that the "*very object*" of the SOP Act was to exclude judicial review for error of law on the face of the record or that "*the objects or terms or context of [the SOP Act] make it plain that the legislature has directed its attention*" to the power to quash for error of law on the face of the record and decided that that power should be ousted.[22]

22. On the contrary – as the passages of the second reading speech relied on by the First Respondent[23] confirm – the legislature understood and accepted that judicial review would be available in relation to SOP Act determinations in limited circumstances.

23. "*[V]ery strong grounds*"[24] of the kind necessary to support an implication that the SOP Act was intended to limit the rights of judicial review confirmed by s 69 of the SCA do not exist.

24. In truth, the SOP Act and the SCA are not "*competing statutes*"[25]; they can "*stand together*"[26]. The "*very strong presumption*" that both acts should operate[27] applies.

25. The reasoning of the primary judge and that of the Full Court in *Maxcon* (which, notably, is not directly addressed in the First Respondent's submissions) is correct.

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[20] See *Hakea Holdings v Denham Constructions* [2016] NSWSC 1120 at [4]-[6] and the authorities cited therein.

[21] See, eg, *Lewence Construction v Southern Han* [2015] NSWCA 150 at [14] and the authorities cited therein.

[22] Cf RS at [30], [56] citing *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 310-311 [314].

[23] See, in particular, the aspect of the second reading speech referred to in RS at [45] to the effect that there was "*ample judicial authority*" regarding the circumstances in which judicial review of adjudication determinations would be permitted.

[24] *Saraswati v The Queen* (1991) 172 CLR 1 at 17 quoted with approval in *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 138 [18].

[25] Cf RS at [18].

[26] *Kutner v Phillips* [1891] 2 QB 267 at 272.

[27] *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276.

26. The appeal should be allowed and the primary judge's orders quashing the Second Respondent's determination for error of law on the face of the record should be reinstated.

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