HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

MAXCON CONSTRUCTIONS PTY LTD APPELLANT

AND

MICHAEL CHRISTOPHER VADASZ (TRADING AS AUSTRALASIAN PILING COMPANY) & ORS RESPONDENTS

Maxcon Constructions Pty Ltd v Vadasz
[2018] HCA 5
14 February 2018
A17/2017

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation

R J Whitington QC with B J Doyle for the appellant (instructed by Diakou Faigen)

M Christie SC with D P Hume for the first respondent (instructed by CCS Legal Pty Ltd)

Submitting appearance for the second and third respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Maxcon Constructions Pty Ltd v Vadasz

Administrative law – Judicial review – *Building and Construction Industry Security of Payment Act* 2009 (SA) – Where subcontract provided for sum to be paid to subcontractor after issue of certificate of occupancy – Where issue of certificate of occupancy required certification from builder that building work performed in accordance with head contract – Where adjudicator appointed to determine disputed payment claim – Where adjudicator determined provisions of subcontract ineffective because pay when paid provisions – Whether adjudicator's determination involved error of law – Whether adjudicator's determination should be quashed.

Administrative law – Judicial review – Availability of certiorari – Error of law on face of record – Whether *Building and Construction Industry Security of Payment Act* 2009 (SA) ousts jurisdiction of Supreme Court of South Australia to make order in nature of certiorari to quash adjudicator's determination for non-jurisdictional error of law on face of record.

Words and phrases – "contingent or dependent on the operation of", "error of law on the face of the record", "order in the nature of certiorari", "pay when paid provision", "retention provisions".

Building and Construction Industry Security of Payment Act 2009 (SA), Pts 2, 3.
Development Act 1993 (SA), s 67.
Development Regulations 2008 (SA), reg 83, Sched 19A.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. This appeal, from the Full Court of the Supreme Court of South Australia[1], concerns the *Building and Construction Industry Security of Payment Act* 2009 (SA) ("the Security of Payment Act"), an Act based[2] on the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the New South Wales Act"). The scheme and purposes of the New South Wales Act are described in the reasons in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[3], which was heard at the same time as this appeal. The relevant provisions of the two Acts are not materially different and what is said in the *Probuild* matter about the scheme and purposes of the New South Wales Act applies equally to the Act in issue here.

2 In this case, an adjudicator determined that retention provisions in a subcontract were what the Security of Payment Act defines as "pay when paid provisions"[4] and did not validly permit the builder, Maxcon Constructions Pty Ltd ("Maxcon"), to deduct an amount from a progress payment otherwise due to the subcontractor, Mr Vadasz (the first respondent in this Court). Maxcon (the appellant in this Court) brought judicial review proceedings in the Supreme Court of South Australia seeking a declaration that the adjudication determination was a "nullity" and an order setting aside the determination. Among other things, Maxcon alleged that the adjudicator was wrong to decide that the relevant provisions were pay when paid provisions.

3 The primary judge (Stanley J) dismissed Maxcon's application for judicial review. Maxcon appealed to the Full Court. By majority, the Full Court (Blue J, Lovell J agreeing, Hinton J dissenting) dismissed Maxcon's appeal. Stanley J and each member of the Full Court proceeded upon the basis that the adjudicator had made an error of law.

4 On appeal to this Court, Maxcon submitted that the Supreme Court had jurisdiction to make an order in the nature of certiorari to quash an adjudicator's determination for a non-jurisdictional error of law that appears on the face of the record. Maxcon further alleged that, in this case, the adjudicator had fallen into

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1 *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193.

2 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 5 March 2009 at 1856.

3 [2018] HCA 4.

4 s 12(2)(c) of the Security of Payment Act.

jurisdictional error. By notice of contention, Mr Vadasz contended that the adjudicator had made no error of law. That contention should be accepted and Maxcon's appeal dismissed.

5 However, it is important to add that, for the reasons explained in *Probuild*, the Supreme Court of South Australia may grant relief (whether in the nature of certiorari or otherwise) for jurisdictional error[5] by an adjudicator appointed under the Security of Payment Act; but the provisions of the Security of Payment Act, like the provisions of the New South Wales Act, oust the Supreme Court's jurisdiction to make an order in the nature of certiorari to quash an adjudicator's determination for error of law on the face of the record that is not a jurisdictional error.

Facts

6 Maxcon, a building contractor, and Mr Vadasz, a piling subcontractor trading under the name Australasian Piling Company, were parties to a subcontract under which Mr Vadasz agreed to design and construct piling for an apartment development.

7 The subcontract required Mr Vadasz to provide security in the form of "cash retention" corresponding to five per cent of the contract sum "for the purpose of ensuring the due and proper performance of the [subcontract] and to allocate to [Mr Vadasz] the risk of being out of pocket for claimed entitlements of [Maxcon] under or in connection with the [subcontract] pending the resolution of any dispute" regarding those entitlements.

8 Clause 11(e) of the subcontract provided:

> "Subject to [Maxcon's] rights to any deductions made or pending deductions which are likely to be made under the [subcontract], retention shall be released:
>
> (a) 50% of retention within the time nominated in Schedule E
>
> (b) Remaining 50% within the time nominated in Schedule E".

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5 ss 6 and 17 of the *Supreme Court Act* 1935 (SA); r 199 of the Supreme Court Civil Rules 2006 (SA); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [96]-[100]; [2010] HCA 1.

Schedule E to the subcontract provided for 50 per cent to be released "90 days after CFO is achieved", with the remaining 50 per cent to be released "365 days after date of CFO".

9 Under the subcontract, "CFO" was defined to mean "the certificate of occupancy and any other Approval(s) required under Building Legislation which are required to enable the Works lawfully to be used for their respective purposes in accordance with [Maxcon's] Project Requirements". It will be necessary to consider this definition later in these reasons.

10 On 25 February 2016, Mr Vadasz served on Maxcon a payment claim pursuant to s 13 of the Security of Payment Act stating that a progress payment of $204,864.55 (including GST) was due. On 8 March 2016, Maxcon provided a payment schedule pursuant to s 14 of the Security of Payment Act indicating that it proposed to pay $141,163.55 (including GST), deducting a retention sum and administration charges.

11 Pursuant to s 17 of the Security of Payment Act, Mr Vadasz applied for adjudication of his payment claim. The adjudicator accepted Mr Vadasz's submission that Maxcon was not entitled to deduct the retention sum ($35,454.00 excluding GST) and determined the adjudicated amount to be equal to the claimed amount. In relation to the retention sum, the adjudicator concluded that cl 11(e) and Sched E to the subcontract ("the retention provisions") were pay when paid provisions which were ineffective by reason of s 12(1) and (2)(c) of the Security of Payment Act and Maxcon was not entitled to retain the retention sum.

Section 12 and pay when paid provisions

12 Section 12 of the Security of Payment Act defines a "pay when paid provision" and provides that such a provision is ineffective:

> "(1) A pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.
>
> (2) In this section—
>
> ***money owing***, in relation to a construction contract, means money owing for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract;

> ***pay when paid provision*** of a construction contract means a provision of the contract—
>
> (a) that makes the liability of 1 party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or a part of that money; or
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> (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or a part of that money is made to the first party by the third party; or
>
> (c) *that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract*." (emphasis added)

Proceedings in the Supreme Court

13 As already noted, Maxcon commenced judicial review proceedings in the Supreme Court. Stanley J dismissed the application. His Honour held that the adjudicator erred in concluding that the retention provisions were pay when paid provisions[6]. However, his Honour held that the error did not vitiate the adjudicator's determination because the error was not jurisdictional and the reasons of the adjudicator were not part of the "record" for the purposes of certiorari[7]. Stanley J's other conclusions are not presently relevant.

14 Maxcon's appeal to the Full Court was dismissed. The Full Court held that the adjudicator's reasons were incorporated into the record[8]. It further concluded that, on "first principles", the Security of Payment Act did not exclude judicial review for error of law on the face of the record[9]. However, the Full Court declined to apply the latter conclusion; it instead followed the decision of

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6 *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2016] SASC 156 at [66].

7 *Maxcon* [2016] SASC 156 at [71], [78].

8 *Maxcon* (2017) 127 SASR 193 at 240 [155], 272 [285].

9 *Maxcon* (2017) 127 SASR 193 at 247 [186], 272 [286].

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)*[10], on the basis that the decision dealt with uniform national legislation and was not plainly wrong[11].

15 In relation to the retention provisions, the Full Court held that the adjudicator erred in concluding that the retention provisions were pay when paid provisions rendered ineffective by s 12 of the Security of Payment Act[12], but the majority held that the error was not a jurisdictional error[13].

No error of law by adjudicator

16 As we have seen, s 12(2)(c) of the Security of Payment Act provides that a pay when paid provision of a construction contract is a provision that "makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of *another contract*" (emphasis added).

17 Thus, the issue was and remains whether the retention provisions made the liability of Maxcon to pay money owing to Mr Vadasz, or the due date for payment of that money, contingent or dependent on the operation of another contract.

18 That issue first directs attention to the provisions of the subcontract. The terms of the relevant provisions have been set out above. In general terms, the subcontract permitted Maxcon to retain, by way of security, a retention sum corresponding to five per cent of the contract sum. As we have seen, cl 11(e) and Item 8 of Sched E to the subcontract further provided that 50 per cent of the retention sum was to be released "90 days after CFO [was] achieved", with the remaining 50 per cent to be released "365 days after date of CFO".

19 "CFO" was defined to mean "the certificate of occupancy and any other Approval(s) required under Building Legislation which [were] required to enable the Works lawfully to be used for their respective purposes in accordance with [Maxcon's] Project Requirements". "Project Requirements" was defined as the

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10 (2016) 344 ALR 355.

11 *Maxcon* (2017) 127 SASR 193 at 247-254 [187]-[209], 272 [286].

12 *Maxcon* (2017) 127 SASR 193 at 226 [113], 268 [270].

13 *Maxcon* (2017) 127 SASR 193 at 238 [148]; cf at 272 [284].

"design intent and intended application and use of the design and its equipment's [sic] and facilities".

20 There was no dispute that "the Works" in the definition of "CFO" referred to the entire project, being the apartment development as a whole, not merely the piling work to be performed by Mr Vadasz. There was also no dispute that the phrase "Building Legislation" in the definition of "CFO" included the *Development Act* 1993 (SA) and the Development Regulations 2008 (SA).

21 Section 67(1) of the Development Act relevantly provides that a person must not occupy a building on which building work is carried out unless an appropriate certificate of occupancy has been issued for the building. A certificate of occupancy is issued by a council[14] and, in general terms, the council must issue the certificate if it is satisfied that the relevant building is suitable for occupation and complies with requirements prescribed by the regulations[15].

22 Regulation 83(2)(a) of the Development Regulations provides that, to obtain a certificate of occupancy, a statement of compliance duly completed in accordance with the requirements of Sched 19A must be submitted. Those requirements include a statement by the *owner* that the documents issued for the purposes of the building work (referred to in these reasons as "the issued documents") are consistent with the relevant development approval as well as a statement by the *builder* that the building work has been performed in accordance with the issued documents. The issued documents include, among others, all contract documents.

23 Under the subcontract, the release of the retention sum was contingent or dependent on "CFO" being "achieved". The retention provisions expressly provided that the due dates for release of the retention sum were tied to the provision of a "certificate of occupancy and any other Approval(s) required under Building Legislation which [were] required to enable the Works lawfully to be used for their respective purposes in accordance with [Maxcon's] Project Requirements". That is, before the due dates for the release of the retention sum could be calculated under the retention provisions, a certificate of occupancy had to be issued under s 67 of the Development Act.

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14 s 67(2) of the Development Act.

15 s 67(6) of the Development Act.

24 The issue of that certificate of occupancy was dependent upon certification by the builder, Maxcon, that the building work had been performed in accordance with the issued documents, including the head contract between Maxcon and the owner of the land. It necessarily follows that the issue of the certificate depended on completion of the whole project in accordance with the provisions of the head contract. Until that certificate was issued on completion of the project, the retention sum was not to be released.

25 And that certificate had not been, and could not have been, issued on 25 February 2016 when Mr Vadasz served on Maxcon a payment claim pursuant to s 13 of the Security of Payment Act. The due dates for payment of the retention sum were dependent on something unrelated to Mr Vadasz's performance[16]. They were dependent on the operation of another contract – namely, the completion of the head contract, which in turn would have enabled a certificate of occupancy to be issued. Accordingly, the retention provisions were pay when paid provisions within the meaning of s 12(2)(c) of the Security of Payment Act and Maxcon was not entitled to deduct the retention sum from the progress payment.

26 The Full Court found that Maxcon's Project Requirements were to be ascertained from the head contract and that the head contract provided for Maxcon to construct a building in accordance with those requirements and to achieve practical completion, at which point a certificate of occupancy would be issued[17]. However, the Full Court concluded that cl 11(e) and Item 8 of Sched E to the subcontract did not make the due dates for payment of the retention sum "contingent or dependent on the operation" of the head contract; rather, the retention provisions made "payment of the retention sum contingent on an independent event which was exogenous to both the [subcontract] and the head contract"[18]. The Full Court reasoned that the issue of a certificate of occupancy was an "independent event" because it depended "not upon any contract that may have been entered into between owner and builder" but upon the completion of

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16 cf New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 September 1999 at 105.

17 *Maxcon* (2017) 127 SASR 193 at 226 [112].

18 *Maxcon* (2017) 127 SASR 193 at 226 [112].

the building in accordance with the plans and specifications in the relevant development approval[19]. That conclusion should be rejected.

27 As the preceding analysis demonstrates, s 12(2)(c) focuses on a provision of a contract and asks whether, on its proper construction, the provision "makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract". Here, the retention provisions did just that: they made the due dates for payment contingent or dependent on "CFO". And for "CFO" to be achieved, there had to be issued a certificate of occupancy and "any other Approval(s) required under Building Legislation which [were] required to enable the Works lawfully to be used for their respective purposes in accordance with [Maxcon's] Project Requirements". Those Project Requirements were to be ascertained from the head contract. "CFO" required satisfactory completion of the head contract before the dates for the release of the retention sum could be calculated, let alone for the retention sum to be released. Accordingly, there was no error of law on the part of the adjudicator.

28 That analysis answers Maxcon's argument that, in circumstances where the head contract was not in evidence, there was no sufficient basis for a finding that the head contract contained an obligation to procure a certificate of occupancy. Such a finding was and remains unnecessary. The subcontract made release of the retention sum contingent on obtaining a certificate of occupancy, and obtaining that certificate depended on works being done in accordance with the issued documents, including the head contract. The conclusion that the due dates for payment of the retention sum were contingent or dependent on the operation of the head contract does not turn on whether the head contract itself contained an obligation to obtain a certificate of occupancy.

29 The first ground in Mr Vadasz's notice of contention should be upheld. In view of that conclusion, the grounds of appeal do not arise.

Order

30 The appeal should be dismissed. It was a condition of the grant of special leave to appeal that Maxcon would pay Mr Vadasz's costs of the appeal to this Court. It is therefore unnecessary to make an order as to costs.

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19 *Maxcon* (2017) 127 SASR 193 at 226 [111].

31 GAGELER J. The notice of appeal and the attendant notice of contention together raise three principal questions. Stated in logical order they are as follows. Do the adjudicator's reasons disclose the error of law found by the Full Court of the Supreme Court of South Australia? If so, is disclosure of an error of law in an adjudicator's reasons sufficient for the Supreme Court to make an order in the nature of certiorari to quash the adjudicator's determination? If not, is the error of law found by the Full Court a jurisdictional error?

32 Were it incumbent on this Court in determining an appeal to reason only in strict logical order, I would answer the first question in the negative for the reasons given by Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, with the consequence that neither of the other two questions would arise. The first question, however, is of no public importance; it is raised only by way of notice of contention in the invocation of a procedure which gives a respondent to an appeal an entitlement to contend that the judgment under appeal ought to be upheld on grounds that the court from which the appeal is brought erroneously decided or failed to decide some matter of fact or law[20]. The other two questions are questions of public importance on which special leave to appeal has been granted. To the extent such an outcome can be achieved consistently with the just resolution of the rights in issue between the parties, I consider that provision by this Court of answers to those questions of public importance is not only permissible but desirable.

33 I would answer the second and third questions and answer both of them in the negative. The consequence is that the first question does not need to be addressed, despite that question being logically anterior.

34 My negative answer to the second question is a direct application of my reasoning in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[21]. There is no material difference between the supervisory jurisdiction of the Supreme Court of South Australia under s 17(2) of the *Supreme Court Act* 1935 (SA) and the supervisory jurisdiction of the Supreme Court of New South Wales under s 69 of the *Supreme Court Act* 1970 (NSW). There is also no material difference between the *Building and Construction Industry Security of Payment Act* 2009 (SA) ("the Security of Payment Act") and the *Building and Construction Industry Security of Payment Act* 1999 (NSW) on which it is modelled. The scope of the authority conferred on an adjudicator by s 22(1) of each Act – to make a valid determination despite adopting reasoning that is mistaken in law – leaves no room for the exercise by either Supreme Court of supervisory jurisdiction to make an order in the nature of certiorari to quash a

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20 High Court Rules 2004 (Cth), r 42.08.5.

21 [2018] HCA 4.

determination merely on the basis of an error of law in the reasons for the determination.

35 The reasoning underlying my negative answer to the third question requires more elaboration. There are, of course, "mistakes and mistakes"[22]. The issue that needs to be considered in answering the third question is whether the particular mistake of law that the Full Court found the adjudicator to have committed had the effect of causing the adjudicator, for some reason other than it simply having been a mistake of law, to exceed the authority conferred by s 22(1) with the consequence that what purported to be a determination within the scope of that authority was no more than an "ostensible determination"[23].

36 The particular mistake of law which the Full Court found the adjudicator to have committed was a misinterpretation of a definition in the construction contract. The Full Court went on to find that the misinterpretation caused the adjudicator to mischaracterise a provision of the construction contract as a "pay when paid provision" within the meaning of s 12(2)(c) of the Security of Payment Act and, by reason of that mischaracterisation, wrongly to treat that provision as having no effect by operation of s 12(1) of the Security of Payment Act[24].

37 The question of whether the error of law found by the Full Court was a jurisdictional error therefore becomes a question of whether the authority conferred by s 22(1) is conditioned by a requirement that the adjudicator not incorrectly apply s 12 of the Security of Payment Act. I answer that question in the negative because the authority conferred by s 22(1) is not expressly so conditioned and because I am unable to see anything in the scheme of the Security of Payment Act to support a conclusion that the authority is impliedly so conditioned.

38 In that respect, I cannot agree with the dissenting view of Hinton J in the Full Court[25] that s 12 of the Security of Payment Act "defines a limit" on the progress payment the statutory entitlement to which is created by s 8 and the

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22 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 268; [1981] HCA 74, quoting *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.

23 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242; [1933] HCA 30.

24 *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193 at 225-226 [109], 226 [112]-[113], 237 [144]-[145], 261 [240], 268 [270].

25 (2017) 127 SASR 193 at 271 [279]-[280].

resolution of a claim to the recovery of which Pt 3, including s 22(1), is directed. Notwithstanding the co-location of s 12 with s 8 within Pt 2, s 12 is neither in form nor in substance a limitation on the statutory entitlement created by s 8. Rather, as Blue J (with whom Lovell J agreed) observed[26], s 12 is a provision which modifies the substantive law applicable to a construction contract.

39 The operation, or potential operation, of s 12 is within the matters which s 22(2) requires the adjudicator "to consider" in making the determination under s 22(1). The adjudicator's determination is not expressly or impliedly governed by the operation of s 12. Conversely, as s 32(1)(b) spells out, the adjudicator's determination has no effect on any right that a party to a construction contract may have as a result of the operation of s 12.

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26 (2017) 127 SASR 193 at 237-238 [146].

40 EDELMAN J. As Gageler J explains, the notice of appeal and notice of contention in this appeal raise three questions. (1) Did the adjudicator err in law, as the Full Court of the Supreme Court of South Australia concluded? (2) Did the *Building and Construction Industry Security of Payment Act* 2009 (SA) exclude judicial review for a non-jurisdictional error of law? (3) Was the error of law as found by the Full Court a jurisdictional error? Strictly, a negative answer to the first question, raised by the notice of contention, would be sufficient to dispose of this appeal. However, in the circumstances of the grant of special leave and the full argument on each issue it is appropriate to answer each question.

41 I agree with Kiefel CJ, Bell, Keane, Nettle and Gordon JJ that the first question should be answered in the negative for the reasons given in their joint judgment. I also agree with the conclusion in the joint judgment that the second question should be answered in the affirmative. My reasons for this conclusion are the same as those that I gave in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[27]. As Gageler J observes, the relevant South Australian legislation is not materially different from the New South Wales legislation considered in that case. The third question should be answered in the negative for the reasons given by Gageler J[28].

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27 [2018] HCA 4.

28 At [37]-[39].