

## PROBUILD CONSTRUCTIONS (AUST) PTY LTD V SHADE SYSTEMS PTY LTD [2018] HCA 4

In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (*Probuild*) the High Court held that the NSW security of payment legislation ousted the Supreme Court's jurisdiction to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record.

While Victoria has similar security of payment legislation, judicial review is entrenched under s 85 of the *Constitution Act 1975* (Vic) (*Constitution Act*). It is therefore unclear whether the conclusion from *Probuild* applies in Victoria.

### Facts

The *Building and Construction Industry Security of Payment Act 1999* (NSW) ('NSW legislation') outlines a system of 'progress payments' for contractors engaged in construction work, under which an adjudicator may determine disputes over payments.

Probuild and Shade Systems were parties to a construction contract.<sup>1</sup> Shade Systems served a payment claim on Probuild under the NSW legislation. Probuild refused to pay, claiming it was owed a larger amount in liquidated damages. Shade Systems applied for adjudication of the claim. The adjudicator determined that Probuild owed Shade Systems a progress payment. Probuild applied to the Supreme Court of New South Wales for an order of certiorari to quash the adjudicator's determination.

The primary judge found that the adjudicator had erred in their consideration of two issues. First, that entitlement to liquidated damages did not arise until practical completion or termination of the subcontract; and second, that Probuild needed to demonstrate that Shade Systems was at fault for the delay which gave rise to the claim for liquidated damages. Shade Systems appealed to the NSW Court of Appeal, which held that, in accordance with its earlier decision in *Brodyn Pty Ltd v Davenport*,<sup>2</sup> the NSW legislation excluded the jurisdiction of the Supreme Court to order certiorari to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record.<sup>3</sup> Probuild appealed the decision by special leave to the High Court.

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<sup>1</sup> See *Probuild* [19]–[26] for detailed facts in this case.

<sup>2</sup> *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.

<sup>3</sup> *Shade Systems v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 344 ALR 355 [85]–[86].

## Decision

The High Court unanimously dismissed the appeal. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ delivered a joint judgment, and Gageler J and Edelman J each delivered separate concurring reasons.

The High Court held that while the NSW legislation did not include an express ouster clause, the statute evinced a ‘clear legislative intention to exclude the jurisdiction of the Supreme Court to make an order in the nature of certiorari to quash an adjudicator’s determination for non-jurisdictional error of law on the face of the record’.<sup>4</sup>

Their Honours considered a number of features of the legislation including:

- The legislative purpose of reforming payment in the construction industry, of which adjudication forms a part;<sup>5</sup>
- The provision of ‘interim’ statutory entitlements that do not finally determine the entitlements of parties, and the preservation of parties’ contractual and other common law rights;<sup>6</sup>
- The need for cash flow in the construction industry that underpins the ‘interim’ entitlements, which are intended to operate quickly;<sup>7</sup>
- The informality of the adjudication process;<sup>8</sup>
- The absence of a right of appeal against an adjudicator’s determination and inability to challenge an adjudicator’s determination in proceedings to set aside a judgment for debt in the amount of the progress payment.<sup>9</sup>

The legislation creates an entitlement that is ‘determined informally, summarily and quickly’ and enforced ‘without prejudice to the common law rights of both parties’.<sup>10</sup> The plurality

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<sup>4</sup> *Probuild* [35] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); see also [78], [80]–[83] (Gageler J); [104]–[109] (Edelman J).

<sup>5</sup> *Probuild* [36] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ).

<sup>6</sup> *Probuild* [37]–[39] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [80] (Gageler J); [90], [102] (Edelman J).

<sup>7</sup> *Probuild* [40]–[41] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [106] (Edelman J).

<sup>8</sup> *Probuild* [42] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [80] (Gageler J).

<sup>9</sup> *Probuild* [43] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [80] (Gageler J); [105]–[106] (Edelman J).

<sup>10</sup> *Probuild* [44] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ), citing *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385, 389 [22].

held that permitting judicial review proceedings where the adjudicator made an error within jurisdiction would ‘frustrate the operation and evident purposes of the statutory scheme’.<sup>11</sup>

On the same day, the High Court handed down its judgment in *Maxcon Constructions v Vadasz* [2018] HCA 5 (*Maxcon*), which concerned the operation of the ‘pay when paid’ provisions under the *Building and Construction Industry Security of Payment Act 2009* (SA) (‘SA legislation’).<sup>12</sup> In *Maxcon*, the High Court held that the adjudicator had not made an error of law.<sup>13</sup> The Court noted that, while it was not necessary to reach its decision, its reasoning in *Probuild* also applied to the SA legislation.<sup>14</sup> The Supreme Court of South Australia therefore could not order certiorari to quash an adjudicator’s determination for non-jurisdictional error of law.<sup>15</sup> The High Court found there were no material differences between the relevant provisions of the NSW and SA legislation.<sup>16</sup>

### Relevance of *Probuild* and *Maxcon* in Victoria

The *Building and Construction Industry Security of Payment Act 2002* (Vic) (‘Victorian legislation’) was modelled on the NSW legislation to allow construction firms to operate under a common payments regime in both States.<sup>17</sup> In *Probuild*, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ noted the similar objects of the NSW legislation and ‘equivalent statutes in Victoria’ and other States and Territories.<sup>18</sup>

While there are differences between security of payment statutes in various States and Territories,<sup>19</sup> the system of progress payments in the Victorian legislation is substantially

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<sup>11</sup> *Probuild* [48] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ), citing *Shade Systems v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 344 ALR 355, 375 [85]. See also [80]–[81] (Gageler J).

<sup>12</sup> See *Maxcon* [1]–[4], [6]–[15] for detailed facts in this case.

<sup>13</sup> *Maxcon* [4], [16]–[29] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [32] (Gageler J); [40]–[41] (Edelman J).

<sup>14</sup> *Maxcon* [4]–[5], [29] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [32] (Gageler J); [40]–[41] (Edelman J).

<sup>15</sup> *Maxcon* [5] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [32], [34] (Gageler J); [40]–[41] (Edelman J).

<sup>16</sup> *Maxcon* [1], [5] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ); [34] (Gageler J); [41] (Edelman J).

<sup>17</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 21 March 2002, 427 (Mary Delahunty).

<sup>18</sup> *Probuild* [3]–[4] (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ).

<sup>19</sup> See, eg, ss 10A, 10B, 28A–28R of the Victorian legislation; Matthew Bell, ‘Security of Payment: Can Victoria Offer Insights into the Re-Shucked Oyster of Judicial Review?’ (2011) 27 *Building and Construction Law Journal* 36, 40.

similar to that outlined under the NSW legislation considered in *Probuild*, and so the conventional view would be that the results in *Probuild* and *Maxcon* would apply in Victoria.

However, under s 85(1) of the *Constitution Act*, the Supreme Court of Victoria has jurisdiction ‘in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction’.<sup>20</sup> Section 85(6) of the *Constitution Act* reads:

A provision of a Bill which excludes or restricts, or purports to exclude or restrict, judicial review by the Court of a decision of another court, tribunal, body or person is to be taken to repeal, alter or vary this section and to be of no effect unless the requirements of subsection (5) are satisfied.

Subsection (5) sets out certain formal requirements for legislation which affects the jurisdiction of the Supreme Court, including the obligation for a statute to expressly refer to s 85, and for the member who introduced the Bill to make a statement to Parliament setting out the reasons for modifying the jurisdiction of the Supreme Court.

In two decisions from 2009, Vickery J held that certiorari to quash an adjudicator’s determination for non-jurisdictional error of law on the face of the record was available, distinguishing an earlier NSW judgment to the contrary based partly on the operation of s 85 of the *Constitution Act*.<sup>21</sup> Like the NSW and South Australian security of payment laws, the Victorian legislation does not contain a general ouster clause. The Victorian legislation only states that ss 28R and 46 are intended to alter or vary s 85 of the *Constitution Act*.<sup>22</sup>

Under s 28R a person may commence proceedings to claim an unpaid amount determined by an adjudicator.<sup>23</sup> If a judgment is issued in favour of the claimant and a person commences proceedings to have that judgment set aside:

... that person, subject to subsection (6), is not, in those proceedings, entitled to challenge an adjudication determination or a review determination ...<sup>24</sup>

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<sup>20</sup> *Constitution Act 1975* (Vic) s 85(1).

<sup>21</sup> See *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 (*‘Hickory’*) [73]–[75], [85]–[87]; *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 (*‘Grocon’*) [82]–[102].

<sup>22</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 51. Section 46 of the Victorian legislation concerns the personal liability of adjudicators.

<sup>23</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 28R(1)–(4).

<sup>24</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 28R(5)(iii), (6). Subsection 6 states that s 28R(5)(iii) does not prevent a person from challenging determinations on the basis that the adjudicator considered a variation of the construction contract that was not a ‘claimable variation’.

Vickery J considered s 28R in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 (*Amasya*). Distinguishing an earlier NSW Court of Appeal case,<sup>25</sup> Vickery J held that s 28R(5)(iii) was a privative clause excluding the Supreme Court's jurisdiction to order certiorari to quash an adjudication determination for non-jurisdictional error of law on the face of the record, but 'only after a judgment has been entered under s 28R and only in respect of a proceeding to have that judgment set aside'.<sup>26</sup> His Honour held that under the Victorian legislation, there is no privative clause restraining a party from initiating 'other proceedings' to prevent entry of a judgment, which may give rise to proceedings for judicial review of the adjudication determination.<sup>27</sup> Vickery J had foreshadowed this finding in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 (*Hickory*).<sup>28</sup>

The result is that where a party has commenced proceedings to have a judgment entered pursuant to s 28R set aside, *Amasya* clearly establishes that the Supreme Court cannot order certiorari to quash an adjudication determination for non-jurisdictional error of law on the face of the record.

However, based on current Victorian authority, it remains unclear whether the High Court's finding in *Probuild* applies in Victoria where an application for judicial review is commenced prior to a judgment being entered under s 28R of the Victorian legislation. Future Victorian decisions will need to determine whether the High Court's finding of implied exclusion of judicial review under equivalent legislative schemes is compatible with the entrenched protection of judicial review under s 85 of the *Constitution Act* and the limited explicit exclusion of judicial review in s 28R(5)(iii).

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<sup>25</sup> *Amasya* [50]–[58]; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; s 25(4) of the NSW legislation.

<sup>26</sup> *Amasya* [65], [94].

<sup>27</sup> *Amasya* [66].

<sup>28</sup> *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 [84], cited in *Amasya* [67]. See generally *Hickory* [75]–[90].