IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S145 of 2017**

BETWEEN: **PROBUILD CONSTRUCTIONS (AUST) PTY LTD**
Appellant

and

SHADE SYSTEMS PTY LTD
First Respondent

DORON RIVLIN
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The First Respondent (**Shade Systems**) certifies that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The critical issue is that stated by the Appellant (**Probuild**) in its submissions filed on 16 June 2017 (**AS**).

PART III: SECTION 78B

3. Shade Systems has considered whether any notices should be given under s 78B of the *Judiciary Act 1903* (Cth) and considers that no such notices are required.

PART IV: MATERIAL FACTS

4. Probuild's statement of facts in Part V of the AS is adequate.

5. However, two features of the factual background which Probuild asserts later in its submissions should be clarified or corrected.

6. The first is Probuild's contention that the adjudicator's determination was "manifestly" erroneous: AS [63]-[64]. If Probuild means that there was error of law which was apparent on the face of the record, then this contention is not denied. If Probuild means something more – and in particular if Probuild means to advance some qualitative contention, such as that the error was substantial or egregious – then Probuild advances a contention which is not the subject of findings below, which goes well beyond the notice of appeal and which is, in any event, irrelevant to the issues before this Court.

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7. The second is Probuild's contention that the determination requires the payment of an amount which is "not properly payable under the Contract": AS [64]. There is no finding to that effect below. In particular, there is no finding that any error of law by the adjudicator was material in the sense of resulting in some determination different to that which would have been made absent the error. All that can be said of the determination in this case is that the record of the determination contains a non-jurisdictional error of law.

PART V: RELEVANT PROVISIONS

8. Relevant provisions in addition to those set out in the Annexure to the AS are annexed.

PART VI: ARGUMENT

Summary

9. This Court should conclude – as the New South Wales Court of Appeal has consistently concluded – that the Supreme Court of New South Wales does not have the power to issue certiorari for non-jurisdictional error of law in the making of a determination under s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**).

10. The Court should reach that conclusion because it should accept the following basic propositions.

    10.1. The source of the Supreme Court's jurisdiction or power to issue relief in the nature of certiorari for non-jurisdictional error of law is the *Supreme Court Act 1970* (NSW) (**SC Act**).

    10.2. That jurisdiction or power of the Supreme Court is liable to statutory affection.

    10.3. Whether there has been such a statutory affection depends on Parliament's intention ascertained in accordance with all relevant principles of statutory construction.

    10.4. The relevant principles of statutory construction include, but are not limited to, a presumption that Parliament does not intend to reduce the jurisdiction or powers of the Supreme Court.

    10.5. The text, context and purpose of the Act are strongly against the availability of judicial review for non-jurisdictional error of law.

    10.6. Parliament intended that the determination of an adjudicator under s 22 of the Act not be reviewable for non-jurisdictional error of law.

11. The result of the Court accepting the last of these propositions is that the appeal should be dismissed. There is no issue as to costs. Probuild has accepted, as a condition of the grant of special leave, that it should pay Shade Systems' costs of the appeal and will not disturb the costs orders below.

Proposition 1: the Supreme Court's jurisdiction or power to issue certiorari for non-jurisdictional error of law finds its source in statute

12. The Supreme Court's jurisdiction or power to issue relief in the nature of certiorari for non-jurisdictional error of law derives from statute. That jurisdiction or power finds its source at least in ss 69(1) and (3) of the SC Act. Section 69(1) is an express conferral of jurisdiction by reference to jurisdiction previously held by the Supreme Court. Section 69(3) declares that the jurisdiction so conferred extends to relief in the nature of certiorari for non-jurisdictional error of law on the face of the record.

13. The Supreme Court's jurisdiction or power may also find its source in s 22 of the SC Act, which continues the Supreme Court in existence, and s 23, which confers on the Court all jurisdiction "necessary for the administration of justice in New South Wales".[1] For present purposes, it is not necessary to decide that question. The critical point is that the source of the Supreme Court's jurisdiction is statute: not common law and not the *Commonwealth Constitution.*

Proposition 2: the Supreme Court's power is liable to statutory affection

14. The Supreme Court's jurisdiction or power to issue certiorari for non-jurisdictional error of law is liable to statutory affection. That follows from two axiomatic propositions: first, the New South Wales Parliament may amend or repeal laws which it has enacted and, second, the laws of the New South Wales Parliament are to be read as one harmonious body of laws.

15. In particular, the Supreme Court's power or jurisdiction to issue relief for non-jurisdictional error enjoys no protection under the Commonwealth Constitution. As this Court said in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [100], "[l]egislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power". It follows from this that, while the Act *must* (if at all available) be read in a way which does not deny the Supreme Court's jurisdiction in respect of jurisdictional error,[2] there is no such imperative in respect of the non-jurisdictional error: cf AS [50]-[51].

Proposition 3: whether there has been a statutory affection depends on Parliament's intention

16. Whether the Supreme Court's jurisdiction or power to issue certiorari is affected by another statute depends on Parliament's intention ascertained in accordance with all applicable constructional principles. In the words of Gleeson CJ, "[t]he problem is one of statutory interpretation": *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [4].

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1 Note *Sinkovich v Attorney-General of New South Wales* (2013) 85 NSWLR 783 at [66].

2 "If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court *must* always choose the latter course when it is reasonably open": *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (emphasis added).

17. Because the task is one of statutory construction, "*all* relevant principles of statutory construction are engaged": *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [26] (Gleeson CJ) (emphasis added) (***S157***). In carrying out this task, it would be an error to assume that any one principle of statutory construction excludes all others: *S157* at [26] (Gleeson CJ). In particular, in this case, it would be an error to assume that any presumption against there being an intention to reduce the jurisdiction or powers of the Supreme Court so dominates the constructional task as to deny the utility of other indicators of Parliament's intention.

Proposition 4: the relevant principles of statutory construction

18. There are two steps in the task of reconciling competing statutes of the one legislature: the two statutes are to be construed considered alone and then the two statutes are to be construed together.

19. The first of these steps attracts well settled principles governing statutory construction. Statutory construction must begin and end with a consideration of statutory text. "The statutory text must be considered in its context [and] [t]hat context includes legislative history and extrinsic materials": *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

20. Statutory purpose is integral to this task. "[A] construction that would promote the purpose or object" of a provision is to be "preferred to a construction that would not promote that purpose or object": *Interpretation Act 1987* (NSW) s 33. That object need not be expressed in the statute itself: *Interpretation Act 1987* (NSW) s 33

21. One of the two sets of statutory provisions to be construed in this case includes s 69(3). That provision is declaratory in form. However, its declaratory nature does not entail that it is to be construed in accordance with some different universe of constructional principles. As Brennan, Toohey and Gaudron JJ said in *Mabo v The State of Queensland* (1988) 166 CLR 186 at 212:[3] "[t]he operation of a declaratory statute, like the operation of any other statute, depends upon the intention of Parliament ascertained by construction of its terms".

22. The second of these steps attracts well settled interactional principles governing the reconciliation of competing statutes of the one legislature. In carrying out the second of these steps, Parliament's intention is to be ascertained as a whole across the body of its statutory law and starting from the presumption that Parliament "did not intend to contradict itself", but intended that all its statutes "should operate": *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 (***Butler***).[4]

23. Where two statutes, construed by themselves, would have operations which alter, detract or impair from each other, the initial task is clear: every attempt should first be made to reconcile the competing statutes: *Northern Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* (2015) 256 CLR 569 at [227] (Nettle and Gordon JJ) (***NAAJA***). "[I]t is only where they are irreconcilable that they should

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3 See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [35] (French CJ, Crennan and Kiefel JJ).

4 Probuild misapplies this presumption at AS [45].

be held to conflict": *NAAJA* at [227]. As the Supreme Court of the United States has put it, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective": *Morton v Mancari*, 417 US 535 at 551 (1974).

24. In that task of reconciliation, "[i]t will often be found that the two [statutes] may reasonably and properly be reconciled by reading the one as subject to the other": *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 (***Butler***). As Gaudron J said in *Saraswati v R* (1991) 173 CLR 1 at 17 (***Saraswati***), "[t]here is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other". As this statement of principle makes clear, when one provision is read as subject to another, it is not that one provision has repealed the other, it is rather that the two have been read harmoniously.

25. Further, it will often be appropriate to apply the maxim *generalia specialibus non derogant*: *Butler* at 276. In particular, as the Supreme Court of the United States has observed, a "precisely drawn, detailed statute" may pre-empt "more general remedies": *Hinck v United States*, 550 US 501 at 506 (2007).

26. One – but only one – of the interactional principles which courts have applied in carrying out this second step is the presumption that Parliament does not intend to reduce the jurisdiction or powers of the courts. That presumption has been described with varying degrees of strength, including by reference to a need for express statement or necessary implication (*S157* at [72]) or the need for a clear and unmistakeable implication (*PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at [29] (French CJ, Kiefel, Bell, Gageler and Gordon JJ) (***PT Bayan***).

27. The presumption is, however, not absolute. As Scalia and Garner said in *Reading Law: The Interpretation of Legal Texts* (2012), "[n]o canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions": at 59. As with other provisions, provisions conferring jurisdiction do not pursue that purpose at all costs: *Carr v Western Australia* (2007) 232 CLR 138 at [5] (Gleeson CJ).

28. It is not the case that only express text can overcome the presumption in favour of preserving the power to issue certiorari: cf AS [24]-[25]. To adopt that proposition is inconsistent with the recognition that the task is ultimately one of discerning Parliament's intention ascertained in accordance with all applicable principles of statutory construction. Parliament's intention can be manifested by implication as much as by express text. Neither *S157* or *PT Bayan* require express statement.

29. The presumption which protects the jurisdiction and powers of the courts is, in this respect, no different to other presumptions of statutory construction which exist to protect systemic values. The presumption is weighty, but not absolute, and must give way if there are sufficient indications that Parliament's intention was otherwise. This does not involve any impermissible undermining of the rule of law: cf AS [29]-[30]. The rule of law is maintained by the constitutional protection of judicial review for jurisdictional error. Further, the rule of law is but one relevant systemic value – others

which are engaged in a case like the present include parliamentary sovereignty and the undoubted power of Parliament to enact remedial legislation calculated to address a specifically-identified mischief.

30. A presumption of construction – even a very strong presumption, such as that which is involved in the principle of legality – may be overcome if the "objects" of the contrary provision include the abrogation or curtailment of the very thing protected by the presumption: *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] (Gageler and Keane JJ) (***Lee***). Further, a presumption of construction – again, even a very strong presumption – may be overcome if there are textual indications to the contrary and, otherwise, statutory objectives would be "frustrate[d]": *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [88] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (which concerned the principle of legality) (***Emmerson***). These observations apply with at least equal force in the task of determining whether the Supreme Court's jurisdiction or power to issue certiorari does not operate in a particular sphere: cf AS [26]-[27].

31. The relevant statutory objects are to be ascertained in accordance with general constructional principle – and, in particular, may be ascertained, not only from "express statement of purpose in the statute itself" but also by "inference from its text and structure and, where appropriate, reference to extrinsic materials": *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [25] (French CJ and Hayne J).

32. There is nothing untoward or unfamiliar in courts assessing whether the objects of a statute would be frustrated if a particular interpretation of a polity's laws were adopted: cf AS [31]. It is fundamental to the task of statutory construction to assess which interpretation of a polity's laws would best achieve Parliament's purposes. Further, it is commonplace – in areas such as s 109 of the *Commonwealth Constitution* – for courts to assess whether one law, if it bears a particular operation, would alter, impair or detract from the operation of another: see, eg, *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630.

Proposition 5: the text, context and objects of the Act are strongly against the availability of review for non-jurisdictional error of law

33. The text, context and objects of the Act militate strongly against the contention that Parliament intended judicial review to be available for non-jurisdictional error of law.

34. The object of the Act is to create a novel statutory right to prompt interim payments for building contractors and, to achieve that end by establishing a unique form of rapid, low-cost, relatively conclusive adjudication by extra-judicial decision-makers.[5]

35. This Court described the Act's objects in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 91 ALJR 233 at [4] when it said:

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[5] See also *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385 at [22] (Handley JA) (Santow JA and Pearlman AJA agreeing): "It is clear the Act confers statutory rights on a builder to receive an interim or progress payment and enables that right to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner".

The Minister responsible for introducing the Bill for the original Act, for conducting the review and for introducing the Bill for the Amendment Act was the Hon Morris Iemma MLA. In the course of introducing the Bill for the Amendment Act, Mr Iemma explained that when introducing the Bill for the original Act the Government of New South Wales had wanted to "stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers". He went on to explain the original design of the Act which the Amendment Act was intended to enhance. He said:

> "The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount final due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid."

Mr Iemma continued by emphasising that "[c]ash flow is the lifeblood of the construction industry" and that the Government was "determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act".

36. In the Second Reading Speech to the *Building and Construction Industry Security of Payment Bill (No 2) 1999* (NSW), the Minister explained the need for the scheme which the Bill enacted:[6]

> [O]n 15 February, the Premier announced the Government's intention to stamp out the un-Australian practice of not paying contractors for work they undertake on construction. It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for the work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families.

37. This object appears in and is given effect by a number of the Act's provisions.

38. The Act's terms reflect a legislative purpose of speed. The Act confers an entitlement to progress payments (s 8) and erects an extra-judicial scheme for the enforcement of that right. The scheme is subject to tight time constraints. After service of a payment claim, a respondent has no more than 10 days to dispute the amount: if no challenge is made within that period, the respondent becomes liable to pay the claimed amount: s 14(4). There is then a short period to serve an adjudication application: s 17(3)(c)-(e). The respondent then has between 2 and 5 days to file an adjudication response: s 20(1).

39. The adjudicator must then "determine [the] adjudication application as expeditiously as possible" and in any case within 10 days after the adjudicator accepts his or her

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6 Parliament of New South Wales, Legislative Assembly, *Parliamentary Debates* (8 September 1999) 103.

appointment or such longer time as the parties agree: s 21(3). However, the adjudicator may have *as few as 5 days* from the date he or she receives the respondent's adjudication response (which will usually contain factual and legal submissions, documents and often expert reports and witness statements).[7] The adjudicated amount must be paid within 5 days of service of the determination: s 23(1). (That is, unless the adjudicator determines a later date).

40. The Minister confirmed this purpose in the Second Reading Speech, saying that the "adjudication timetable is short because the very purpose of adjudication is to have a decision from the adjudicator within as short a time as reasonably possible".[8]

41. The Act's terms also reflect a legislative purpose of informality. The Act prescribes few mandatory procedures for adjudicators, and gives the adjudicator a broad discretion as to the procedures to be adopted: see s 21, particularly s 21(4). Indeed, where the adjudicator decides to convene a conference of the parties, Parliament has expressly required that the conference "is to be conducted informally and the parties are not entitled to any legal representation": s 21(4A). In the Second Reading Speech, the Minister observed that "[t]he process is not judicial, the provisions of the Commercial Arbitration Act 1984 do not apply, and there is no power to call for witnesses or for evidence on oath".[9] There is no strict obligation to give reasons; the parties can agree that the adjudicator need not do so: s 22(3)(b).

42. The Act's terms also disclose a legislative intention to give a degree of conclusiveness to valid determinations by adjudicators. That finality ensures the "effective[ness]" of the scheme to which Keane JA referred in *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at [39].[10] An adjudication gives rise to a legal duty to pay the adjudicated amount: s 23(2). If that duty is breached, the adjudicator may issue an adjudication certificate (s 24(1)) which can be "filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly": s 25(1). The Act substantially limits a respondent's ability to challenge such a judgment. In particular, the respondent is not entitled "to challenge the adjudicator's determination": s 25(4).

43. The rights created by the Act are interim only. In general, nothing in the Act affects any right that a party may have under the relevant construction contract or in respect of anything done or omitted to be done under the contract: s 32(1). A court hearing a claim in respect of the contractual and extra-contractual rights which are not affected by the Act "may make such orders as it considers appropriate for the restitution of any amount" paid pursuant to an adjudicator's determination: s 32(3).

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7 If the claimant serves its adjudication application upon an authorised nominating authority (s 17(3)(a)) and upon the respondent (s 17(5)) on the same day, and an adjudicator notifies the parties of his or her acceptance of the application (s 21(3)(a)) on that day, the adjudicator will have 10 days from that date to determine the application. But the adjudicator might receive the respondent's adjudication response on the fifth day (s 20(1)), in which case the adjudicator will effectively have 5 remaining days to adjudicate upon the competing submissions.

8 Parliament of New South Wales, Legislative Assembly, *Parliamentary Debates* (8 September 1999) 107.

9 Parliament of New South Wales, Legislative Assembly, *Parliamentary Debates* (8 September 1999) 106.

10 There, his Honour said in respect of the analogous Queensland legislation, that it provided "a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract".

44. The New South Wales Parliament turned its mind to the possibility of conferring a statutory right of appeal, to be exercised prior to the final determination of rights as contemplated in 32. That possibility was considered, but rejected, by the Government. In the Second Reading Speech, the Minister said:[11]

> The bill does not specifically provide for an appeal from an adjudicator's decision. The adjudicator's decision is only an interim decision until the final amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the appeal.
>
> Inserting by statute yet a further adjudication appeal process between the adjudicator's interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts. It can also be a source of abuse by a desperate respondent seeking to delay payment.

45. When it enacted the Act, the New South Wales Parliament understood that rights of judicial review would be very limited. The Minister said in his Second Reading Speech,[12] "the ambit of the dispute to be decided is fixed by two documents, namely, the payment claim and the payment schedule. Provided that the adjudicator actually decides the dispute evidenced by these documents, there is ample judicial authority to show that the courts will not interfere with or set aside a decision of an adjudicator".

46. The object of ensuring prompt payment by means of rapid, low-cost and reasonably conclusive extra-judicial adjudication would be stultified and frustrated by the availability of judicial review in the Supreme Court of New South Wales for non-jurisdictional error of law.[13]

46.1. If the Supreme Court had such a jurisdiction or power, it would conduce to proliferation of litigation. That, in turn, would delay the final resolution of disputes regarding progress payments and would increase the costs borne by sub-contractors.

46.2. Further, it would increase the likelihood that a stay of enforcement of an adjudicator's determination would be granted – based on a prima facie case of error of law – thereby delaying payment to the contractor. While the objects of the Act will have a role to play in the exercise of the court's discretion to stay enforcement (see AS [55]), there will necessarily be costs incurred in litigating that issue. Further, the threat of litigation by a large contractor, coupled with the possibility if not the likelihood that a stay will be granted and the possibility that costs will be awarded if the stay is opposed but granted, would operate as a significant practical disincentive to small sub-contractors defending stay litigation

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11 Parliament of New South Wales, Legislative Assembly, *Parliamentary Debates* (8 September 1999) 107.

12 Parliament of New South Wales, Legislative Assembly, *Parliamentary Debates* (8 September 1999) 106.

13 See also [67] of the decision under appeal: "[t]o a significant extent, the coherent and expeditious procedure provided by the Security of Payment Act would be undermined if the determination of the adjudicator were to be subject to judicial review in the supervisory jurisdiction of this Court for any error of law which might be identified in the reasons given by the adjudicator".

when threatened. The ability of the court to extract undertakings from the head contractor is of little succour to the sub-contractor in that case: cf AS [56]-[57].

47. It is inherent to the scheme created by the Act that adjudicators will make errors. The Supreme Court of New South Wales has observed that the "fast track interim progress payment adjudication vehicle ... must necessarily give rise to many adjudication determinations which will simply be incorrect" and that "[t]hat is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing": *Brodyn Pty v Davenport* [2003] NSWSC 1019 at [14] (Einstein J). Given the extremely limited time available to adjudicators (see paragraph 39 above), it is unsurprising that the Courts have employed the term "pressure-cooker" as a metaphor to describe the environment in which adjudicators provide determinations.[14] The scheme contemplates that injustice caused by tolerable errors can be corrected in final proceedings. However, until then, there is an allocation of risk from the head contractor to the sub-contractor. The legislative purpose of allocating risk in this way has been recognised by appellate Courts on a number of occasions.[15]

48. The legislative intention that "a progress payment, on account, should be made promptly and that *any* disputes over the amount finally due should be decided separately"[16] is fundamental to the Act. It would be antithetical to the Act's purpose and operation if every progress claim (of which there may be many) in relation to a construction contract were capable of giving rise to Supreme Court proceedings on the basis of an alleged non-jurisdictional error of law by an adjudicator. That is particularly so given that "it is notorious that disputes are commonly part and parcel of building contracts".[17]

49. The position adopted by the Court of Appeal in these proceedings[18] is consistent with the approaches adopted in other jurisdictions. One leading text, referring to the position internationally (including Australia), has observed that legislation introducing statutory adjudication "represents the most radical statutory intervention ever made in the operation of construction contracts."[19] Although the text of the statutory regimes (including those in Australia) varies, their common purpose "is to improve the cash flow of those who perform construction work".[20] In the case of the Singapore *Building*

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14 See e.g. *Shell Refining (Australia) Pty Ltd v A.J. Mayr Engineering Pty Ltd* [2006] NSWSC 94 at [27] (Bergin J); *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at [66] (Applegarth J); *R v Macdessi; Ex Parte Walton* [2014] TASSC 64 at [24] (Blow CJ).

15 *R.J. Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at 401 [40] (Keane JA, with whom Fraser JA and Fryberg J agreed); *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 407 [52] (Spigelman CJ), 437 [207] (McDougall J); *Façade Treatment Engineering Pty Ltd (in liq.) v Brookfield Multiplex Constructions Pty Ltd* (2016) 313 FLR 163 at 186 [86] (Warren CJ, Tate and McLeish JJA).

16 *Southern Han Breakfast Point Pty Ltd (in liq.) v Lewence Construction Pty Ltd* (2016) 91 ALJR 233 at 235 [4], quoting from the Second Reading Speech to the *Building and Construction Industry Security of Payment Amendment Bill* (2002) (emphasis added).

17 *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98; (2005) 31 BCL 407 at [233], per Kaye JA.

18 See at [67] (and footnote 13 above).

19 Julian Bailey, *Construction Law* (2nd Ed., 2016), Informa Law, Oxford, Vol III, p. 1715.

20 *Ibid.*

and Construction Industry Security of Payment Act, which is based on the NSW Act,[21] the Chief Justice of Singapore recently observed that "this abbreviated process of dispute resolution is a species of rough justice,"[22] using a description applied in Australia[23]. The Chief Justice continued:[24]

> But we tolerate this because it ensures that payments are made upfront. Because cash flow is the life blood of those in the building and construction industry, timeous payment for work done or materials supplied ensures that the construction work will proceed with minimal disruption as far as this is possible. Any shortcomings in the process is offset by the fact that the resultant decision only has temporary finality in that there remains the possibility of argument and reversal of the adjudicator's determination after the construction project is completed in another more thorough and deliberate forum.

50. Similar observations were made by the Chief Justice[25] when quoting from a passage from the seminal judgment of Dyson J (as his Lordship then was) in *Macob Civil Engineering Ltd v Morrison Construction Ltd*:[26]

> Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept.[27]

51. The outcome pressed by Probuild in these proceedings would be far worse than restoring the traditional approach referred to in this passage. It would mean that subcontractors face the prospect of multiple Supreme Court proceedings in relation to each project. That would be contrary to the deeply ingrained principle that the law favours the resolution of disputes between parties "in a single action rather than successive proceedings".[28] More importantly, it would be an outcome which Parliament clearly did not intend.

52. Probuild's submissions at AS [36]-[39] verge on impermissibly contending that errors of law under the Act should be characterized as jurisdictional. That contention would be impermissible because it is well beyond the grant of special leave and the notice of appeal and controverts that which was common ground below, namely, that any error

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21 *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 at [37] (Judith Prakash J).

22 *Didwania v Hauslab Design and Build Pte Ltd* [2017] SGCA 19 at [31] (Sundaresh Menon CJ, Andrew Phang Boon Leong and Tay Yong Kwang JJA agreeing).

23 See e.g. *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 at [130]; *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344 at [13].

24 *Didwania v Hauslab Design and Build Pte Ltd* [2017] SGCA 19 at [31] (Sundaresh Menon CJ, Andrew Phang Boon Leong and Tay Yong Kwang JJA agreeing) (citations omitted).

25 *W.Y. Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at 390 [23] (Sundaresh Menon CJ, with whom V.K. Rajah JA and Quentin Loh J agreed).

26 [1999] CLC 738; 75 Con LR 101; [1999] BLR 93 at [14].

27 In neither Singapore nor the U.K. can an adjudicator's determination be challenged on the basis of a non-jurisdictional error of law: *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2012] SGHC 194 at [5]; per Lee Seiu Kin J (appeal dismissed [2013] SGCA 32); Bailey, note 19 above, p 1932; *C&B Scene Concept Design Ltd v Kobards Ltd* [2002] BLR 93 at 98 [24]-[25] (CA).

28 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ). The Court expressed this as a common law principle; but it is a principle which is rooted in public policy and thus relevant to the interpretation of statutes.

was not jurisdictional. If there are some errors of law under the Act which, having regard to their consequences, are so significant that Parliament cannot have intended them to be made, then the mechanism by which the concerns raised by Probuild at AS [36]-[39] is as addressed is the court's power to identify those errors as jurisdictional and therefore necessarily subject to judicial review. That point is irrelevant in the present case: the only error relied on is non-jurisdictional and is, accordingly, an error which Parliament intended to permit the adjudicator to make while nevertheless acting within jurisdiction.

53. Probuild's contention that Parliament cannot have intended to permit a determination to stand if it requires the payment of an amount which is "not properly payable under the contact" (see AS [64]-[65]) proceeds from the unproven assumption that the error affected the determined amount. It also assumes the answer to the very question at issue in these proceedings – did Parliament intend to permit a determination to stand despite the existence of a non-jurisdictional error of law? It is not absurd to answer that question "yes" once it is appreciated that the class of error at issue is non-jurisdictional error.

Proposition 6: Parliament intended that an adjudicator's determination not be liable to review for non-jurisdictional error of law

54. The question, then, becomes whether, even though the Act, considered alone, is strongly against the availability of judicial review for non-jurisdictional error of law, Parliament's intention was that it be available once the Act is read together with the SC Act. That question should be answered no.

55. The provision or provisions conferring jurisdiction or power on the Supreme Court of New South Wales to issue certiorari for non-jurisdictional error of law should be read as subject to the Act – that is, in the manner contemplated in *Butler* and *Saraswati*.

56. As in *Lee* at [314],[29] the very object of the Act is to limit head contractors' ability to access the courts in respect of progress payments unless and until final rights are litigated under s 32. Further, as in *Emmerson*,[30] the objects of the Act would be frustrated were judicial review for non-jurisdictional error of law available.

57. This is a case in which Parliament, in the Second Reading Speech, had its attention squarely directed to the issue of appeal rights, and was informed that they would be available by means of final proceedings under s 32.[31]

58. As foreshadowed in *Butler*, the maxim that the specific should govern the general is of particular relevance. The Act provides the more specific regime – with its sui generis and tightly drawn dispute resolution mechanism addressing a discrete mischief in the construction industry – which, all other things being equal, should prevail over the general remedies otherwise available under the SC Act.

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29 See paragraph 30.
30 See paragraph 30.
31 See paragraph 44.

59. If it be necessary, the provisions of the Act identified in paragraphs 38 to 43, read in their legislative context, manifest an unmistakeable, implicit parliamentary intention that there be no review for non-jurisdictional error of law on the face of the record.

60. Further, the position confirmed in the decision under appeal has been the law in New South Wales since at least *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421. Parliament has amended the Act on a number of occasions since[32] but has not seen fit to amend the Act on this issue. This can give the Court comfort that the position consistently adopted in New South Wales and upheld by the Court of Appeal in the decision under appeal accords with Parliament's intention.

PART VII: HEARING ESTIMATE

61. Shade Systems estimates it will need 1.5 hour to present its argument.

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32 In particular, through the *Building and Construction Industry Security of Payment Act 2010* (NSW) and the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW).

ANNEXURE

***Supreme Court Act 1970* (NSW) (as presently in force)**

22 Continuance

The Supreme Court of New South Wales as formerly established as the superior court of record in New South Wales is hereby continued.

23 Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.