

NO GROUNDS TO REVIEW NON-JURISDICTIONAL ADJUDICATOR ERRORS

A full bench of the New South Wales Court of Appeal (the Court) has unanimously affirmed that an adjudication determination made under the Building and Construction Industry Security of Payment Act 1999 (NSW) is not subject to judicial review on the grounds of non-jurisdictional error: *Shade Systems Pty Limited v Probuild Constructions (Aust) Pty Ltd (No. 2)* [2016] NSWCA 379.

This judgment clarifies the uncertainty raised in the earlier judgment of the Court in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd & Ors* [2015] NSWCA 288, where Sackville J suggested that a non-jurisdictional error could be subject to judicial review.

In *Shade*, a subcontractor, Shade Systems, served a payment claim on Probuild pursuant to a construction contract. Probuild responded by issuing a payment schedule certifying that no money was payable. Unhappy with Probuild's assessment, Shade Systems referred the dispute to an adjudicator, who determined that Shade Systems was in fact entitled to payment in the amount of AU\$277,755.

Probuild sought a review of the adjudicator's determination in the Supreme Court, alleging

a denial of procedural fairness (a jurisdictional error) and errors of law (non-jurisdictional errors). At first instance, Emmett AJA, rejected the claim for procedural unfairness but held that the supervisory jurisdiction of the Court permitted it to review non-jurisdictional errors of law. His Honour made orders quashing the determination and remitting the matter back to the adjudicator for further determination.

Before the adjudicator re-determined the matter, Shade Systems appealed to the Court. It argued that Emmett AJA erred in quashing the determination, on the basis that the Court has no power to review non-jurisdictional errors. A five-judge bench unanimously agreed, allowing the appeal, and dismissing Sackville J's suggestion in *Lewence*.

This decision has important implications for principals and contractors alike, as it limits the grounds for review of an adjudicator's decision. In seeking such a review, it is important for parties to frame the application on the grounds of jurisdictional error.



For more information, please contact the authors of this briefing:

Nick Watts

Partner, Sydney
T: +61 (0)2 9320 4619
E: nick.watts@hfw.com

Aidan Dierickx

Associate, Sydney
T: +61 (0)2 9320 4642
E: aidan.dierickx@hfw.com

HFW has over 450 lawyers working in offices across Asia, Australia, the Middle East, Europe and the Americas. For further information about aviation issues in other jurisdictions, please contact:

Richard Abbott

Partner, Sydney
T: +61 (0)2 9320 4621
E: richard.abbott@hfw.com

Matthew Blycha

Partner, Perth
T: +61 (0)8 9422 4703
E: matthew.blycha@hfw.com

Hugues de La Forge

Partner, Paris
T: +33 1 44 94 40 50
E: hugues.delaforge@hfw.com

Carolyn Chudleigh

Partner, Sydney
T: +61 (0)2 9320 4620
E: carolyn.chudleigh@hfw.com

Martin Downey

Partner, Hong Kong
T: +852 3983 7684
E: martin.downey@hfw.com

Michael Sergeant

Partner, London
T: +44 (0)20 7264 8034
E: michael.sergeant@hfw.com

Nick Longley

Partner, Melbourne/Hong Kong
T: +61 (0)3 8601 4585/
+852 3983 7680
E: nick.longley@hfw.com

Robert Blundell

Partner, Dubai
T: +971 4 423 0571
E: robert.blundell@hfw.com

Max Wieliczko

Partner, London
T: +44 (0)20 7264 8036
E: max.wieliczko@hfw.com

Lawyers for international commerce

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