

LegalUpdate

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To what extent are Adjudication Determinations under the *Building and Construction Industry Security of Payments Act 1999* (NSW) subject to review by the Court?

Further to our article in April 2010, there have been some further developments on the question of the ability of parties to seek the Supreme Court's assistance to set aside unfavourable determinations made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**'the Act'**).

Our suspicion that it would only be a matter of time before the decision in *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394 (**'Brodyn'**) would be challenged has proved to be correct. In the case of *Chase Oyster Bar v Hamo Industries* [2010] NSWSC 332 (**'Chase'**) the applicant argued that *Brodyn* had been effectively undermined by the decision in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 (**'Kirk'**). In that case, Justice McDougal referred what he described as the "Kirk" point directly to the Court of Appeal for determination.

The matter in which CBP is acting referred to in our previous article, may also be referred to the Court of Appeal to be heard together with *Chase*. Alternatively our client may be given leave to make submissions in *Chase*. We can also confirm that the State of New South Wales has intervened in *Chase* and notified its intention to intervene in our proceedings which tends to highlight the importance of these issues to the broader construction and engineering industries. Given it is unlikely that this point will be dealt with by the Court of Appeal for some time, anyone involved in the construction and engineering industries should continue to monitor the situation. How the Court elects to deal with the likely backlog of matters pending resolution of the issue (in particular, will it allow parties to make payment into Court pending the outcome) will be of particular interest to many industry participants.

Further, in our excitement at the prospect of the Court revisiting **Brodyn**, in our previous article we misquoted part of what the High Court said in *Kirk*. In that case the High Court did not suggest that State Legislation which purports to take from a State Supreme Court power to grant relief for non-jurisdictional error of

law appearing on the face of the record, is beyond power. However, this does not detract from the principal point that was made in the article (and the point that is to be agitated in the Court of Appeal), that there is some potential that the pre-2004 situation, in which aggrieved parties could approach the Supreme Court to have determinations set aside on the basis that the adjudicator's determination was affected by jurisdictional error (not non-jurisdictional error on the face of the record), may be revived following Kirk. There are contrary arguments. Time will tell.

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