

Newsflash

28 September 2010

Judicial Review of Adjudication Determinations - implications of the decision *Chase Oyster Bar v Hamo Industries*

In our April update regarding the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) we commented that it was only a matter of time before someone challenged the reasoning in *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394 (**Brodyn**).

The New South Wales Court of Appeal has recently handed down its Judgment in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 (**Chase Oyster Bar**) where the questions it was asked to consider were related to that issue. CBP acted for the intervening applicant in that case.

The relevant questions and the Court of Appeal's answers in *Chase Oyster Bar* were as follows:

Question 2: Whether in light of the decision of the High Court in *Kirk v IRC* [2010] HCA 1 (**Kirk**) the decision in *Brodyn* should not be followed or was incorrectly decided so far as it held that:

- a. the Supreme Court of New South Wales was not required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the *Act*;
- b. an order in the nature of certiorari [effectively a power of a Higher Court allowing appeal from a lower Court decision] was not available to quash or set aside a decision of an adjudicator under the *Act*;
- c. the *Act* expressly or impliedly limited the Supreme Court of New South Wales' power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the *Act*.

Answer: To the extent that *Brodyn* held, in relation to an adjudication application which was not in compliance with s 17(2)(a) of the *Act*, the matters set out in the question at a, b and c, it was in error.

Question 3: Whether the Act, so far as it expressly or impliedly limits the power of the Supreme Court of New South Wales to review an adjudicator's determination for jurisdictional error, is inconsistent with the requirement of the Constitution that there be a State Supreme Court with jurisdiction to grant relief in the nature of certiorari.

Answer: The Act contains no such limitation.

It is expected that we will now see a number of applications made to the Court by creative applicants seeking to test the waters following the decision in *Chase Oyster Bar*.

Whilst the grounds upon which a party who is dissatisfied with an adjudication determination may have returned to the pre-*Brodyn* position, the critical question remains, what constitutes jurisdictional error. Whilst jurisdictional error certainly includes but may be broader than the "essential preconditions" in *Brodyn*, how far the Courts will allow jurisdictional error to extend in the context of adjudication determinations remains to be seen ... and tested in the Court.

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