

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

CDR Update: To what extent are Adjudication Determinations under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* subject to review by the Court? Is the tide changing?

A recent decision of the High Court has potentially wide-ranging effects on 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').

How does the Act Work?

- The Act provides a statutory regime for the recovery of progress payments for any person who undertakes to carry out construction work.¹
- The Act provides a fast-track mechanism for the adjudication of payment disputes on an interim basis, providing contractors and subcontractors with a mechanism to alleviate their cash flow problems and receive timely payment for work done without having to resort to litigation.² This of course assumes Adjudicators "get it right" most of the time, which is not necessarily a safe assumption.

- The reality is that adjudication often involves complicated questions of fact and law with payment, of in many cases, millions of dollars turning on the determination of the Adjudicator who may not have sufficient legal qualifications or experience or sufficient time to ensure that the Determination is reasonable and consistent with acceptable legal principles.
- That problem has been compounded by the Court's reluctance (to date at least) to become involved even if it is clear that the Determination is flawed.

Are Adjudication Determinations Amenable to Review by the Court?

- The courts have power to review the actions of government decision makers and hold them accountable for conduct that is not authorised by law: this is referred to as "judicial review".³ The New South Wales Supreme Court has inherent power to undertake judicial review of administrative decisions,⁴ and to grant relief⁵ by way of judgment or court order setting aside a determination.⁶

¹ Section 3, *Building and Construction Industry Security of Payment Act 1999 (NSW)*.

² Part 3, Division 2, *Building and Construction Industry Security of Payment Act 1999 (NSW)*.

³ R Creyke and J McMillan, *Control of Government Action: Texts, Cases and Commentary*, 2005, Butterworth's: Sydney.

⁴ Section 23, *Supreme Court Act 1970 (NSW)*.

⁵ By issuing the prerogative writs of certiorari (quashing a decision), prohibition (an order preventing the decision-maker from doing a specific act), mandamus (ordering the decision-maker to perform a specific act), and equitable remedies of declaration and injunction.

⁶ Section 69 of the *Supreme Court Act 1970 (NSW)*

- An adjudicator's authority to make determinations comes from the *Act*, which means that in principle, determinations made by an adjudicator are amenable to judicial review.
 - Prior to 2004, it was common practice for parties who were dissatisfied with an adjudicator's determination under the *Act* to apply to the Supreme Court to quash the adjudicator's determination. The Court determined that a determination could be set aside on the basis of:
 - jurisdictional error;
 - substantial denial of natural justice;
 - fraud;
 - error of law on the face of the record.⁷
 - The distinction between jurisdictional error and non-jurisdictional error remains an elusive one. For present purposes however, it is sufficient to note that jurisdictional error may, among other things, involve a situation where an adjudicator exceeds his/her authority by:
 - identifying the wrong issue;
 - asking the wrong question;
 - ignoring relevant material;
 - relying on irrelevant material;
 - making an erroneous finding or reaching a mistaken conclusion.⁸
- which the Supreme Court was entitled to review determinations made under the *Act*. Brodyn applied to the Supreme Court for an order to quash the adjudicator's determination on the grounds that the relevant payment claim was invalid because the contract had terminated and the final payment claim had been made.
- The Court of Appeal rejected Brodyn's arguments, and held that the legislative intent of the *Act* was to exclude judicial review, except for certain limited circumstances, so as to ensure that adjudication determinations remained a rapid and interim process with minimal court involvement.⁹
 - The effect of this decision was to significantly restrict the ability of parties to construction contracts to seek judicial review of an adjudicator's determination under the *Act*.¹⁰
 - In *Brodyn*, the Court of Appeal held that an adjudicator's determination can only be challenged if:
 1. The basic and essential requirements for a valid determination are not satisfied.¹¹ The Court provided a non-exhaustive list of 5 'basic and essential requirements':
 - the existence of a construction contract between the parties (ss.7-8 of the *Act*);

⁷ *Musico v Davenport* [2003] NSWSC 977; *Multiplex Constructions v Luikens* [2003] NSWSC 1140.

⁸ *Craig v South Australia* (1995) 184 CLR 163 at 179 (per Brennan, Deane, Toohey, Gaudron and McHugh JJ). Later adopted by the High Court majority in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

⁹ *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394 (per Hodgson JA, Giles JA and Mason P). Section 25(4)(a)(iii) of the *Act* acted to prohibit a respondent from challenging an adjudication determination once it was filed as a judgment debt.

¹⁰ In doing so, the Court overturned the decisions of *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935 and *Musico & Ors v Davenport & Ors* [2003] NSWSC 977.

¹¹ *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394 at [53].

The Brodyn Effect: Closing the Lid on Judicial Review

- In *Brodyn Pty Ltd v Davenport* (2004) NSWCA 394, the New South Wales Court of Appeal considered the grounds upon

- the service of a payment claim by the claimant on the respondent (s.13);
 - the making of an adjudication application to an ANA (s.17);
 - acceptance of the application by an eligible adjudicator (ss.18-19);
 - determination by the adjudicator of the amount of the progress payment, the due date, rate of interest payable and written reasons (ss.19(2), 21(5), 22(1) and 22(3)(a).
2. The purported determination is not a bona fide attempt to exercise the power granted under the Act;¹²
 3. There is a substantial denial of the measure of natural justice required under the Act.¹³

Testing the Waters: Opportunities for Rethinking the Operation of the Act following *Kirk v IRC* [2010] HCA 1

- Statements made by the High Court in *Kirk v IRC* could potentially widen the avenues of appeal for parties seeking judicial review of adjudication determinations.
- In the case of *Kirk v IRC* the High Court was asked to consider whether the Supreme Court had power to review a decision of the Industrial Relations Court under the *Occupational Health & Safety Act 1983* (NSW). Relevantly, the High Court was required to consider whether the New South Wales Parliament had power to enact legislation that would exclude judicial review.
- The High Court in *Kirk* reaffirmed the inherent power of State Supreme Courts to review the decisions of inferior Courts or any body exercising public functions.¹⁴ Importantly, the Court held that any:
*'Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.'*¹⁵
- The High Court's reasoning suggests that the state legislature cannot limit the power of the Supreme Court to quash jurisdictional errors of law made by adjudicators.
- If this statement is applied in the context of the Act, it opens up the opportunity to reargue *Brodyn* on the basis that relief should be available for jurisdictional errors of law. This has the potential to revive the pre-2004 situation in which aggrieved parties could approach the Supreme Court to have adjudication determinations set aside on the basis that the adjudicator's determination was affected by jurisdictional error.
- It raises interesting questions about whether adjudication determinations, which are often given by people without formal legal training, should be open to judicial review. On one hand, the intent of the Act is to provide contractors with a mechanism for quickly and cheaply obtaining progress payments. It might be argued that the ability of

¹² Ibid at [55-56].

¹³ Ibid.

¹⁴ *Kirk v IRC* [2010] HCA 1 at [97]-[99].

¹⁵ Ibid at [100].

parties to access the courts to set aside determinations will act to circumvent that purpose.

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- On the other hand, the *Act* can also be used by parties to secure large progress payments without proper review of their underlying entitlement to those payments. It also needs to be acknowledged that adjudicators are faced with a difficult task of potentially valuing millions of dollars of construction work in a short period of time based on nothing more than the parties' written submissions. Notwithstanding the terms of the *Act*, resulting progress payments can at times be rendered final where commercial considerations make Court proceedings to recover those amounts impractical.
- It is only a matter of time before the decision in *Brodyn* is challenged. Anyone involved in the construction industry should carefully monitor the situation, given the possibility that following *Kirk*, the power of the Supreme Court to review determinations made under the *Act* may soon be expanded. In that regard, CBP is presently acting in Supreme Court proceedings, where it is likely the decision in *Brodyn* will be challenged. Enquiries on the status of those proceedings

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