

SHADE SYSTEMS PTY LTD v PROBUILD CONSTRUCTIONS (AUST) PTY LTD (NO 2)
[2016] NSWCA 379

FACTS

The adjudicator had made a determination in favour of Shade Systems in the amount of \$277,755.03, and in arriving at that amount had rejected Probuild's claim for liquidated damages that would have otherwise offset the entire adjudicated amount.

Probuild sought an order quashing the determination on the basis that it involved an error of law on the face of the record. The adjudicator's reasons indicated that he assumed the onus was on Probuild to demonstrate that the failure to achieve practical completion by the due date was caused by default on the part of Shade Systems. This was held to be an incorrect view of the law.

Probuild successfully argued before the Court at first instance that the adjudicator had made an error of law, and the Court ordered the matter remitted to the adjudicator for further consideration and determination according to law.

ISSUES

Whether adjudication determinations are able to be challenged if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

FINDINGS

Shade Systems appealed on the basis that previous judgements had ruled adjudication determinations unreviewable except for jurisdictional issues. Probuild disagreed, but also argued that even if this was the case, those decisions should be reopened.

The Court of Appeal considered the matter significant and appointed a five-judge bench. It was not contested that the adjudicator had been wrong at law.

QUOTE

Several decisions were reviewed, including *Musico v Davenport* [2003] NSWSC 977, *Brodyn v Davenport* [2004] NSWCA 394, *Chase Oyster Bar v Hamo* [2010] NSWCA 190, and cases in Victoria and Queensland.

The Court of Appeal held

"It is the unanimous view of cases in this Court that both McDougall J in *Musico* and this Court in *Brodyn* concluded that relief is not available to quash an adjudicator's determination on a ground other than jurisdictional error."

The Court of Appeal did not find sufficient reason to doubt the correctness of this view, and set aside the lower Court orders quashing the adjudication determination.

IMPACT

This decision confirms the position in New South Wales, Queensland, Victoria, and South Australia, where adjudication determinations cannot be challenged other than for jurisdictional error.

It is likely to be persuasive in all jurisdictions except the Australia Capitol Territory where the relevant legislation specifically allows judicial review for errors of law and the Court has the option to remit the determination to the adjudicator.

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