

SECURITY OF PAYMENT: CHALLENGES TO ADJUDICATIONS ON THE BASIS OF JURISDICTIONAL ERROR: Back to the future



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STRUCTURE OF PRESENTATION

This presentation will:

- Recap the policy underpinnings of *SOPA*;
- Consider the adjudication process and the stages at which challenges can be brought in it; and
- Isolate for analysis *only one* of those stages for deeper consideration, viz the stage once an adjudicator has handed down his or her adjudication determination.

References to *Jacobs* are to my loose leaf service, published by Thomson Reuters: *Injunctions: Law & Practice*, in which I devote a chapter to *SOPA*

INTRODUCTION TO SOPA

- The *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) contains a mechanism for the determination by nominated adjudicators of disputes relating to progress payments (adjudication determinations), and a relatively simple and effective procedure for the enforcement of such adjudication determinations.

The scheme of the Act is to create a “*pay now, argue later*” situation.

An adjudicator determines rights only on an *interim basis*.

Jacobs para [12.100]

POLICY UNDERPINNING SOPA

- The scheme recognises that the construction industry is important to the economy, and cash flow is the life blood of the industry; and is aimed to redress the mischief of developers and head contractors delaying payment to those down the line.

It allows the person who has done construction work (as defined) to serve a payment claim setting out in fairly brief form, particulars of what is claimed and the amount (payment claim); and that sets in train brutally short time limits for the following to occur:

- for the recipient of the notice to serve a “payment schedule” setting out what is agreed, what is denied and why;
 - for the person who served the payment claim to apply to a nominating authority for the appointment of an adjudicator to make a determination.
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- The determination, unless challenged on one of the bases discussed below, can fructify into a judgment of a court of competent jurisdiction, and can then be enforced via the court’s machinery.

Jacobs [12.100]

RELEVANCE OF POLICY TO CHALLENGES

- The above policy means that adjudicator's reasons are to be construed "generously" and this in turn, is the backdrop to which one consider challenges to adjudications: *CC Builders* [2019] NSWSC paras [8] –[10]

SOPA: IMPORTANT SECTIONS

- Section 10 of SOPA stipulates how work is to be valued.
- s 22 says that an adjudicator is to determine the amount of the progress payment etc.; and stipulates what matters *only* are to be taken into account e.g. the provisions of the Act and the contract etc.

STATUTORY SCHEMA
OF SOPA AND STAGES
AT WHICH
CHALLENGES CAN BE
BROUGHT

Bouygues Construction
[2017] NSWSC

The stages at which and the purposes for which injunctions, certiorari and other remedies may be considered are in the main:

(a) prior to the appointment of an adjudicator, to prevent such appointment;

(b) after the appointment of the adjudicator, to stop the adjudication process;

(c) once a determination has been made, to prevent the appointing body from issuing a certificate under s 24 of the New South Wales Act (there are similar provisions in all similar Acts in the other States and Territories), to found the basis of a judgment under s 25.

(d) after a judgment is entered under s 25, to stay that judgment and/or to preclude any execution thereon; and

(e) after a stay is granted, and moneys are paid into court as security : an injunction to restrain payment out of such moneys.

Jacobs [12.400]

DIVINING THE INTENTION OF PARLIAMENT

SOPA: CERTIORARI IN RESPECT OF JURISDICTIONAL ERROR OF LAW

The debate as to whether there is certiorari or not in relation to the determination of an adjudicator, and if so, whether for “mere” error of law by an adjudicator, or only error of law that also amounts to jurisdictional error, arises because the Acts themselves do not make any express reference to this matter.

It is left to courts to divine Parliament’s intention.

BACK TO THE FUTURE

Musico [2003]
NSWSC

2003:

Judicial review was available in NSW for jurisdictional error of law, and this included considering whether the adjudicator had power to make the determination.

BACK TO THE FUTURE

Brodyn [2004] NSWCA

2004:

Certioari fell out of vogue in NSW post the NSWCA decision in

Brodyn [2004] NSWCA, which held that an injunction was the appropriate remedy.

Brodyn said that rather than reviewing the decision of an adjudicator on the basis of jurisdictional and non-jurisdictional error of law, an adjudication would be valid unless it failed to comply with one of the 5 “basic and essential” requirements of the Act.

Brodyn is dealt with in detail in *Jacobs : Injunctions: Law & Practice*

BACK TO THE FUTURE

Chase Oyster Bar
[2010] NSWCA

2010:

The NSWCA departed from its previous decision in *Brodyn* by holding that held that determinations by adjudicators are in principle amenable to orders in the nature of certiorari for jurisdictional error.

BACK TO THE FUTURE

Southern Han Breakfast Point [2016] HCA

2016:

The High Court held in *Southern Han Breakfast Point* [2016] HCA that a reference date for making a progress claim, was a jurisdictional fact necessary as a pre-condition for there to be a valid payment claim, and hence a valid determination.

However, their Honours warned against placing too much stock on viewing the proceedings through the lens of jurisdictional fact, which they said embodied merely the conclusion being contended for.

EXAMPLES OF JURISDICTIONAL ERROR

Bauen Constructions
[2010] NSWSC

Since the decision in *Chase Oyster Bar*, the following have been identified as examples of jurisdictional error:

(i) Where, on the face of the adjudicator's reasons, the adjudicator did not perform their statutory function.

EXAMPLES OF JURISDICTIONAL ERROR

St Hilliers Contracting
[2010] NSWSC

(ii) here, delay being in issue, “[r]ather than approaching the matter by way of determining whether any delay had been established, the adjudicator found delay because, as she put it, the plaintiff had offered no alternative explanation. This approach discloses no logical or rational reasoning process for the conclusionthe adjudicator did not carry out the task given to her by the Act and fell into jurisdictional error.”

EXAMPLES OF JURISDICTIONAL ERROR

Cockram Construction
[2018] NSWCA

- *Can a party contend for jurisdictional error on the part of adjudicators, if their reasoning is wrong?*

The adjudicator's ultimate function is "to determine the amount and timing of a progress payment": In performing that function, the adjudicator is bound "to consider" the matters in paras (a)–(e) of sub-s (2) and not "to consider" other matters: *Hargreaves* at [65] (Basten JA).

The obligation in s 22(2) required "a process of evaluation, sufficient to warrant the description" as consideration in the particular context, and not mere "formalistic reference" to those matters.

In the NSW Court of Appeal in *Cockram* [2018] NSWCA 107

EXAMPLES OF JURISDICTIONAL ERROR

Cockram Construction
[2018] NSWCA

- In *Cockram*, the contract between the sub and head contractors had a clause that the subcontractor would only be entitled to an EOT if the head contractor was likewise entitled to receive one from its principal. The subcontractor submitted a payment claim for millions of dollars, the head contractor rejected it, and the subcontractor submitted an adjudication application. According to the head note:

The adjudicator's determination of the claim included a conclusion that the subcontractor had established its entitlement to extensions of time, the clause not providing a legitimate or workable condition precedent as it relied on a contractual relationship to which the subcontractor was not a party.

EXAMPLES OF JURISDICTIONAL ERROR

Cockram Construction
[2018] NSWCA

- The head contractor sought judicial review of that determination on the basis that the adjudicator had departed from her statutory function by refusing to apply the condition in the subcontract. The primary judge (Ball J) granted the relief on the basis that the adjudicator failed to give reasons for the conclusion. The subcontractor appealed against that decision.

The appeal was allowed, on the grounds:

- (i) that the impugned part of the adjudication demonstrated complete reasons for the conclusion reached by the adjudicator;
- (ii) that this left no room for the inference that some unarticulated reasons underpinned the conclusion;
- (iii) of the statement of principle extracted above in paras [40] and [41] of the judgment.

EXAMPLES OF JURISDICTIONAL ERROR

Cockram Construction
[2018] NSWCA

- That is, it mattered not that the adjudicator had been right or wrong on the law as to the true construction of the contract. Merely getting it wrong in this way, without more [13], did not constitute embarking “on an exercise in extra-legal compensatory justice”: [14].

EXAMPLES OF JURISDICTIONAL ERROR

Iskra [2019]

- The crisp issue was whether (as the trial judge had found), the adjudication determination was infected with jurisdictional error, in that the adjudicator failed to form a view as to what was properly payable having regard to the true construction of the contract and the true merits of the claim.

The owner had claimed that the builder had charged excessive fees, in circumstances where the contract for a restaurant and function-centre fit-out was on a do-and-charge basis plus a 6% margin for profit.

EXAMPLES OF JURISDICTIONAL ERROR

Iskra [2019]

- The learned primary judge acceded to the owner's submission (couched in my commentator's lexicon) that the adjudicator had effectively rubber stamped the application, without applying an independent, critical mind to it as mandated by *inter alia* ss 10 and 22 of SOPA. This was unanimously reversed on appeal.

EXAMPLES OF JURISDICTIONAL ERROR

CC BUILDERS [2019]
NSWSC

- It will be recalled that Sec 22 of *SOPA* stipulates that the adjudicator is “*only*” allowed to “*consider*” a *numerus clausus* of matters. One of those matters is all submissions “*duly made*” by the claimant in support of the claim, and by the respondent in support of the schedule.
- In short, a submission can only be only “*duly made*” to the adjudicator on a topic, if that topic has been referred to in the payment claim or payment schedule.

EXAMPLES OF JURISDICTIONAL ERROR

CC BUILDERS [2019]
NSWSC

- There is a strong line of authority that says that whether a party has “duly made” a submission, is a matter for the adjudicator.
- However, it was held in CC Builders that despite this line of authority, if the adjudicator was “*obviously wrong*” in finding that a submission had not been “*duly made*”, that would constitute jurisdictional error. There was evidence of this, because the adjudicator referred in one part of the determination to the relevant submission (on whether an EOT had been granted or not), but in the operative part, said there was no such submission; hence there was “*no rational or reasonable basis*” for taking that position: para [34].



JURISDICTIONAL
ERROR
GAZING AHEAD

- There is a constant stream of cases coming out on the metes and bounds of jurisdictional error.

I will update the relevant chapter in my loose leaf service, *Injunctions: Law & Practice*, from time to time, so feel free to consult it to see if the answer to your questions are in there; and also please feel free to email me if you come across a particular case you think ought be included or topic that should be addressed.

CITATIONS

- *Bauen Constructions Pty Ltd v Westwood Interiors Pty Ltd* [2010] NSWSC 1359 (18 November 2010)
- *Bouygues Construction Australia Pty Ltd v Southern Cross Electrical Engineering Ltd* [2017] NSWSC 1665
- *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394
- *CC Builders (Aust) Pty Ltd v Milestone Civil Pty Ltd* [2019] NSWSC 1251
- *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190
- *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* (2018) 97 NSWLR 773; [2018] NSWCA 107
- *Iskra v MMIR Pty Ltd* [2019] NSWCA 126
- *Musico v Davenport* [2003] NSWSC 977
- *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence* [2016] HCA 52
- *St Hilliers Contracting Pty Ltd v Dualcorp Civil Pty Ltd* (2011) 27 BCL 437; [2010] NSWSC 1468
- *Jacobs, Injunctions: Law & Practice*. Thomson Reuters (Loose Leaf Service).