MAXCON CONSTRUCTIONS PTY LTD v MICHAEL CHRISTIAN VADASZ (TRADING AS AUSTRALASIAN PILING COMPANY) & ORS (A17/2017)

Court appealed from: Full Court of the Supreme Court of South Australia [2017] SASCFC 2

Date of judgment: 8 February 2017

Special leave granted: 12 May 2017

Maxcon Constructions Pty Ltd ("Maxcon") entered into a contract with Mr Christian Vadasz to design and construct piling for an apartment building. It was a term of that contract that Maxcon would retain 5% of the contract sum as a retention sum. (This sum was to be released at defined times after the issue of a certificate of occupancy for the building.) Unbeknown to Maxcon, Mr Vadasz was an undischarged bankrupt at the time.

Mr Vadasz served on Maxcon a payment claim under section 13 of the *Building and Construction Industry Security of Payment Act* 2009 (SA) ("the Act") for $204,864.55. Maxcon then served on Mr Vadasz a payment schedule of $141,163.55, with $38,999.40 having been deducted by way of the retention sum and $24,750 as a set off for administration charges.

Mr Vadasz then applied for an adjudication of his payment claim. The Third Respondent ("the Adjudicator") later issued an adjudication determination ("the Adjudication") for $204,864.55. He held that the retention sum provisions in the contract were "pay when paid" provisions and thereby void pursuant to section 12 of the Act. The Adjudicator also rejected Maxcon's setoff claim for administration charges.

Maxcon then commenced proceedings, seeking a declaration that the Adjudication was a nullity. It submitted that the contract was rendered void as a result of Mr Vadasz's breach of section 269(1)(b) of the *Bankruptcy Act* 1966 (Cth). This was because he had not disclosed his bankruptcy to Maxcon. Maxcon further submitted that the Adjudication comprised jurisdictional errors or errors of law on the face of the record thereby vitiating the entire determination. Justice Stanley however dismissed that action. His Honour found that Mr Vadasz's failure to disclose his bankruptcy did not result in the contract being void. He further held that there was no jurisdictional error (or other error of law) made by the Adjudicator.

On 8 February 2017 the Full Court of the South Australian Supreme Court (Blue and Lovell JJ, Hinton J dissenting) dismissed Maxcon's subsequent appeal. The majority held that the Adjudicator's error in concluding that the retention sum provisions were "pay when paid" provisions (and thereby void pursuant to section 12 of the Act) did not comprise a jurisdictional error. All Justices held however that that error *did* comprise an error of law on the face of the record. Despite this finding, their Honours held that *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 was authority for the proposition that the remedy of certiorari was impliedly excluded under the Act.

The grounds of appeal include:

- The Full Court erred by following *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No.2)* [2016] NSWCA 379 and concluding that the Act excluded judicial review on the ground of error of law on the face of the record;

- The Full Court erred by holding that the error of law made by the Adjudicator in the application of s 12 of the Act did not amount to jurisdictional error.

On 16 October 2017 the Respondent filed a Summons, seeking to rely upon a proposed Amended Notice of Contention, the grounds of which include:

- The Full Court erred in holding (at [98] – [113]) that the Second Respondent made an error of law in concluding that the contractual provisions in respect of the retention sum were “pay when paid” provisions within the meaning of s 12 of the Act.