



HENRY DAVIS YORK  
LAWYERS

## CONSTRUCTION LAW INSIGHT

20 JANUARY 2012

# Adjudication of SOPA Claims and Jurisdictional Error

Since the 2010 Court of Appeal decision in *Chase Oyster Bar v Hamo Industries (Chase Oyster Bar)*, adjudicator's determinations under the Building and Construction Industry Security of Payment Act 1999 (SOPA) have become more susceptible to review for jurisdictional error. Two recent NSW Supreme Court decisions shed further light on the circumstances where a determination may be quashed due to jurisdictional error.

### Jurisdiction and the terms of the contract

Previously, under the line of authority established in *Brodyn Pty Ltd v Davenport*, challenging a determination in the Courts proved difficult. *Chase Oyster Bar* then broadened the scope for judicial review, finding that adjudications under the Act are reviewable for jurisdictional error, and if the error is established, the determination must be repealed or deemed void.

However recent cases, such as *Clyde Bergemann v Varley Power*, highlight that Courts remain reluctant to overturn determinations. The plaintiff (**Bergemann**) subcontracted works to the first defendant (**Varley**). During the course of the project, Varley served a payment claim under SOPA for A\$3.955 million. In response, Bergemann issued a payment schedule in the sum of A\$300,000 on a without prejudice basis. The matter proceeded to adjudication where the adjudicator determined Varley was entitled to approximately A\$2.5 million.

Bergemann challenged the adjudicator's determination on the basis that by awarding an amount in excess of Varley's contractual entitlement, the adjudicator had acted outside the scope of their jurisdiction.

McDougall J noted that not all errors of law made by adjudicators amount to jurisdictional error, and affirmed the position that parties are generally bound to accept the determination as the sum of the progress payment, the date on which it is payable and the rate of interest owing.

### Who does this affect?

All construction industry professionals (including principals and contractors) who operate under SOPA provisions.

### Highlights

- Adjudicator's determinations under SOPA remain susceptible to review.
- The Courts have refined what jurisdictional error means for adjudicators.
- While determinations are more susceptible to judicial review for jurisdictional error, Courts remain reluctant to overturn adjudications unless the adjudicator has misconstrued their powers in a material way.
- Jurisdictional error is a complex area of law. It is advisable to seek legal advice to ensure your rights are protected in pursuing or responding to claims under SOPA.

Thus, if an adjudicator misconstrues or misapplies contractual provisions, and does not calculate the amount of the progress payment in accordance with the terms of the relevant contract, the adjudicator has not necessarily exceeded, or failed to exercise, the jurisdiction conferred by SOPA.

### **The requirement of good faith**

A further issue raised in *Clyde Bergemann* was whether the adjudicator exercised their statutory powers in good faith when determining claims for variations.

McDougall J noted that while an adjudicator must put their mind to the discharge of their duty, there are necessary limits on the time and effort they can expend on the consideration of submissions. Section 21(3) of SOPA states a primary obligation on adjudicators “is to determine an adjudication as expeditiously as possible.”

It was held that to satisfy the good faith requirement, the reasons given by an adjudicator should be sufficient to demonstrate they have “engaged actively with the dispute” and “dealt with it in a way that is reasoned, and not perverse, arbitrary or capricious.”

In *Clyde Bergemann*, McDougall J found that the adjudicator did grapple with the issues concerned and gave logical reasons for their conclusion. The Court formed the view that Bergemann “was seeking to re-argue the merits of the individual decisions, under the cover of nominal reliance on the principles of natural justice and good faith,” and upheld the determination.

### **Failure to consider submissions – a possible ground of review**

In *Owners Strata Plan 61172 v Stratabuild Ltd*, the First Defendant, Stratabuild, served a payment claim on the Plaintiff, the Owners. The Owners in turn served a payment schedule, claiming that no amount was owing due to various defects, including unsatisfactorily thin paint. Stratabuild subsequently applied for adjudication and, in the adjudication response, the Owners relied upon expert evidence regarding the nature and extent of the defective paint.

The adjudicator determined that as the expert evidence had not been included in the Owner’s payment schedule, it constituted additional submissions which the adjudicator had no power to consider by reason of 20(2B) of SOPA. In response, the Owners filed a summons seeking a declaration that the adjudication determination was void.

However, the Court held that the Owner’s payment schedule was specific enough to indicate the reasons for the Owners to withhold payment, and that the expert evidence merely supported those reasons, rather than providing additional ones. Thus consideration of the material by the adjudicator was not contrary to S20(2B) of SOPA.

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## **If the decision was erroneous, did it amount to jurisdictional error?**

The Owners contended that the adjudicator's misapprehension of the nature of their functions and powers was a jurisdictional error, and the adjudicator failed to accord procedural fairness by failing to consider the expert evidence, rendering the determination void.

The Court held that the adjudicator's confusion over the meaning of "reasons" and "submissions" under SOPA was sufficient to amount to jurisdictional error, and the adjudicator also failed to afford both parties procedural fairness. The determination was therefore invalid.

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