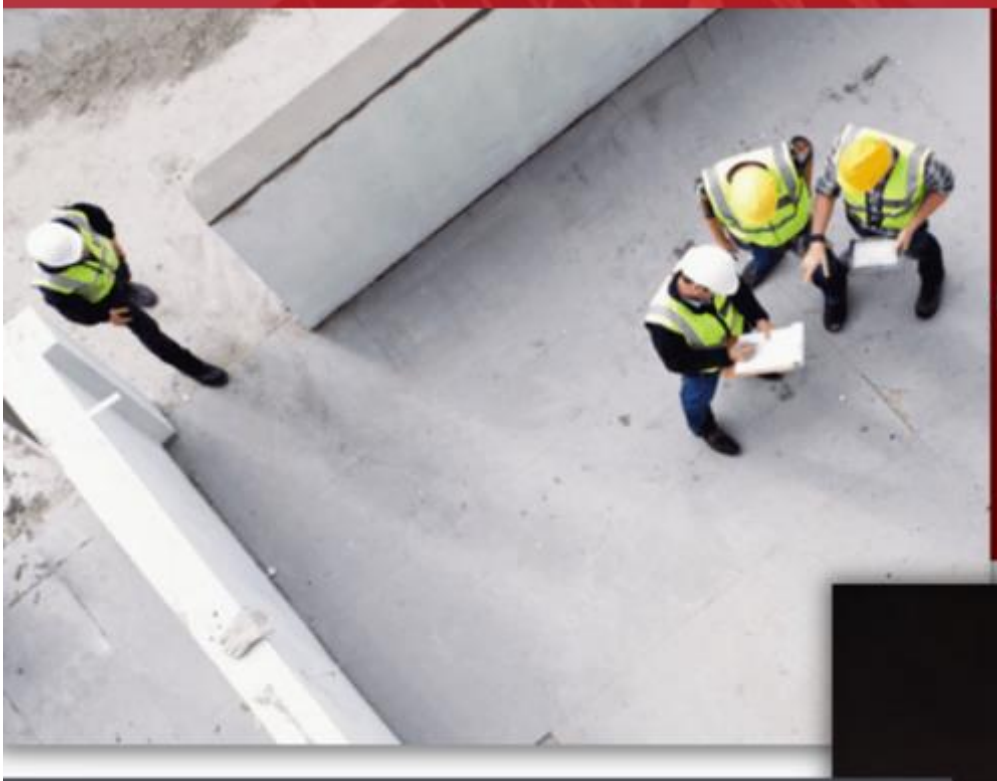
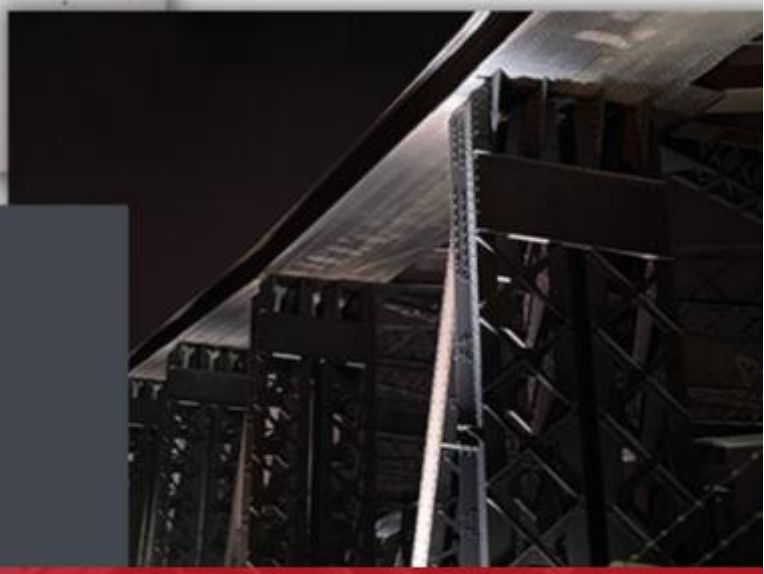
Crisp Case Note: *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215





Newsletter

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In this Newsletter, we provide a case note on *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215. We discuss the key findings of the case and the principle of jurisdictional error under section 32A of the *Building and Construction Industry Security of Payment Act* 1999 (NSW).

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Introduction

The recent case of *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215 involved an adjudication dispute between a construction contractor, Ceerose Pty Ltd (Ceerose), and a subcontractor, A-Civil Aust Pty Ltd (A-Civil). On 12 September 2023, the Court of Appeal dismissed Ceerose's appeal and affirmed the decision of the NSW Supreme Court (NSWSC) that the adjudication determinations concerning two developments were tainted by jurisdictional error.

Facts of the Case

Ceerose was a building contractor undertaking two developments, one in York Street, Sydney ("York Street") and another in Greenknowe Avenue, Elizabeth Bay ("Elizabeth Bay"). A-Civil was subcontracted by Ceerose to complete construction work for both projects.

In May 2022, A-Civil served Ceerose with two payment claims under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act")[1] in relation to each project. Both payment claims were disputed by Ceerose.

In June 2022, A-Civil applied for adjudication under the Act for each project and Ceerose filed an adjudication response. The adjudicator, Mr Tuhtan, determined that Ceerose was obliged to pay A-Civil $2,045,453.97 for the York Street works, and $349,324.36 for the Elizabeth Bay works. Subsequently, Ceerose appealed the adjudication in the Supreme Court, seeking to set aside both determinations for jurisdictional error.

On 20 March 2023, Justice Darke held that both determinations were partially affected by jurisdictional error. However, applying section 32A of the Act[2], set aside only those parts of the determinations said to be affected by jurisdictional error. Ceerose appealed, asserting further aspects of the determinations should be set aside.

The Court (Payne JA, Ward ACJ and, Basten AJA concurring) dismissed the appeal and allowed the cross-appeal.

Jurisdictional Error

Jurisdictional error is described as "a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make."[3] In other words, it involves a decision-

[1] *Building and Construction Industry Security of Payment Act* 1999 (NSW).
[2] Ibid s 32A.
[3] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [24] per Kiefel CJ, Gageler and Keane JJ.

maker either surpassing the granted authority to make decisions or failing to exercise that authority when required to do so.

In *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; [2003] ALJR 1088[4], jurisdictional error, in the sense of a constructive failure to exercise jurisdiction was examined. Gummow and Callinan JJ, with Hayne J agreeing, held that for an administrative decision-maker "[t]o fail to respond to a substantial, clearly articulated argument, relying upon established facts" was both a constructive failure to exercise jurisdiction and a failure to accord natural justice.[5] Similarly, Kirby J found a constructive failure to exercise jurisdiction in that case where the decision-makers mistake "amounts to a basic misunderstanding of the case brought by an applicant."[6]

These observations relate to the claim that the adjudicator failed to accord the applicant procedural fairness, namely where the adjudicator failed to consider a matter which he was obliged to consider.

Section 32A of SOPA and Appeal Grounds 3, 5, 8 and 10

The principal subject matter of the appeal was Ceerose's claim that the primary judge erred in the application of section 32A of the Act[7]. Ceerose raised several issues regarding the primary judge's decision on section 32A[8], delineated in grounds 3(a)-(g) and 5, pertaining to York Street, as well as grounds 8 and 10, addressing Elizabeth Bay.

Section 32A

Under section 32A of Act[9], the Supreme Court has a discretionary power to set aside the whole or part of an adjudicator's determination that has been impacted by jurisdictional error. Section 32A provides:

> (1) If, in any proceedings before the Supreme Court relating to any matter arising under a construction contract, the Court makes a finding that a jurisdictional error has occurred in relation to an adjudicator's determination under this Part, the Court may make an order setting aside the whole or any part of the determination. [emphasis added]
>
> (2) Without limiting subsection (1), the Supreme Court may identify the part of the adjudicator's determination affected by jurisdictional error and set aside that part only, while confirming the part of the determination that is not affected by jurisdictional error.

[4] *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; [2003] ALJR 1088.
[5] Ibid [23]-[25] (Gummow, Callinan JJ, and Hayne J)
[6] Ibid [88] (Kirby J).
[7] *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 32A.
[8] Ibid.
[9] Ibid.

This provision was incorporated into the Act by the *Building and Construction Industry Security of Payment Amendment Act* 2018 (NSW)[10], taking effect on 21 October 2019. In the Legislative Council's Second Reading Speech, Mr. Scot MacDonald, representing Hon Sarah Mitchell, conveyed the following[11]:

> "New powers will enable the Supreme Court to sever part of an adjudicator's determination affected by jurisdictional error and confirm the balance to be enforceable. In *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003][12], the NSWSC held that jurisdictional error invalidates the whole of an adjudicator's determination. This is the case even where the error is confined to one part of the determination and does not affect the remaining part or parts. This outcome unfairly and unnecessarily deprives a party of an interim payment with adverse consequences for cash flow. It also serves to incentivise a party to challenge unfavourable determinations. The purpose of section 32A is to address this by making clear that decisions can be set aside in part and as such are theoretically severable where jurisdictional error has infected a part but not the whole of the decision."

It may be, on a correct understanding of jurisdictional error within the framework of the Act, that the primary judge, by adhering to *Hargreaves*[13] and *Pacific General Securities*[14], incorrectly identified jurisdictional error in the adjudication determination, even though none was present.

York Street Appeal (Grounds 3 and 5)

Ceerose's third ground of appeal concerned the adjudicator's failure to arrive at its own conclusion, simply relying on the parties' submissions, and thereby not properly considering the matters outlined in section 22(2) of the Act[15]. The argument on this ground asserts that the primary judge ought to have recognised this as a jurisdictional error.

Section 22(2) provides the matters an adjudicator is required to consider, namely:

> (a) the provisions of this Act,
>
> (b) the provisions of the construction contract from which the application arose,
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

[10] *Building and Construction Industry Security of Payment Amendment Act* 2018 (NSW).
[11] New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 24 October 2018 at 62.
[12] NSWSC 1140.
[13] *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 388, [52] Hodgson JA.
[14] Pacific General Securities Ltd & Anor v Soliman & Sons [2006] NSWSC 13.
[15] *Building and Construction Industry Security of Payment Amendment Act* 2018 (NSW), s 22(2).

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

It is evident that an adjudicator is obligated to consider only those submissions that have been "duly made" by the parties, or to put differently, material that is relevant.

When discussing the scope of the material that an adjudicator is required to evaluate, the Court of Appeal dismissed Hodgson JA's interpretation of that duty as presented in *Coordinated Construction Co Pty Ltd v JM Hargreaves & ORS* [2005] NSWSC 77.[16] In doing so, it clarified that in light of the express restriction in section 20(2B)[17], an adjudicator must not look beyond the terms of an adjudication response when rejecting part, or all of a payment claim. The Court emphasized that allowing the adjudicator to consider matters beyond the terms of the payment schedule would be an error, as it is unlikely Hodgson JA intended to hold that it would invariably amount to a jurisdictional error if an adjudicator failed to consider the "true merits of the claim". Moreover, section 14(3)[18] requires a payment schedule to provide reasons for scheduling an amount less than the payment claim.[19]

Alleging lack of consideration of material

To successfully prove that an adjudicator failed to consider relevant material as required by section 22(2)[20], one must establish that such consideration did not occur. This poses a formidable challenge, as emphasised by the Court (at [62] to [67]). For instance, an adjudicator is not compelled to provide reasons for their determination, and due to the restricted timeframe within which they are required to make a determination (10 days), it may not be feasible for them to produce detailed reasoning.

With ground 5, Ceerose argued that the primary judge erred in setting aside only the part of the decision tainted by jurisdictional error, asserting that the term 'determination' encompasses both the decision itself and its accompanying reasoning. Ceerose referenced section 22(3)(b) of the Act[21], which states that the "determination" includes the reasons for the determination, hence section 32A[22] obliges the Court to identify the parts of the *reasons* which should be set aside.

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[16] *Coordinated Construction Co Pty Ltd v JM Hargreaves & ORS* [2005] NSWSC 77, [75] to [78] (Hodgson JA).
[17] *Building and Construction Industry Security of Payment Amendment Act* 2018 (NSW), s 20(2B).
[18] Ibid s 14(3).
[19] *Coordinated Construction Co Pty Ltd v JM Hargreaves & ORS* [2005] NSWSC 77, [51] to [53] (Hodgson JA).
[20] *Building and Construction Industry Security of Payment Amendment Act* 2018 (NSW), s 22(2).
[21] Ibid s 22(3)(b).
[22] Ibid s 32A.

In response, the Court of Appeal held (at [108]) that, as judicial review is only concerned with the review of determinations or orders, the Court was only required to set aside the part of the determination affected by the jurisdictional error and not the reasons. Hence, ground 5 was dismissed.

Elizabeth Bay Appeal (Grounds 8 and 10)

For the same reasons given in relation to York Street ground 3, ground 8 should be dismissed. With ground 10, for the same reasons as in relation to ground 5 of the York Street appeal, it is the adjudicator's decision which is set aside, in part, and not the reasons of the adjudicator.

Conclusion

The decision in *Ceerose* has provided clarity to various aspects of adjudication law and the interpretation of provisions within the Act. The Court affirmed that adjudicators aren't obligated to delve beyond the submissions provided by the parties, nor are they required to examine beyond the submissions duly made by the parties. At a practical level, the decision won't have a significant impact as adjudicators seldom deviate from the parties' submissions. Even if they deviate, procedural fairness must be afforded to both parties to address any material matters arising from such deviations to avoid setting aside the decision.

Additionally, the Court clarified that when an adjudication determination is vitiated by jurisdictional error, the Supreme Court is only required to set aside the part of the decision affected by jurisdictional error, not the reasoning.