

Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWSC 239

FACTS

The case of *Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWSC 239* involved the appeal of an adjudication between a construction contractor and subcontractor.

In late 2021, Ceerose Pty Ltd (**Ceerose**) entered two subcontracts with A-Civil Aust Pty Ltd (**A-Civil**) for construction works on a building site in the Sydney CBD and further site in Elizabeth Bay, a bay neighbouring the Sydney CBD and local botanical gardens.

On 30 May 2022, the defendant served a payment claim seeking a payment of \$3,556,466.80; A-Civil provided a payment schedule in response which provided an assessment of \$895,565.50. Ceerose made an adjudication application on about 28 June 2022, and on 2 August 2022, a determination for the amount of \$2,045,453.97 was issued.

A-Civil appealed the adjudication in the supreme court, claiming jurisdictional error, however Ceerose contended that the determination should stand in whole, or at least any part or parts not affected by jurisdictional error.

ISSUE

Whether the adjudication should be void in its entirety?

FINDING

The court allowed the appeal, but the determination was only struck down in part, with His Honour, Justice Darke stating:

182. *When jurisdictional error is found in respect of an adjudicator's determination under the Act, the Court commonly declares the determination to be invalid, or makes orders quashing the determination. In more recent times, however, at least since the decision of the Court of Appeal in YTO Construction Pty Ltd v Innovative Civil Pty Ltd [2019] NSWCA 110, in some cases where part or parts of a determination appear to be affected by jurisdictional error, questions have arisen as to whether it is open to the Court to effectively sever those parts and order the determination to be set aside only to that extent.*

186. *I am inclined to think that it would be appropriate in both cases to make orders under s 32A of the Act. In each case, the adjudicated amount is in reality the sum of a number of distinct parts only some of which are, according to my conclusions, affected by jurisdictional error. In each case (and especially in relation to the Elizabeth Bay site Determination) numerous parts of the Determination, that together reflect substantial sums of money and a significant portion of the adjudicated amount, are not so affected. It seems to me that it may be appropriate to not set aside those parts, and indeed confirm those parts, as envisaged by s 32A(2), whilst setting aside the balance of the Determinations.*

IMPACT

This decision shows how the court may choose to uphold parts of an adjudication, while still choosing to striking-down other parts, infected by jurisdictional error.

In NSW, arguments to preserve part or parts of an adjudication decision which are unaffected by any alleged jurisdictional issues, may be a strategic tool for parties seeking to defend against any appeal.

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