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E-ALERT: Everything Old is New Again?

By ,

As was widely anticipated, on 21 December 2016, the High Court unanimously allowed the appeal in S*outhern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 and firmly re-established the previously accepted view that a reference date is a precondition to the making of a valid payment claim under the *Building and Construction Industry Security of Payment Act*1999 (NSW) (**Act**)[1].

Brief history of the matter

Southern Han entered into a construction contract with Lewence. The contract provided that payment claims were to be made on the 8th date of each month. The contract also allowed Southern Han to take the work out of Lewence's hands in certain circumstances of unremedied default. The same clause allowed Southern Han to suspend payments in the event that it took the works out of Lewence's hands.

On 10 October 2014, Southern Han served a notice to show cause and on 27 October 2014, Southern Han took the works out of Lewence's hands. Lewence considered that conduct to be a repudiation, which Lewence elected to accept and terminated the contract.

Subsequently, Lewence purported to serve a payment claim under the Act and to seek to have the payment adjudicated. The Adjudicator determined that the payment claim was valid and that Lewence was entitled to payment.

Southern Han sought relief in the New South Wales Supreme Court on the basis that the payment claim was void as not being supported by a valid reference date.

Decisions below

At first instance, Ball J made a declaration that the payment claim was void because it was not supported by a valid reference date.

Ward, Emmett JJA and Sackville AJA then allowed the appeal, holding that a valid reference date was not a precondition to a valid payment claim.

Appeal to the High Court

The Court, in unanimously allowing the appeal, accepted that:

1. a valid reference date is a precondition of a valid payment claim;
2. a payment claim without a valid reference date could not be the subject of a valid adjudication application; and
3. Lewence's payment claim was not supported by a valid reference date (on either view of the case) because:

a. the contract allowed Southern Han to suspend payments if it took the works out of Lewence's hands and no further reference dates accrued until that suspension was ended pursuant to the contract; or
b. if Southern Han had repudiated the contract, then the contract had been terminated by Lewence and no further reference dates accrued after the termination of the contract (nothing in the contract suggesting that reference dates continued to accrue post termination).

Take home points

First, in absence of a reference date, a payment claim is void and it cannot (generally speaking) be the subject of a valid adjudication application[2]. This restores what had been accepted to be the case prior to the decision of the New South Wales Court of Appeal in the present case.
Second, the Court seems to have tacitly accepted[3] the 'Queensland' position (i.e. that, in general, no reference dates accrue after a contract has been terminated) as against the 'New South Wales' position (where reference dates can accrue post termination). It will be interesting to see what approach the New South Wales Courts will take moving forward in that regard.

Third, contractors should give the matter serious thought before they elect to accept a purported repudiation (based on a purported taking of the works out of their hands); particularly if the next payment claim is due to be made shortly after. An action for damages/upon a quantum meruit basis will take far longer to prosecute than a claim made under the Act. In a cash-flow driven sector, this decision might be difference between keeping a business alive and liquidation.

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[1] Given the similarity of the language used, the High Court's decision is likely to be applied in Queensland

[2] The author notes in the margin that only a decision to deny jurisdiction will be valid in such circumstances; although there is a good deal of authority to suggest that a decision maker such as an Adjudicator cannot finally determine their own jurisdiction

[3] Albeit arguably in *obiter*

Should you wish to discuss any matters arising out of this article, please contact the author:

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