

**SOUTHERN HAN BREAKFAST POINT PTY LTD (IN LIQ) v LEWENCE
CONSTRUCTION PTY LTD & ORS (S199/2016)**

Court appealed from: New South Wales Court of Appeal
[2015] NSWCA 288

Date of judgment: 25 September 2015

Special leave granted: 28 July 2016

In January 2013 the appellant (“Southern Han”) entered into a contract (“the Contract”) with the first respondent (“Lewence”) for the latter to construct a block of residential units for a price of \$14.2 million excluding GST. The Contract provided that Lewence would claim payment from Southern Han monthly, by claiming on the eighth day of each month for work done up to the previous day. In October 2014, Lewence duly claimed a monthly payment on 8 October. In the ensuing days, however, Southern Han gave notice under the Contract that it was taking the construction work out of Lewence’s hands. Lewence regarded this as a repudiation of the Contract and accepted that the Contract was terminated as of 28 October 2014.

On 4 December 2014 Lewence served Southern Han with a claim for \$3.2 million including GST (“the Payment Claim”). The Payment Claim claimed sums for work done up to 27 October 2014 and for various costs allegedly incurred by Lewence. It also claimed a progress payment under the Contract of \$1.2 million including GST, for work carried out to 7 October 2014. The Payment Claim stated that it was made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”).

Section 8(1) of the Act relevantly provides that a person who has undertaken to carry out construction work is entitled to a progress payment on and from each “reference date” under the applicable contract. 8 October 2014 was a “reference date” within the meaning of s 8(1). Section 13 of the Act contains the following subsections:

- (5) *A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.*
- (6) *However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.*

After Southern Han denied owing Lewence any amount (and contended that it had overpaid Lewence by \$64,000), Lewence applied for an adjudication of the Payment Claim. Southern Han submitted that the adjudicator did not have jurisdiction because the Payment Claim was not a valid claim under the Act. The adjudicator rejected that submission and proceeded to determine Lewence’s claim in the sum of \$1.2 million including GST (“the Determination”).

Southern Han challenged the validity of the Determination in the Supreme Court. On 15 May 2015 Justice Ball declared the Determination void. This was after holding that the existence or otherwise of a “reference date” within the meaning of s 8 of the Act was a matter going to the jurisdiction of the adjudicator. His Honour held that the adjudicator lacked jurisdiction, as there was no longer a reference date available to support the Payment Claim. This was on either of two alternative bases. The first was that Southern Han’s taking over the work and suspending payment under the Contract meant that there was no subsequent date on which a progress payment could be claimed. The second was that Lewence’s termination of the Contract had brought the accrual of reference dates to an end.

The Court of Appeal (Ward & Emmett JJA, Sackville AJA) unanimously allowed an appeal by Lewence and set aside the declaration made by Justice Ball. Their Honours held that Justice Ball had erred by construing s 13(1) of the Act as requiring a claimant to be a person who had undertaken construction work under a contract *in respect of which a reference date had arisen*. All that was required for the service of a claim under the Act was a claimed entitlement to a progress payment. Only after service of a claim would the existence of a reference date become relevant, in the determination of whether the claimant was in fact entitled to a progress payment. The Court of Appeal therefore held that the Payment Claim was a valid claim under the Act, which came to be duly determined by the adjudicator. Their Honours also held that, on the case and the evidence presented (which did not include a copy of the claim made by Lewence on 8 October 2014), it was not open to them to determine that the Payment Claim was a second claim in respect of 8 October 2014 which thereby contravened s 13(5) of the Act.

The grounds of appeal are:

- The Court of Appeal erred in concluding that the existence of a reference date to support a payment claim under the Act is not a jurisdictional fact (and that hence it is for an adjudicator under the Act to determine).
- The Court of Appeal erred in holding that a reference date arose after the termination of the contract in circumstances where the contract did not provide for a date after termination on or from which a progress claim could be made.
- The Court of Appeal erred in concluding that Lewence did not contravene s 13(5) of the Act by serving two payment claims with respect to the same reference date.

Lewence has filed a notice of contention, the grounds in which include:

- If it be necessary, the Payment Claim was “support[ed]” by a reference date. Even if (as contended by Southern Han) “*the existence of a reference date to support a payment claim*” is a jurisdictional fact, the decision of the Court of Appeal should be affirmed on the ground that Southern Han failed to demonstrate the absence of that jurisdictional fact.