



HIGH COURT OF AUSTRALIA

21 December 2016

SOUTHERN HAN BREAKFAST POINT PTY LTD (IN LIQUIDATION) v
LEWENCE CONSTRUCTION PTY LTD & ORS
[2016] HCA 52

Today the High Court unanimously allowed an appeal from the Court of Appeal of the Supreme Court of New South Wales. The High Court held that the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under s 13(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act").

The appellant ("Southern Han") and the respondent ("Lewence") were parties to a construction contract for the construction by Lewence of an apartment block ("the Contract"). The Contract made provision for Lewence to "claim payment progressively" by making a "progress claim" on the 8th day of each calendar month for work under the Contract done to the 7th day of that month. On 27 October 2014, Southern Han gave Lewence a notice purporting to exercise its right under the Contract to take out of Lewence's hands the whole of the work remaining to be completed. Lewence treated the giving of that notice as repudiation of the Contract and purported to accept the repudiation and to terminate the Contract. On 4 December 2014, Lewence served on Southern Han a purported payment claim, which claimed payment for work carried out by Lewence up to 27 October 2014. Southern Han provided a payment schedule in response to Lewence's payment claim indicating that the amount it proposed to pay was nil.

Lewence purported to make an application for adjudication. The adjudicator rejected an argument that he lacked jurisdiction and purported to determine the application. Southern Han sought a declaration in the Supreme Court that the purported determination was void or, alternatively, an order in the nature of certiorari quashing the purported determination. The primary judge made the declaration sought, construing the Act as requiring a reference date to have arisen under the Contract as a precondition to the making of a valid payment claim, and finding that there was no reference date to support Lewence's purported payment claim. The Court of Appeal allowed Lewence's appeal, holding that the existence of a reference date is not a precondition to the making of a valid payment claim under the Act. By grant of special leave, Southern Han appealed to the High Court.

The High Court held that the reference in s 13(1) to a "person referred to in s 8(1) who is or who claims to be entitled to a progress payment" was to be construed as referring to a person who has undertaken to carry out construction work or supply related goods and services under a construction contract, and who therefore is entitled to a progress payment only on and from each reference date. The existence of a reference date under a construction contract within the meaning of s 8(1) was therefore a precondition to the making of a valid payment claim under s 13(1). There was nothing in the Contract to indicate an intention that Lewence's right to make progress claims was to survive termination, thus preventing a future reference date from arising. The High Court allowed the appeal, set aside the orders made by the Court of Appeal and in their place ordered that the appeal to the Court of Appeal be dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*