

HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND GORDON JJ

SOUTHERN HAN BREAKFAST POINT PTY LTD
(IN LIQUIDATION)

APPELLANT

AND

LEWENCE CONSTRUCTION PTY LTD & ORS

RESPONDENTS

*Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence
Construction Pty Ltd
[2016] HCA 52
21 December 2016
S199/2016*

ORDER

1. *Appeal allowed.*
2. *Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 25 September 2015 and in their place order that the appeal to that Court be dismissed.*
3. *The first respondent pay the appellant's costs of the appeal to this Court and of the appeal to the Court of Appeal.*
4. *The first respondent repay to the appellant the sum of \$1,276,000 paid to the first respondent on 7 October 2015 together with interest since that date.*

On appeal from the Supreme Court of New South Wales

Representation

M Christie SC with D P Hume for the appellant (instructed by CCS Legal Pty Ltd)

2.

S Robertson with P F Santucci for the first respondent (instructed by Maddocks Lawyers)

Submitting appearance for the second and third respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd

Statutory Construction – *Building and Construction Industry Security of Payment Act 1999* (NSW), s 13(1) – Whether existence of reference date under construction contract precondition to making of valid payment claim.

Contract – Construction of terms – Where construction contract made provision for contractor to "claim payment progressively" by making a "progress claim" – Whether it was the parties' intention that the contractor's right to make a progress claim under construction contract was to survive termination.

Words and phrases – "payment claim", "progress claim", "progress payment", "reference date".

Building and Construction Industry Security of Payment Act 1999 (NSW), ss 8, 13.

1 KIEFEL, BELL, GAGELER, KEANE AND GORDON JJ. This appeal raises an important question as to whether the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act").

2 Contrary to the conclusion of the Court of Appeal of the Supreme Court of New South Wales¹, and consistently with the conclusion of the primary judge², the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim and no such reference date existed in the present case.

The Act

3 Enacted by the Parliament of New South Wales "to reform payment behaviour in the construction industry"³, the Act mandated that it be subjected to review after the first three years of its operation⁴. As a consequence of the review then conducted, the Act was extensively amended by the *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW) ("the Amendment Act").

4 The Minister responsible for introducing the Bill for the original Act, for conducting the review and for introducing the Bill for the Amendment Act was the Hon Morris Iemma MLA. In the course of introducing the Bill for the Amendment Act, Mr Iemma explained that when introducing the Bill for the original Act the Government of New South Wales had wanted to "stamp out the practice of developers and contractors delaying payment to subcontractors and

1 *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288.

2 *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502.

3 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 September 1999 at 104.

4 Section 38.

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suppliers"⁵. He went on to explain the original design of the Act which the Amendment Act was intended to enhance. He said⁶:

"The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid."

Mr Iemma continued by emphasising that "[c]ash flow is the lifeblood of the construction industry" and that the Government was "determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act"⁷.

5 The Act in the form relevant to the circumstances giving rise to this appeal is as subsequently amended to 20 April 2014. There have been further amendments since then, but they are not material and it is convenient to refer to the Act in that relevant form in the present tense.

6 Section 3 of the Act gives statutory expression to the object of the Act, summarises the means by which the Act pursues that object, and emphasises that the Act is not intended to affect other entitlements and remedies. It states:

"(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the

5 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542.

6 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542.

7 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542.

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carrying out of that work and the supplying of those goods and services.

- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
 - (a) the making of a payment claim by the person claiming payment, and
 - (b) the provision of a payment schedule by the person by whom the payment is payable, and
 - (c) the referral of any disputed claim to an adjudicator for determination, and
 - (d) the payment of the progress payment so determined.
- (4) It is intended that this Act does not limit:
 - (a) any other entitlement that a claimant may have under a construction contract, or
 - (b) any other remedy that a claimant may have for recovering any such other entitlement."

7

The Act contains expansive definitions of "construction work"⁸ and of "related goods and services"⁹, and defines "construction contract" broadly to encompass any "contract or other arrangement under which one party undertakes

8 Section 5.

9 Section 6.

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to carry out construction work, or to supply related goods and services, for another party"¹⁰.

8 The Act also contains a definition of "progress payment". That definition is as follows¹¹:

"**progress payment** means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

- (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or
- (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
- (c) a payment that is based on an event or date (known in the building and construction industry as a 'milestone payment')."

9 Part 2 of the Act is headed "Rights to progress payments". The central provisions of Pt 2 are ss 8 and 9.

10 Section 8 provides:

"(1) On and from each reference date under a construction contract, a person:

- (a) who has undertaken to carry out construction work under the contract, or
- (b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

(2) In this section, **reference date**, in relation to a construction contract, means:

10 Section 4, "construction contract".

11 Section 4, "progress payment".

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- (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
- (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month."

The reference in s 8(2)(b) to a "named month" is to a calendar month, according to the Gregorian calendar¹².

11 Section 9 provides:

"The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

- (a) the amount calculated in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract."

12 Part 3 of the Act is headed "Procedure for recovering progress payments". Part 3 begins with s 13, which relevantly provides:

- "(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

12 Section 21(1) of the *Interpretation Act* 1987 (NSW), "month" and "named month".

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(2) A payment claim:

- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
- (b) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*), and
- (c) must state that it is made under this Act.

...

(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."

13 Within the meaning of the Act: a claim referred to in s 13 is a "payment claim"; the person by whom a payment claim is served is the "claimant"; the amount of the progress payment claimed to be due for construction work carried out, or for related goods and services supplied, is the "claimed amount"; and the person on whom the payment claim is served is the "respondent"¹³.

14 Service by a claimant on a respondent of a payment claim for a claimed amount is the trigger for the procedure set out in Pt 3. That procedure is essentially in two stages. The timing of the steps to be taken at each stage is closely circumscribed.

15 First, the respondent has an opportunity to reply to the payment claim by providing to the claimant a "payment schedule". The payment schedule is to indicate the "scheduled amount", being the amount of the payment (if any) that the respondent proposes to make. The payment schedule is also to indicate the reasons for withholding payment if the scheduled amount is less than the claimed amount. If the respondent does not provide a payment schedule within time, the respondent becomes liable to pay the claimed amount to the claimant¹⁴. If the

13 Section 4, "claimant", "claimed amount", "payment claim", "respondent".

14 Section 14.

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respondent does not pay the whole or any part of the claimed amount (in circumstances where the respondent has not provided a payment schedule) or the whole or any part of the scheduled amount (in circumstances where the respondent has provided a payment schedule), the claimant can recover the unpaid portion from the respondent as a debt in a court of competent jurisdiction¹⁵. In recovery proceedings for that unpaid portion, the respondent is not entitled to cross-claim against the claimant or to raise any defence in relation to matters arising under the construction contract¹⁶.

16 Next, if the scheduled amount is less than the claimed amount, or as an alternative to commencing recovery proceedings for an unpaid portion in a court of competent jurisdiction, the claimant can make an application for adjudication of the payment claim¹⁷. That "adjudication application" is made to an authorised nominating authority, which must refer the application to a person eligible to be an adjudicator¹⁸. The adjudication application can contain such relevant submissions as the claimant chooses to include¹⁹. An adjudicator accepts the adjudication application by causing notice of the acceptance to be served on the claimant and respondent²⁰. Once that occurs, the respondent has an opportunity to lodge with the adjudicator an "adjudication response" containing such relevant submissions as the respondent chooses to include, following which the adjudicator is obliged to determine the adjudication application as expeditiously as possible²¹.

15 Sections 15(1) and (2) and 16(1) and (2).

16 Sections 15(4) and 16(4).

17 Section 17(1).

18 Section 17(3)(b) and (6).

19 Section 17(3)(h).

20 Section 19(1).

21 Sections 20 and 21.

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17 The jurisdiction of an adjudicator is set out in s 22, which provides in part:

"(1) An adjudicator is to determine:

- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***), and
- (b) the date on which any such amount became or becomes payable, and
- (c) the rate of interest payable on any such amount.

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

- (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,
- (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.

(3) The adjudicator's determination must:

- (a) be in writing, and
- (b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination)."

18 An amount of a progress payment determined to be payable under s 22 is referred to in the Act as an "adjudicated amount"²². A respondent must pay an adjudicated amount to a claimant on or before the date determined pursuant to s 23, which must be at least five days after service of the adjudicator's determination²³. If the respondent fails to pay, the claimant can request the authorised nominating authority to provide an "adjudication certificate"²⁴. An adjudication certificate can be filed as a judgment for a debt in a court of competent jurisdiction and is enforceable accordingly²⁵. If the respondent commences proceedings to have that judgment set aside, not only is the respondent not entitled to cross-claim against the claimant or to raise any defence in relation to matters arising under the construction contract but the respondent is not entitled to challenge the adjudicator's determination and is required to pay the unpaid portion of the adjudicated amount into court as security pending the final determination of the proceedings²⁶.

19 The provisions of the Act have effect despite any provision to the contrary in any contract²⁷. Subject to that qualification, nothing in Pt 3 affects any right that a party to a construction contract may have under the contract, under Pt 2 in respect of the contract, or apart from the Act in respect of anything done or omitted to be done under the contract²⁸. Part 3 also has no effect on civil proceedings arising under a construction contract, save that a court or tribunal is required to allow for any amount paid to a party under or for the purposes of Pt 3 in any order or award it makes and may make such order as it considers appropriate for the restitution of any amount so paid having regard to its decision in those proceedings²⁹.

22 Section 4, "adjudicated amount".

23 Section 23.

24 Section 24.

25 Section 25(1).

26 Section 25(4).

27 Section 34.

28 Section 32(1).

29 Section 32(2) and (3).

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The facts

20 Southern Han Breakfast Point Pty Ltd ("Southern Han") and Lewence Construction Pty Ltd ("Lewence") were parties to a contract for the construction by Lewence of an apartment block at Breakfast Point in New South Wales ("the Contract").

21 Clause 37 of the Contract dealt with payment. Clause 37.1, read with Item 28 of Annexure Part A to the Contract, made provision for Lewence to "claim payment progressively" from Southern Han 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. Clause 37.2 then made provision for a progress certificate evidencing the Superintendent's opinion of the moneys due from Southern Han to Lewence pursuant to the progress claim and for Southern Han to pay the amount certified.

22 Clause 39 of the Contract dealt with default. Clause 39.2 entitled Southern Han, in the event of Lewence committing a "substantial breach of the Contract", to give Lewence a "notice to show cause". Clause 39.4 provided:

"If [Lewence] fails to show reasonable cause by the stated date and time, [Southern Han] may by written notice to [Lewence]:

- a) take out of [Lewence's] hands the whole or part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6; or
- b) terminate the Contract."

23 Clause 39.5 obliged Southern Han to complete work taken out of Lewence's hands. Clause 39.6 provided:

"When work taken out of [Lewence's] hands has been completed, the Superintendent shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to [Lewence] if the work had been completed by [Lewence]."

24 Clause 39.7 entitled Lewence, in the event of Southern Han committing a "substantial breach of the Contract", to give Southern Han a "notice to show cause" following which, if Southern Han failed to show cause, cl 39.9 permitted Lewence to suspend the whole or any part of the work under the Contract and

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then to terminate the Contract if Southern Han failed to remedy the breach, or if the breach was irremediable and Southern Han did not make other arrangements to Lewence's reasonable satisfaction.

25 Clause 39.10 provided:

"If the Contract is terminated pursuant to subclause 39.4(b) or 39.9, the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the Contract had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages."

26 On 10 October 2014, Southern Han gave Lewence a notice to show cause under cl 39.2 of the Contract. Then, on 27 October 2014, Lewence having responded to the notice to show cause, Southern Han gave Lewence a further notice purporting to exercise its right under cl 39.4 to take out of Lewence's hands the whole of the work remaining to be completed under the Contract. Lewence treated the giving of that further notice as repudiation of the Contract by Southern Han and, on 28 October 2014, purported to accept the repudiation and terminate the Contract.

27 On 4 December 2014, Lewence served on Southern Han a document which purported to be a payment claim for work carried out under the Contract. The document complied with the formal requirements of s 13(2) of the Act but it did not nominate a reference date. There is no dispute, however, that it claimed payment for work carried out by Lewence under the Contract up to 27 October 2014, including for work carried out to 7 October 2014 which had been the subject of a prior payment claim which Lewence had served on Southern Han on or after 8 October 2014. Southern Han replied by providing a payment schedule to Lewence indicating that the scheduled amount Southern Han proposed to pay was nil.

28 Lewence subsequently purported to make an adjudication application to Australian Solutions Centre, an authorised nominating authority. Australian Solutions Centre referred the application to Mr Ian Hillman, an eligible adjudicator, who purported to accept it by giving notice to Lewence and Southern Han. Southern Han lodged a response which contained a submission arguing that Mr Hillman lacked jurisdiction to determine the application. Rejecting Southern Han's argument that he lacked jurisdiction, Mr Hillman purported to determine the application.

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The proceeding in the Supreme Court

29 By originating summons filed in the Equity Division of the Supreme Court, Southern Han sought a declaration that Mr Hillman's purported determination was void, or alternatively an order in the nature of certiorari under s 69 of the *Supreme Court Act* 1970 (NSW) quashing the purported determination so as to remove its purported legal effect.

30 One basis on which Southern Han sought that relief was that the document Lewence served on Southern Han on 4 December 2014 was not a payment claim under the Act for want of a reference date. Southern Han contended that the document could not be a payment claim under the Act as the events of 27 and 28 October 2014 meant that no date for making a progress payment could have arisen under the Contract after 8 October 2014.

31 The primary judge (Ball J) made the declaration sought. His Honour construed 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 in turn as a precondition to the making of a valid adjudication application and determination³⁰.

32 The primary judge went on to find that there was no reference date to support the purported payment claim of 4 December 2014. That finding of the absence of a reference date was made on alternative hypotheses, it being common ground between the parties that Southern Han could only succeed by establishing that there was no reference date on both hypotheses.

33 On the hypothesis that Southern Han had on 27 October 2014 exercised its right under cl 39.4 to take out of Lewence's hands the whole of the work remaining to be completed under the Contract, his Honour found that Lewence's right to make a progress claim under cl 37.1 was suspended by cll 39.4 and 39.6³¹. On the hypothesis that Lewence had on 28 October 2014 accepted Southern Han's repudiation and terminated the Contract, his Honour found that

30 *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [40].

31 *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [44]-[46].

Lewence's only right to make a progress claim was the right which had accrued on 8 October 2014 and which had already been exercised³².

34 Lewence appealed to the Court of Appeal. That Court (Ward and Emmett JJA and Sackville AJA) allowed the appeal, set aside the declaration and dismissed the originating summons. The Court was unanimous in holding that the existence of a reference date is not a precondition to the making of a valid payment claim under the Act³³. The Court was also unanimous in rejecting an argument, raised by Southern Han by way of notice of contention, to the effect that the purported payment claim was in respect of the reference date of 8 October 2014 with the result that its service was precluded by s 13(5) of the Act³⁴.

35 Having held that the existence of a reference date is not a precondition to the making of a valid payment claim, Ward JA (with whom Sackville AJA relevantly agreed³⁵) went on to consider further grounds of Lewence's appeal which challenged the primary judge's finding that there was no reference date to support the purported payment claim of 4 December 2014.

36 On the hypothesis that Southern Han had exercised its contractual right to take out of Lewence's hands the whole of the work remaining to be completed under the Contract, Ward JA agreed with the primary judge that Lewence's right to make a progress claim under cl 37.1 of the Contract was suspended³⁶. On the hypothesis that Lewence had accepted Southern Han's repudiation and terminated the Contract, her Honour disagreed with the primary judge. Her Honour accepted that termination of the Contract terminated Lewence's contractual right

32 *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [47]-[50].

33 *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [46]-[62], [118]-[120], [127]-[142].

34 *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [63]-[72], [121], [143]-[151].

35 *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [124].

36 *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [83]-[92].

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to make further progress claims under cl 37, but considered that termination of the Contract did not prevent continuing reference to the Contract for the purpose of determining Lewence's statutory right to make a further progress claim. Termination did not alter the fact that cl 37.1 provided for the making of a progress claim on the 8th day of each calendar month for work under the Contract done to the 7th day of that month, and 8 November 2014 was therefore an available reference date³⁷.

The appeal to this Court

37 Southern Han's appeal to this Court from the decision of the Court of Appeal is on three grounds. The first is that the Court of Appeal was wrong to conclude that the existence of a reference date is not a precondition to the making of a valid payment claim. The second is that the majority in that Court was wrong to consider that 8 November 2014 was an available reference date on the hypothesis that Lewence had accepted Southern Han's repudiation and terminated the Contract. The third is a repetition of Southern Han's contention in the Court of Appeal that the purported payment claim was in respect of the reference date of 8 October 2014 and that its service was for that reason precluded by s 13(5) of the Act.

38 For its part, Lewence supports the reasoning of the Court of Appeal. In addition, and on the assumption that the existence of a reference date is a precondition to the making of a valid payment claim, Lewence advances by notice of contention other reasons as to why a reference date existed in the present case.

39 On the hypothesis that Southern Han had exercised its contractual right to take the remaining work out of Lewence's hands, Lewence contends that the suspension of payment under cl 39.4(a) of the Contract did not operate to prevent the subsequent accrual of a date for making a progress claim under cl 37.1 of the Contract. On the hypothesis that Lewence had accepted Southern Han's repudiation and terminated the Contract, Lewence contends that its right to make a progress claim under cl 37.1 of the Contract survived termination. For those reasons Lewence contends that, on either hypothesis, the Court of Appeal's conclusion that 8 November 2014 was an available reference date was correct.

37 *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [74]-[82].

40 Lewence contends in the alternative that the absence of a contractual reference date capable of being picked up by s 8(2)(a) of the Act results only in the application of s 8(2)(b). On the hypothesis that Lewence had accepted Southern Han's repudiation and terminated the Contract, Lewence goes on to contend that if s 8(2)(a) did not operate to make 8 November 2014 an available reference date for the making of a payment claim for work carried out up to 27 October 2014, then s 8(2)(b) operated to make 31 October 2014 an available reference date for the making of that claim.

41 The issue raised by the last of Southern Han's grounds of appeal can be disposed of immediately. Against the statutory background of s 13(6) making plain that a claimant can include in a payment claim an amount that has been the subject of a previous claim, the mere fact that the purported payment claim served on 4 December 2014 claimed payment for work carried out before 7 October 2014 cannot be treated as indicating that it was in respect of the reference date of 8 October 2014. Rather, the fact that it also claimed payment for work carried out up to 27 October 2014 indicates that it is to be characterised as made in respect of some reference date after 27 October 2014. The purported payment claim was not in respect of the reference date of 8 October 2014 and s 13(5) was therefore not engaged.

42 To address the remaining issues in the appeal, it is convenient to commence by isolating the two principal issues of statutory construction. The first issue is as to whether the existence of a reference date is a precondition to the making of a payment claim. The second issue, which arises if the first issue is determined in the affirmative, is as to how a reference date is to be determined.

43 Once those issues of statutory construction are resolved, the remaining contractual issues can conveniently be addressed in the context of applying the Act, properly construed, to the circumstances postulated in the alternative hypotheses.

The need for a reference date

44 There is no dispute between the parties that service of a payment claim under s 13(1) of the Act is an essential precondition to taking subsequent steps in the procedure set out in Pt 3 of the Act. There is accordingly no dispute that, unless a payment claim answering that description is served, there can be no adjudication application and hence no adjudication within the jurisdiction conferred by s 22 of the Act. That shared understanding of the relationship between s 13(1) and s 22 is undoubtedly correct.

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45 Against the background of that understanding, the contest between the parties about whether or not a reference date is needed to support a payment claim is, on one view, quite narrow. Their contest is focussed on the opening words of s 13(1). The difference between them is as to what is connoted by the reference to "[a] person referred to in section 8(1)".

46 Lewence argues, consistently with the view of the Court of Appeal, that the reference is to a person who meets the description in s 8(1)(a) or s 8(1)(b): a person who has undertaken to carry out construction work or supply related goods and services under a construction contract. Southern Han argues, consistently with the view of the primary judge, that the reference is to a person who, by operation of s 8(1), is entitled to a progress payment: a person who has undertaken to carry out construction work or supply related goods and services under a construction contract in respect of which a reference date has arisen.

47 Stressing that the entitlement to a progress payment conferred by s 8(1) arises "[o]n and from each reference date under a construction contract", Southern Han couches its argument in terms that the existence of a reference date to support a payment claim is a "jurisdictional fact". Treating "jurisdictional fact" as a label for a "criterion, satisfaction of which enlivens the power of [a] decision-maker"³⁸, Southern Han's invocation of that terminology, in the context of a challenge to the validity of a purported determination by an adjudicator of a purported adjudication application based on a purported payment claim, is not inappropriate. The terminology serves to emphasise that, if Southern Han's construction of s 13(1) is correct, the existence or non-existence of a reference date is not within the jurisdiction of the adjudicator to determine under s 22 of the Act. But that is the limit of its utility. Southern Han recognises that the terminology of "jurisdictional fact" is no more than a label for the conclusion for which it contends and that appending that label to the conclusion adds nothing to the requisite antecedent statutory analysis.

48 The statutory analysis required to resolve the competing constructions of s 13(1) ultimately involves forming a view as to the place of that provision within the structure of the Act read in light of its legislative history. It is as well to begin with that legislative history.

38 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28]; [2000] HCA 5; see also *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 139 [43]; [2008] HCA 43.

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49 As originally enacted, s 3(1) of the Act stated:

"The object of this Act is to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services."

50 Section 13(1) correspondingly provided:

"A person who is entitled to a progress payment under a construction contract (the *claimant*) may serve a payment claim on the person who under the contract is liable to make the payment."

51 Notwithstanding the design of the Act to ensure that a person who has carried out construction work under a construction contract can recover progress payments on an interim basis in circumstances of a protracted contractual dispute, the language of s 13(1) as originally enacted left open an argument that such a person needed to establish a contractual right to payment before the right to make a statutory claim arose. That argument was put to the Supreme Court in 2002. The argument was rejected at first instance³⁹, but its correctness appears to have been assumed on appeal to the Court of Appeal⁴⁰.

52 Prior to the argument's rejection at first instance, the argument was addressed in a discussion paper published in the course of the review of the Act that was conducted in 2002. The discussion paper noted that the argument raised questions an example of which was: "if, because work is defective, there is no amount due to the claimant, can the claimant make a valid payment claim?"⁴¹

53 In response to the argument, the discussion paper was unequivocal in expressing the policy position that "a claimant should be able to make a valid payment claim under the Act even though it may ultimately be proved that no

39 *Beckhaus v Brewarrina Council* [2002] NSWSC 960.

40 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576.

41 New South Wales, Department of Public Works and Services, *Review Discussion Paper: Options for Enhancing the Building and Construction Industry Security of Payment Act 1999*, (2002) at 19.

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payment is due"⁴². The discussion paper went on to formulate "proposed action" in the following terms⁴³:

"Clarify under s 13 that a payment claim may be made by a person referred to in s 8 (ie a person who has undertaken to carry out construction work or who has supplied related goods or services) claiming to be entitled to a progress payment under the construction contract or the Act."

54 Sections 3(1) and 13(1) were substituted to take their present form by the Amendment Act⁴⁴. The explanatory note to the Bill for the Amendment Act identified the purpose of those substitutions. Against the background of an acceptance that the Act was "meant to ensure that a person who carries out construction work under a construction contract is entitled to receive and recover specified progress payments", the explanatory note identified the purpose of the substitution of s 3(1) as being to clarify that "the object of the Act is to ensure that the entitlement to progress payments relates to work that is undertaken to be carried out under a construction contract"⁴⁵. It identified the purpose of the substitution of s 13(1) as being to clarify that "a payment claim may be made by a person who claims to be entitled to a progress payment"⁴⁶.

55 Lewence relies on the parenthetic explanation in the language in which the proposed action in the discussion paper was formulated to support its argument that the reference in s 13(1), as substituted by the Amendment Act, to "[a] person referred to in section 8(1)" is simply to a person who has undertaken to carry out

42 New South Wales, Department of Public Works and Services, *Review Discussion Paper: Options for Enhancing the Building and Construction Industry Security of Payment Act 1999*, (2002) at 19.

43 New South Wales, Department of Public Works and Services, *Review Discussion Paper: Options for Enhancing the Building and Construction Industry Security of Payment Act 1999*, (2002) at 19.

44 *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW), Sched 1 [1], [22].

45 New South Wales, Legislative Assembly, Building and Construction Industry Security of Payment Amendment Bill 2002, Explanatory Note at 2-3.

46 New South Wales, Legislative Assembly, Building and Construction Industry Security of Payment Amendment Bill 2002, Explanatory Note at 3.

construction work or supply related goods and services under a construction contract. Lewence argues that that reading is confirmed by the further reference in s 13(1) to the person being a person "who is or who claims to be entitled to a progress payment". Those additional words, Lewence argues, show that a reference date need not have arisen and that the person need do no more than claim that a reference date has arisen.

56 Lewence also places reliance on the object of the Act stated in s 3(1), as also substituted by the Amendment Act, as being "to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments". The absence of any mention of a reference date in that statement of statutory object, Lewence argues, is indicative of the irrelevance of a reference date both to the entitlement to receive a progress payment and to the ability to recover a progress payment.

57 The considerations on which Lewence relies are not compelling. The statement of the object of the Act in s 3(1) cannot be read as excluding qualifications to the entitlement to receive a progress payment or to the ability to recover a progress payment that are embedded in the detail of the substantive provisions of the Act. And the significance of the discussion paper published in the course of the review of the Act which preceded the Amendment Act lies less in the precise language it used to formulate the clarification it proposed to s 13 than in the precise reason it gave for proposing that clarification. The reason was limited to ensuring that a person on whom the Act conferred an entitlement to a progress payment was to be able to make a valid payment claim even though it may ultimately be proved that no payment was due under the construction contract.

58 Close attention to the structure of the Act puts the language of s 13(1) in perspective. The Act gives effect to the object stated in s 3(1) by the cumulative means sketched out in ss 3(2) and 3(3). As foreshadowed in s 3(2), Pt 2 confers a statutory entitlement to a progress payment. As foreshadowed in s 3(3), Pt 3 builds on Pt 2 by establishing a procedure for recovery of a progress payment to which an entitlement exists. The two parts, however, are not hermetically sealed.

59 Within Pt 2 an important distinction is drawn between a progress payment to which a person is entitled and the amount of the progress payment to which that person is entitled. Cast in the present tense, s 8(1) makes clear that a person who meets the description of a person who has undertaken to carry out construction work or supply related goods and services under a construction contract is immediately by force of that provision "entitled to a progress

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payment" on and from each reference date under the construction contract. Cast in the future tense, in contrast, s 9 makes clear that the amount of a progress payment to which the person is so entitled is not fixed by force of that section but "is to be" ascertained in the manner prescribed by that section, and quantifies the amount of the progress payment to which a person is entitled by force of s 8(1). Section 9 in that way anticipates the procedure for recovery of a progress payment set out in Pt 3. Under that procedure, in the event of a dispute between a claimant and a respondent, the ascertainment of the amount, if any, of the progress payment to be recovered is committed to the jurisdiction of an adjudicator to determine under s 22.

60 That distinction drawn in Pt 2, between a present entitlement to a progress payment and the future ascertainment of the amount of the progress payment to which that present entitlement relates, explains the two-part description in s 13(1) of a person who is able to make a payment claim so as to trigger the procedure for recovery set out in Pt 3. The first part of the description – "[a] person referred to in section 8(1)" – refers to a person whom s 8(1) makes "entitled to a progress payment". The second part of the description – "who is or who claims to be entitled to a progress payment" – neither contradicts nor qualifies the first part of the description. The second part of the description rather recognises, consistently with s 9, that the amount of the progress payment to which that person is entitled might ultimately be ascertained, according to the procedure set out in Pt 3, to be less than the amount that the person claims to be due and might even be ascertained according to that procedure to be nothing.

61 The construction of s 13(1) consonant with the structure of the Act is accordingly that advanced by Southern Han. The description in s 13(1) of a person referred to in s 8(1) is of a person whom s 8(1) makes entitled to a progress payment. Section 8(1) makes a person who has undertaken to carry out construction work or supply related goods and services under a construction contract entitled to a progress payment only on and from each reference date under the construction contract. In that way, the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1).

62 That construction of s 13(1) affords to s 13(1) an operation that is harmonious with s 13(5). Section 13(1) operates to require that each payment claim be supported by a reference date and s 13(5) operates to require that each reference date support no more than one payment claim. Section 13(5) has been held to produce the result that "a document purporting to be a payment claim that

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is in respect of the same reference date as a previous claim is not a payment claim under the [Act]"⁴⁷. Section 13(1) correspondingly produces the result that a document purporting to be a payment claim that is not in respect of a reference date is not a payment claim under the Act. The document is ineffective in either case to trigger the procedure established by Pt 3.

The determination of a reference date

63 Having concluded that the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1), the issue is then as to how any such reference date is to be determined.

64 That issue needs to be addressed in light of the definition of "progress payment", which applies to the construction of the Act "except in so far as the context or subject-matter otherwise indicates or requires"⁴⁸. The definition picks up the statutory entitlement created by s 8(1) by providing that a progress payment means a payment to which a person is entitled under s 8. That was all that the definition did when it was originally enacted. The definition was amended by the Amendment Act, however, in order "to make it clear that the Act creates an entitlement not only to payments that are in the nature of instalments, but also to final payments and to single or one-off payments"⁴⁹. The amendment of the definition was responsive to an earlier judicial interpretation which had limited references to progress payments in s 8 and elsewhere in the Act to payments designated by construction contracts to be progress payments⁵⁰.

47 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 194 [14].

48 Section 6 of the *Interpretation Act* 1987 (NSW).

49 *Building and Construction Industry Security of Payment Amendment Act* 2002 (NSW), Sched 1 [7]; New South Wales, Legislative Assembly, Building and Construction Industry Security of Payment Amendment Bill 2002, Explanatory Note at 3.

50 *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42 at 49 [37].

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65 Through its adoption of the drafting device "means ... and includes ..." ⁵¹, the amended definition serves to indicate that the categories of payment to which s 8(1) is capable of applying extend to include a payment meeting any of the descriptions in the three paragraphs of the definition. That is to say, s 8(1) is to be read in light of the definition as capable of creating a statutory entitlement not only to a payment in the nature of an instalment but also to a final payment under a construction contract, to a single or one-off payment under a construction contract and to a payment of a type known in the construction industry as a milestone payment. This makes clear that the Act is not concerned only with providing a statutory mechanism for securing payments that are to occur during the currency of an existing construction contract. The statutory contemplation is that a claim for a progress payment might be made after the contract has expired.

66 The repeated references in s 8, and in the extended definition of progress payment, to payment "for" work carried out or to be carried out (or goods and services supplied or to be supplied) "under" a construction contract nevertheless point to an important limitation that is implicit in the overall design of the Act, and that has been so from the time of its original enactment. That limitation is that the Act is concerned to provide a statutory mechanism for securing payment of an amount claimed to be payable in partial or total discharge of an obligation to pay for work (or for goods and services supplied) imposed by the contractual force of a construction contract. The Act is not concerned to provide security for payment of an amount claimed by way of damages for breach of a construction contract. Nor is the Act concerned to provide security for payment of an amount which, according to prevailing authority ⁵², might be claimed as an alternative to damages by way of restitution for work carried out (or goods and services supplied) in the event of the construction contract terminating on acceptance of repudiation.

67 Explaining that limitation, Barrett J said in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* ⁵³:

"The clear message throughout the Act is ... that any 'progress payment', including one within para (a), (b) or (c) of the definition of

⁵¹ *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 159 [32]; [2008] HCA 45.

⁵² *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 24 VR 510 at 514-515 [9]-[12].

⁵³ (2004) 20 BCL 276 at 285 [34].

'progress payment', can only have that character if it is 'for' work done or, where some element of advance payment has been agreed, 'for' work undertaken to be done. The relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price. Compensation of that kind does not bear to actual work the relationship upon which the 'progress payment' concept is founded."

68 Consistently with that explanation, while emphasising the characterisation of a contractual payment always to be one of substance as to which a mere contractual label cannot be conclusive, Hodgson JA referred in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*⁵⁴ to a progress payment as an "amount that a construction contract requires to be paid as part of the total price of construction work".

69 That limitation implicit in the design of the Act explains the express temporal limitation in the opening words of s 8(1), by which a statutory entitlement to a progress payment exists only on and from each reference date. The reference date, defined for the purpose of s 8(1) in s 8(2), is the date for making a claim for payment of the whole or part of the amount contracted to be paid for work carried out or undertaken to be carried out, or for related goods and services supplied or undertaken to be supplied.

70 The reference date for which s 8(2)(a) provides is a date set by contractual force as a date for making a contractual claim to be paid the whole or part of the contracted amount. The mention in s 8(2)(a) of "a date determined by or in accordance with the terms of the contract" is of a date fixed by operation of one or more express provisions of the construction contract. The mention is not of a date that is determined independently of the operation of the contract merely having regard to the contractual terms.

71 The reference date for which s 8(2)(b) provides is applicable only where a construction contract contains no express provision for determining a date for making a contractual claim to be paid the whole or a relevant part of the contracted amount. Absent an express contractual provision for determining a reference date, s 8(2)(b) operates of its own force to provide a reference date for the purpose of s 8(1). In so applying, s 8(2)(b) fulfils the statutory promise in s 3(2) of granting a statutory entitlement to a progress payment regardless of

54 (2005) 63 NSWLR 385 at 397 [41].

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whether the relevant construction contract makes provision for progress payments. The provision does not, however, alter the nature of a progress payment in respect of which a claim can be made.

The absence of a reference date

72 From the preceding analysis of the Act, it follows that: the question whether the document served by Lewence on Southern Han on 4 December 2014 answered the description of a payment claim in s 13(1) turns on whether Lewence was on that date entitled under s 8(1) to a progress payment in relation to work carried out to 27 October 2014; and the question whether Lewence on that date had that entitlement under s 8(1) turns on whether a reference date under the Contract had then come to exist in relation to that work under s 8(2).

73 The Contract having made express provision in cl 37.1 fixing the date for the claiming of progress payments under the Contract, s 8(2)(b) could have no application. The requisite reference date was potentially capable of having arisen only in the application of s 8(2)(a).

74 Examination of the potential application of s 8(2)(a) leads finally to the contractual question of whether cl 37 of the Contract continued to operate so as to fix 8 November 2014 as a reference date notwithstanding the events of 27 and 28 October 2014. That question falls to be addressed on the alternative hypotheses considered by the primary judge and the Court of Appeal.

75 On neither hypothesis is there reason to doubt the negative answer to that contractual question given explicitly by the primary judge and explicitly (on one hypothesis) or implicitly (on the other hypothesis) by Ward JA in the Court of Appeal.

76 On the hypothesis that Southern Han exercised its right under cl 39.4 to take out of Lewence's hands the whole of the work remaining to be completed under the Contract on 27 October 2014, cl 39.4 operated expressly to suspend payment until completion of the process for which cl 39.6 provided. The commercial purpose of the suspension in the event of such a breach, as the primary judge explained⁵⁵, was to provide a form of security to Southern Han in the event that the costs of completion of the work taken out of Lewence's hands were greater than the amount Southern Han would have had to pay if Lewence

⁵⁵ *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [46].

had completed the work itself. That commercial purpose would be undermined were cl 39.4 to be interpreted as suspending payment only for the work taken out of Lewence's hands.

77 True it is that cl 39.4 would have permitted Southern Han to take only some of the work out of Lewence's hands, in which case to interpret that clause as suspending payment for the work other than that taken out of Lewence's hands would mean that Lewence would have been obliged to continue with other work for which it would not be paid until completion of the cl 39.6 process. But, given that Southern Han's right to take work out of Lewence's hands was capable of being exercised, and that the suspension was correspondingly capable of occurring only following what cl 39.2 referred to as a substantial breach of the Contract, such a result is hardly surprising.

78 The suspension of payment was a suspension of the totality of the rights conferred and obligations imposed in relation to payment by cl 37. The rights so suspended included Lewence's right to make a progress claim under cl 37 for work carried out up to the time of the work being taken out of its hands.

79 On the hypothesis that Lewence accepted Southern Han's repudiation and terminated the Contract on 28 October 2014, the effect of termination was that Lewence and Southern Han were both discharged from further performance of the Contract and that Lewence's rights under the Contract were limited to those which had then already accrued under the Contract except in so far as the Contract is properly to be interpreted as stipulating to the contrary⁵⁶. The right to make a progress claim under cl 37.1 of the Contract in relation to work carried out to 27 October 2014 had not accrued as at 28 October 2014. Had the Contract not then been terminated, the right would have accrued only on 8 November 2014.

80 Nothing in the Contract was indicative of a contractual intention that cl 37 was to survive termination. Rather, as the primary judge observed⁵⁷, to the extent that the Contract adverts to its termination at all, its assimilation by cl 39.10 of the rights of the parties following termination under the Contract to their rights

⁵⁶ *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477; [1933] HCA 25; *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379; [1936] HCA 6.

⁵⁷ *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [50].

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following termination of the Contract on acceptance of repudiation suggests that the parties were content to abide by the default position at common law in the event that the Contract were to be terminated on acceptance of repudiation.

81 Application of those principles to prevent a future reference date arising on the hypothesis that Lewence accepted Southern Han's repudiation does not have the effect, as Lewence argues, of permitting Southern Han to take advantage of its own wrong. The effect is rather to substitute for Lewence's future right to obtain payment under the Contract an immediate right to damages for breach of the Contract or restitution outside the Contract. The Act would have operated to secure payment under the Contract on and from the future date on which a contractual right to claim payment arose, but it is beyond the scope of the Act to secure the payment of damages or amounts by way of restitution.

Orders

82 The orders to be made are as follows:

- (1) Appeal allowed.
- (2) Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 25 September 2015 and in their place order that the appeal to that Court be dismissed.
- (3) The first respondent pay the appellant's costs of the appeal to this Court and of the appeal to the Court of Appeal.
- (4) The first respondent repay to the appellant the sum of \$1,276,000 paid to the first respondent on 7 October 2015 together with interest since that date.

