

### Is a reference date a precondition to the validity of a payment claim?

Jane Buncle reports on *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Construction Pty Ltd & Ors* [2016] HCA 52

#### Overview

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

#### Background

The appellant (Southern Han) and the respondent (Lewence) were parties to a construction contract for the construction by Lewence of an apartment block at Breakfast Point in New South Wales (contract).

The contract contained payment provisions, which provided Lewence could 'claim payment progressively' by making a 'progress claim' on the 8<sup>th</sup> day of each calendar month for work under the contract done to the 7<sup>th</sup> day of that month. The contract also contained provisions that entitled Southern Han to give Lewence a 'notice to show cause' in the event that Lewence committed a substantial breach of the contract. If Lewence failed to show cause, the contract provided that Southern Han could:

- take out of Lewence's hands the whole or part of the work remaining to be completed and suspend payment until it became due and payable; or
- terminate the contract.

On 27 October 2014, Southern Han gave Lewence 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 that notice as a repudiation of the contract and, on 28 October 2014, terminated the contract.

On 4 December 2014, Lewence served on Southern Han a document that purported to be a payment claim which claimed payment for work carried out by Lewence up to 27 October 2014. The purported payment claim complied with the requirements of s 13(2) of the Act, but did not include a reference date. Southern Han provided a payment schedule in response to Lewence's payment claim indicating that the amount it proposed to pay Lewence was nil.

Lewence made an application for adjudication in respect of the payment claim.<sup>1</sup> Southern Han lodged a response which contained a submission arguing that the adjudicator lacked jurisdiction.<sup>2</sup> The adjudicator rejected an argument that he lacked jurisdiction and purported to determine the application.

Southern Han then commenced proceedings in the Supreme Court seeking a declaration that the adjudication was void or, alternatively, an order of certiorari under s 69 of the *Supreme Court Act 1970* (NSW) quashing the determination. One basis upon which Southern Han sought relief was that the document

Lewence served on 4 December 2014 was not a payment claim because of the absence of a reference date.

#### Primary judge decision

In the Supreme Court, Ball J construed the Act as requiring a reference date as a precondition to the making of a valid payment claim. Accordingly, in the absence of a reference date and, therefore, a valid payment claim, Ball J held that there could not be a valid adjudication application under s 22 of the Act.<sup>3</sup>

#### Court of Appeal decision

Lewence appealed. Ward, Emmett JJA and Sackville AJA allowed the appeal, set aside the declaration and dismissed the originating summons determining that the existence of a reference date was not a precondition to the making of a valid payment claim under the Act.<sup>4</sup> Relevantly, the Court of Appeal considered that 8 November 2014 was an available reference date for the payment claim on the basis that there was no provision in the contract that precluded the exercise of the statutory right to make a payment claim in accordance with the contractual provisions.<sup>5</sup> Southern Han was successful in its application for special leave to appeal to the High Court.

#### The need for a reference date

Kiefel, Bell, Gageler, Keane and Gordon JJ unanimously held that the existence of a reference date is a precondition to making a valid payment claim. Their Honour's determination turned on the opening words of s 13(1) of the Act: 'a person referred to in section 8(1)'.

The Court agreed with Southern Han's submission that the reference in the opening words of s 13(1) 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.<sup>6</sup>

The court then stated as follows:

The description in section 13(1) of a person referred to in section 8(1) is of a person whom section 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 section 8(1) is a precondition to the making of a valid payment claim under section 13(1).<sup>7</sup>

The court's interpretation was based on the legislative history of the Act<sup>8</sup> and amendments made in 2002<sup>9</sup> that aimed to ensure that a person entitled to a progress payment could make a valid

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payment claim even though it may be proven that the party was not entitled to any payment under the construction contract.<sup>10</sup> The court stated that this interpretation was emphasised by the structure of Part 2 and Part 3 of the Act, which the court said draws the distinction between present entitlements to progress payments, and a future ascertainment of the amount of the payment to which the present entitlement relates.<sup>11</sup>

The court also stated that the above construction afforded to s 13(1) was harmonious with s 13(5) of the Act. The court noted that s 13(5) had been held to produce the result that 'a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the Act'.<sup>12</sup> Section 13(1) therefore produced the corresponding result that a document purporting to be a payment claim, that did not have a reference date, was not a payment claim under the Act and was therefore ineffective.<sup>13</sup>

### Determining the available reference date

Having concluded that the existence of a reference date is a precondition to the making of a valid payment claim under s 13(1) of the Act, the court then examined how the reference date could be determined and whether a reference date existed in this case.

The court noted that s 8(2)(b) of the Act had no application as the contract made express provision for fixing the date for the claiming of progress payments. Rather, the question was whether the reference date arose by the application of s 8(2)(a) of the Act.<sup>14</sup> That section provides that the reference date is to be determined in accordance with the terms of the construction contract as the date a claim for a progress payment may be made in relation to work carried out under the contract.<sup>15</sup>

This analysis then led to the question of whether the provisions in the contract regarding progress payments continued to operate so as to fix 8 November 2014 as a reference date, notwithstanding the repudiation and termination of the contract. That question

fell to be determined by two alternative hypotheses, previously considered by Ward JA in the Court of Appeal.

These alternative hypotheses were as follows:

- Southern Han was entitled to take work out of the hands of Lewence on 27 October 2014, and therefore did not repudiate the contract, with the result being that the contract was not terminated because of Lewence's attempt to rely on that repudiation to terminate; or
- Southern Han repudiated the contract by taking the work out of the hands of Lewence, and the contract was terminated validly by Lewence on 28 October 2014.

The court held that, in either scenario, no reference date arose on which Lewence could rely as a basis for the payment claim.

In respect of the first scenario, the contract provided that if Southern Han took work out of the hands of Lewence, all further obligations to pay Lewence were suspended until completion of the process. The court held that this suspension was a suspension of the totality of the rights conferred and obligations imposed in respect of the payment provisions in the contract, including Lewence's right to make a progress claim under the contract for the work carried out up to the time of the work being taken out of its hands.<sup>16</sup> The court noted that the practical and commercial purpose of this suspension was to provide Southern Han security in the event 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 had completed the work.<sup>17</sup>

As to the second scenario, the court held that the effect of termination was that Lewence and Southern Han were both discharged from further performance of the contract and 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 was properly interpreted to the contrary.<sup>18</sup> The court noted that Lewence's right to make a payment claim under the contract would have only accrued in the event the contract had not been terminated on 28 October 2014, which would have meant the right would have accrued on 8 November 2014.

Finally, the court held that the terms of the contract did not indicate a contractual intention that the payment provisions would survive the termination of the contract. Rather, the court stated that the primary judge was right to observe that to the extent the contract adverted to its termination at all, the assimilation of the rights of the parties following termination under the contract to their rights following termination of the contract on acceptance of repudiation suggested that the parties were content to abide by the default position at common law in the event that the contract was to be terminated on acceptance of repudiation.<sup>19</sup>

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### Endnotes

1. Section 17(1) of the Act.
2. Section 22 of the Act.
3. *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [40].
4. *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [46]-[62], [118]-[120], [127]-[142].
5. *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd* [2015] NSWCA 288 at [74]-[82].
6. At [46].
7. At [61].
8. At [52]-[54]; New South Wales, Department of Public Works and Services, *Review Discussion Paper: Operations for Enhancing the Building and Construction Industry Security of Payment Act 1999* (2002) at 19.
9. At [54], *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW), Sched 1 [1], [22].
10. At [54]-[57].
11. At [60]-[63].
12. At [62] citing *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 194 [14].
13. At [9].
14. At [73]-[74].
15. Section 8(2)(a) of the Act.
16. At [78].
17. At [76], citing Ball J in the primary judge decision *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 at [46].
18. At [79], citing *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.
19. At [80].

## Anshun estoppel and representative proceedings

Louise Hulmes reports on *Timbercorp Finance Pty Ltd (in liquidation) v Collins & Anor; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44

### Overview

The appellant in both appeals (Timbercorp) was part of the Timbercorp Group of companies and invested in agribusiness schemes on behalf of investors. Each respondent in each appeal (Mr and Mrs Collins and Mr Tomes) was an investor and a party to a loan agreement.

The respondents were group members in a proceeding commenced under Part 4A of the *Supreme Court Act 1986* (Vic) (Act) against Timbercorp, among others, in relation to the agribusiness schemes. The group proceeding was unsuccessful and Timbercorp subsequently commenced recovery proceedings against each of the respondents, alleging the respondents were in default of their loan agreements.

The issue for determination by the High Court was whether the respondents were precluded from relying on certain defences in the recovery proceedings, on the basis that the respondents did not raise those issues in the group proceeding, or opt out of the group proceeding. Timbercorp appealed to the High Court from the Court of Appeal of the Supreme Court of Victoria, submitting that the respondents should be so precluded, either because an *Anshun*<sup>1</sup> estoppel arose against them, or because relying on the defences was an abuse of process.

The High Court unanimously dismissed the two appeals, French CJ, Kiefel, Keane and Nettle JJ delivering a joint judgment and Gordon J delivering a separate judgment.

### Facts

In 2009, companies comprising the Timbercorp Group went into liquidation and then administration. In October 2009, a group proceeding was commenced in the Supreme Court of Victoria by a lead plaintiff, Mr Woodcroft-Brown, as plaintiff on his own behalf and on behalf of group members including the respondents. The group members were defined as all persons who at any time during the period 6 February 2007 to 23 April 2009 acquired and/or held an interest in a managed investment scheme of which Timbercorp Securities was the responsibility entity. The respondents did not opt out of the group proceedings.

Common questions of fact or law were identified in relation to the group proceeding. The allegation in the group proceeding was essentially that Timbercorp Securities had failed to disclose information about risks, which it was required to disclose in compliance with its statutory obligations. The group proceeding was unsuccessful at trial and on appeal.

Timbercorp then commenced the two recovery proceedings, and Mr and Mrs Collins and Mr Tomes filed their respective defences. Mr and Mrs Collins' defence contains two principal claims: that they did not acquire an interest in the project in which they sought to invest through Timbercorp Securities, and that no loan was advanced to them by Timbercorp for that purpose. They contend, in the alternative, that the loan offers constituted unconscionable conduct.

Mr Tomes, in his defence, alleged that no loan agreement was concluded between him and Timbercorp, because the person