

Court of Appeal  
Supreme Court  
New South Wales

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Case Name: Lewence Construction Pty Ltd v Southern Han  
Breakfast Point Pty Ltd

Medium Neutral Citation: [2015] NSWCA 288

Hearing Date(s): 29 June 2015

Date of Orders: 25 September 2015

Decision Date: 25 September 2015

Before: Ward JA at [1];  
Emmett JA at [96];  
Sackville AJA at [123]

Decision: (1) Appeal allowed.  
(2) Set aside orders 1, 2 and 4 made by the Equity  
Division of the Supreme Court of New South Wales on  
15 May 2015 and in lieu thereof order:  
(i) That the summons filed in Court on 2 April 2015 is  
dismissed with costs.  
(ii) That the funds in Court (including any interest which  
has accrued thereon) be paid out to the first defendant  
or the first defendant's solicitor.  
(3) Order the first respondent to pay the appellant's  
costs of this appeal.

Catchwords: ADMINISTRATIVE LAW – jurisdictional error –  
jurisdictional fact – whether the existence of a reference  
date in s 8 of the Building and Construction Industry  
Security of Payment Act 1999 (NSW) to support a  
payment claim is a jurisdictional fact

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

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 4, 7, 8, 13, 34, Pt 2, Pt 3  
Interpretation Act 1987 (NSW), s 35  
Supreme Court Act 1970 (NSW), s 69

Cases Cited: Alghussein Establishment v Eton College [1988] 1 WLR 587  
Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd [2013] NSWSC 707  
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346  
Brewarrina Shire Council v Beckhaus Civil Pty Ltd [2003] NSWCA 4; (2003) 56 NSWLR 576  
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport [2004] NSWCA 394; (2004) 61 NSWLR 421  
Castle Constructions Pty Ltd v Fekala Pty Ltd [2006] NSWCA 133; (2006) 65 NSWLR 648  
Consolidated Constructions Pty Ltd v Ettamogah Pub [2004] NSWSC 110; (2004) 20 BCL 373  
Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69; (2009) 74 NSWLR 190  
Energetech Australia Pty Ltd v Sides Engineering Pty Ltd [2005] NSWSC 801  
Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd [2004] NSWSC 905  
Isis Projects Pty Ltd v Clarence Street Ltd [2004] NSWSC 222  
John Holland Pty Ltd v Coastal Dredging and Construction Pty Ltd [2012] QCA 150; (2012) 2 Qd R 435  
Kembla Coal & Coke v Select Civil [2004] NSWSC 628  
Kirk v Industrial Court of New South Wales [2010] HCA 1; (2010) 239 CLR 531  
Kitchen Xchange Pty Ltd v Formacon Building Service Pty Ltd [2014] NSWSC 1602  
Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd [2014] QSC 293  
Lucchitti v Tolco Pty Ltd [2003] NSWSC 1070  
McDonald v Dennys Lascelles Ltd [1933] HCA 25; (1933) 48 CLR 457  
Minister for Commerce v Contrax Plumbing (NSW) Pty Limited [2005] NSWCA 142  
Omega House Pty Ltd v Khouzame [2014] NSWSC 1837

Patrick Stevedores Operations No 2 Pty Ltd v  
McConnell Dowell Constructors (Aust) Pty Ltd [2014]  
NSWSC 1413  
Photo Production Ltd v Securicor Transport Ltd [1980]  
AC 827  
Qline Interiors Pty Ltd v Jezer Construction Group Pty  
Ltd [2002] QSC 88; [2009] 2 Qd R 566  
Southern Han Breakfast Point Pty Ltd v Lewence  
Construction Pty Ltd [2015] NSWSC 502  
The Solholt [1983] 1 Lloyd's Rep 605  
Trives v Hornsby Shire Council [2015] NSWCA 158  
Trustees of Roman Catholic Church for Diocese of  
Lismore v T F Woollam and Son [2012] NSWSC 1559

Texts Cited:

Dennys, N et al (eds) Hudson's Building & Engineering  
Contracts, (12th ed, 2010, Sweet & Maxwell)

Category:

Principal judgment

Parties:

Lewence Construction Pty Ltd (Appellant)  
Southern Han Breakfast Point Pty Ltd (First  
Respondent)  
Ian Hillman (Second Respondent)  
Australian Solutions Centre Pty Ltd (Third Respondent)

Representation:

Counsel:  
S Robertson (Appellant)  
M Christie SC with B Michael (First Respondent)

Solicitors:  
Maddocks (Appellant)  
CCS Legal Pty Ltd (First Respondent)  
Second Respondent (submitting appearance)  
Third Respondent (submitting appearance)

File Number(s):

CA 2015/147625

Publication Restriction:

Nil

Decision under appeal:

Court or Tribunal:

Supreme Court of New South Wales

Jurisdiction:

Equity Division, Technology & Construction List

Citation:

[2015] NSWSC 502

Date of Decision: 05 May 2015  
Before: Ball J  
File Number(s): 2015/00098617

*[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

## HEADNOTE

**[This Headnote is not to be read as part of the judgment]**

In January 2013, Lewence Construction Pty Ltd ('Lewence'), as contractor, entered into a construction contract with Southern Han Breakfast Point Pty Ltd ('Southern Han'), as principal, for the construction of an apartment block in Breakfast Point ('the contract').

On 4 December 2014, Lewence served Southern Han with a payment claim invoking the provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act'). By that time, Southern Han had issued Lewence with a notice purporting to take further work under the contract out of Lewence's hands and Lewence had in turn notified Southern Han that it regarded this as a repudiation of the contract, which Lewence accepted as bringing to an end the contract with effect from 28 October 2014. The payment claim was the subject of adjudication. A determination was made in favour of Lewence.

Southern Han brought proceedings in the Technology & Construction List in the Equity Division of the Supreme Court seeking a declaration that the adjudication determination was void. Southern Han contended that the adjudicator had made a jurisdictional error because he wrongly determined that a 'reference date' (being the date on which a claim for a progress payment can be made) within the meaning of s 8 of the Act had arisen in respect of the work

that was the subject of the payment claim, whereas in fact no such reference date had arisen.

The primary judge accepted the construction of ss 8 and 13 of the Act advanced by Southern Han, namely that satisfaction of the requirement under s 8(1) of the Act that there be an available reference date to support a progress claim was a matter going to the jurisdiction of the arbitrator and was therefore amenable to judicial review.

Southern Han did not seek to establish that it had validly exercised its' contractual rights to take over the work and suspend payment. The primary judge found that there was no available reference date that could support the impugned payment claim on either of the two relevant hypotheses that arose in those circumstances, ie, that Southern Han had validly taken over the work and suspended payment under the contract or that the termination by Lewence was valid.

On appeal, Lewence challenged the construction of ss 8 and 13 adopted by the primary judge and, in the alternative, the findings made by his Honour that on the proper construction of the contract, there was no available reference date in respect of the impugned payment claim.

Southern Han filed a notice of contention seeking to affirm the primary judgment on the ground that the impugned payment claim was served in contravention of s 13(5) of the Act, because it was a second or subsequent claim in respect of a reference date, and was therefore not a valid payment claim.

*Held* allowing the appeal:

(1) The existence of a reference date to support a payment claim is not a jurisdictional fact; it is not an essential pre-condition for the making of a valid payment claim (Ward JA at [60], [93]; Emmett JA at [119]; Sackville AJA at [133]).

*Kembla Coal & Coke v Select Civil* [2004] NSWSC 628 affirmed.

(2) The words "on and from each reference date" in s 8(1) do not purport to identify a person, they identify the time on and from which a person who

satisfies the description in either (a) or (b) of that sub-section is entitled to a progress payment (Ward JA at [61], [93]; Emmett JA at [119]).

(3) The words “a person referred to in s 8(1)” in s 13(1) refer, in their ordinary meaning, to a person failing within either s 8(1)(a) or 8(1)(b) (Ward JA at [61], [93]). To read those words as referring to a claimant who not only satisfies either sub-par (a) or sub-par (b) of s 8(1), but who is also able to show that the reference date has arrived would be a strained interpretation (Sackville AJA at [132]). It would be surprising if Parliament had intended in those words to pick up the fact of arrival of a reference date (Emmett JA at [120]).

(4) The words “or who claims to be entitled to a progress payment” in s 13(1) make clear that the existence of a dispute as to the entitlement of a person to a progress claim does not preclude the making of a valid payment claim (Ward JA at [61]).

(5) The construction of ss 8 and 13 advanced by Southern Han is difficult to reconcile with the statutory language and adds uncertainty and complexity to legislation intended to achieve certainty and to operate simply (Sackville AJA at [142]; Emmett JA agreeing at [120]).

(6) There was no reason to conclude that the impugned payment claim was a second or subsequent claim “in respect of” the 8 October reference date when the impugned payment claim covered work under the contract after that date and the earlier claim was not in evidence (per Ward JA at [94]; Emmett JA agreeing at [121]).

(7) (obiter) had it been necessary to determine, termination of the contract would not have precluded Lewence from making a valid payment claim in respect of a reference date arising after termination (Ward JA at [82]; Sackville AJA agreeing at [152]).

(8) (obiter) had it been necessary to determine, on the proper construction of the contract, if Southern Han had validly exercised its right to take the work out of Lewence’s hands and suspend payments, this would have precluded Lewence from making a valid payment claim (Ward JA at [92]; Sackville AJA agreeing at [152]).

## JUDGMENT

- 1 **WARD JA:** In January 2013, Lewence Construction Pty Ltd (Lewence), as contractor, entered into a contract with Southern Han Breakfast Point Pty Ltd (Southern Han), as principal, for the construction of an apartment block in Breakfast Point. The contract was substantially in the form of the Australian Standard General conditions of contract (the AS 4000-1997 version).
- 2 The proceedings in this Court relate to a dispute between the parties as to the validity of a payment claim made by Lewence on 4 December 2014 invoking the provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act). By that time, Southern Han had issued a notice purporting to take further work under the contract out of Lewence's hands and Lewence had in turn notified Southern Han that it regarded this as a repudiation of the contract, which Lewence then accepted as bringing to an end the contract with effect from 28 October 2014.
- 3 The 4 December 2014 payment claim ("the impugned payment claim") was subsequently the subject of an adjudication determination dated 30 March 2015 made in favour of Lewence by the second respondent (who has filed a submitting appearance in these proceedings). The third respondent, which has also filed a submitting appearance, is the entity which nominated the adjudicator.
- 4 By summons filed in the Technology & Construction List in the Equity Division of the Supreme Court on 2 April 2015, Southern Han sought a declaration that the adjudication determination was void, as well as seeking ancillary relief in respect of that determination. The primary judge determined that Southern Han was entitled to a declaration in the terms that it sought. Lewence appeals from that decision.

### Contract Provisions

- 5 Clause 37 of the standard form contract entered into between Southern Han and Lewence, headed "Payment", provides relevantly as follows:

37.1 Progress claims

The *Contractor* shall claim payment progressively in accordance with Item 28.

...

[Item 28 of the reference schedule specifies the times for progress claims as being:

8th day of each month for *WUC* done to the 7th day of that month

The term *WUC* is defined in cl.1 as meaning the work which the Contractor is or may be required to carry out and complete under the Contract, including variations, remedial work, construction plant and temporary works]

### 37.2 Certificates

The *Superintendent* shall, within 14 days after receiving such a progress claim, issue to the *Principal* and the *Contractor*:

(a) a *progress certificate* evidencing the *Superintendent's* opinion of the moneys due from the *Principal* to the *Contractor* pursuant to the progress claim and reasons for any difference ('*progress certificate*'); and

(b) a certificate evidencing the *Superintendent's* assessment of retention moneys and moneys due from the *Contractor* to the *Principal* pursuant to the *Contract*.

If the *Contractor* does not make a progress claim in accordance with Item 28, the *Superintendent* may issue the *progress certificate* with details of the calculations and shall issue the certificate in paragraph (b).

If the *Superintendent* does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant *progress certificate*.

The *Principal* shall within 7 days after receiving both such certificates, or within 21 days after the *Superintendent* receives the progress claim, pay to the *Contractor* the balance of the *progress certificate* after deducting retention moneys and setting off such of the certificate in paragraph (b) as the capital *Principal* elects to set off. If that setting off produces a negative balance, the *Contractor* shall pay that balance to the *Principal* within 7 days of receiving written notice thereof.

Neither a *progress certificate* nor a payment of moneys shall be evidence that the subject *WUC* has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

(Italicisation in the above and following extracts of the contract provisions indicates that the term is defined in cl 1 of the contract).

- 6 Clause 37.4 deals with the making of a written final payment claim and the certification process applicable in relation to such a claim.
- 7 Clause 39 deals with default and insolvency. Clause 39.1, headed "Preservation of other rights", provides that if a party breaches (including repudiates) the contract nothing in that clause shall prejudice the right of the other party to recover damages or exercise any other right or remedy.
- 8 Pursuant to cl 39.2, the principal is permitted, if the contractor commits a substantial breach of the contract, to issue a written notice to show cause,

failing compliance with which, by the date and time stated in the notice, the principal is entitled pursuant to cl 39.4 *either* to take the whole or part of the work remaining to be completed out of the contractor's hands *or* to terminate the contract. In its terms, cl 39.4 provides:

39.4 *Principal's rights*

If the *Contractor* fails to show reasonable cause by the stated date and time, the *Principal* may by written notice to the *Contractor*:

- (a) take out of the *Contractor'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*.

- 9 On completion of work taken out of the contractor's hands pursuant to cl 39.4, there is to be an adjustment. Clause 39.6 provides that:

39.6 *Adjustment on completion of work taken out*

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

- 10 Clause 39.10 provides as follows:

39.10 *Termination*

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.

**Relevant Events**

- 11 On 10 October 2014, Southern Han issued a notice under cl 39.2 of the contract, identifying as the substantial breach for the purposes of that notice a "substantial departure from a construction program ... without reasonable cause or without the Superintendent's approval" and, in the alternative, the Contractor's failure "to proceed with due expedition and without delay". The notice required Lewence to show cause in writing, on or before 1pm on 20 October 2014, why Southern Han should not exercise a right referred to in cl 39.4 of the contract.
- 12 Lewence responded on 20 October 2014. It denied that the show cause notice complied with the requirements of cl 39.3 and therefore maintained that it was

not a valid notice under cl 39.2; denied any breach, substantial or otherwise, of the contract; and denied Southern Han's entitlement to exercise any rights under cl 39.4, foreshadowing that it would consider any attempt to do so as a repudiation of the contract.

13 Southern Han did not accept the matters raised in Lewence's response and proceeded on 27 October 2014 to issue a notice under cl 39.4(a), electing to take the whole of the remaining work out of Lewence's hands and advising that it had decided to suspend any further payment "until it becomes due and payable" pursuant to cl 39.6 of the contract. Lewence responded on 28 October 2014, as it had foreshadowed, advising that it considered that Southern Han had repudiated the contract and that it elected to terminate the contract at law. It also foreshadowed a damages claim on a *quantum meruit* basis.

14 On 4 December 2014, Lewence served the impugned payment claim for \$3,229,202.50. The header to the letter (which was expressed to form part of the payment claim) described the impugned payment claim as "Progress Claim No 18". The first item shown in the tax invoice attached was described as:

Progress Claim on account of Contract Sum, in accordance with the Contract signed 18 January 2013 for the Work Under Contract (WUC) carried out to 7 October 2014

and was in an amount of \$1,095,662.00. The invoice then listed a series of amounts referable to variations; a series of claims for delay costs under cl 34.9; and a claim for release of the 100% retention and for release of liquidated damages "incorrectly withheld from previous claims".

15 It is clear from the accompanying "Trade Breakdown" that the impugned payment claim included work in addition to work that had been the subject of a previously approved claim. The primary judge noted (at [8]) that it was agreed that the impugned payment claim related to work done by Lewence up to 27 October 2014 (when the work was taken out of its hands). Although there was some suggestion during submissions in these proceedings that Southern Han disputed that this was the case, ultimately it did not press the issue. I proceed on the basis that, as indicated by the Trade Breakdown attached to the invoice, the impugned payment claim included work done after 8 October

2014, which was the last progress payment date preceding the date on which Lewence notified Southern Han of its acceptance of the latter's alleged repudiation of the contract and purported to bring the contract to an end.

- 16 On 18 December 2014, Southern Han served a payment schedule and a response to the impugned payment claim, according to which Lewence had been overpaid and was indebted to Southern Han in the sum of \$64,909.67. That payment schedule appears to acknowledge that work the subject of the impugned payment claim was performed between 7 October 2014 and 27 October 2014 (see, for example, the comment as against the item "Project Preliminaries").
- 17 On 9 January 2015, Lewence lodged an adjudication application which for some reason was subsequently withdrawn. On 17 February 2015, Lewence lodged a new adjudication application with the third respondent (Australian Solutions Centre Pty Ltd), which nominated the second respondent as the adjudicator of the claim.
- 18 On 26 February 2015, Southern Han lodged an adjudication response, submitting 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 determined Lewence's claim on 30 March 2015 in the sum of \$1,221,051.08 including GST.

### **Primary judgment**

- 19 Southern Han argued before the primary judge that the adjudicator had committed a jurisdictional error because he wrongly determined that a reference date, within the meaning of s 8 of the Act, had arisen in respect of work that was the subject of the impugned payment claim, whereas in fact no such reference date had arisen. (Southern Han also claimed that it had been denied natural justice by the adjudicator on two bases but as no challenge is made to his Honour's determination of those issues it is not necessary to consider them.)
- 20 The jurisdictional error issue turned on the correct construction of ss 8 and 13 of the Act.

21 Section 8 provides:

### 8 Rights to progress payments

(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:

- (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.

22 Section 13, relevantly, provides:

### 13 Payment claims

(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.

...

(4) A payment claim may be served only within:

- (a) the period determined by or in accordance with the terms of the construction contract, or
- (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(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.

23 The scheme of the Act is recognised as providing an entitlement to progress payments and a mechanism to ensure that disputes concerning the amount of such payments be resolved with the minimum of delay, those payments being only on account of a liability that will finally be determined otherwise (as so

described by Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421 at [51]).

- 24 Having considered both parties' submissions, his Honour ultimately accepted the construction advanced by Southern Han, namely that satisfaction of the requirement under s 8 of the Act that there be an available (unused) reference date to support a progress claim is a matter that goes to the jurisdiction of the adjudicator and hence is susceptible to judicial review.
- 25 His Honour found that there was no available reference date that could support the impugned payment claim on either of the two relevant hypotheses (those two alternative hypotheses arising because Southern Han did not seek to establish that it had validly exercised its right under cl 39.4(a) of the contract to take over the work and hence that Lewence's termination of the contract was invalid).
- 26 First, on the hypothesis that, as Southern Han contended, it had validly taken over the work and suspended all payments under the contract, his Honour considered that there could be no subsequent date under the contract on which a claim for a progress payment may be made and consequently no reference date ([44]). Second, on the alternative hypothesis, namely that the termination by Lewence was valid, his Honour concluded that this brought an end to the accrual of reference dates ([46]). Accordingly, his Honour made the declaration sought by Southern Han.

### **Grounds of appeal**

- 27 Lewence raises the following three grounds of appeal:
1. The primary judge erred in holding (at [30]-[31], [37]) that a purported payment claim is not a valid payment claim for the purposes of s 13(1) of the *Building and Construction Industry Security of Payment Act 1999 (NSW) (Act)* if it is served by a person who is not, in law, entitled to a progress payment within the meaning of s 8(1) of that Act.
  2. Further and in the alternative to ground 1, the primary judge erred in holding (at [46]) that the accrual or occurrence of any "reference dates" (that is, dates on which a claim for a progress payment may be made) would be brought to an end if the Appellant terminated the relevant construction contract for repudiation by the First Respondent.
  3. Further and in the alternative to grounds 1 and 2, the primary judge erred in holding (at [44]) that the accrual or occurrence of any "reference dates" would be suspended if the First Respondent validly exercised a right under the

relevant construction contract to take out of the Appellant's hands the whole of the work remaining to be completed.

- 28 By notice of contention filed 12 June 2015, Southern Han seeks to have the decision below affirmed on the ground that the impugned payment claim was served in contravention of s 13(5) of the Act and was therefore not a valid payment claim. It accepts that if, on the proper construction of the Act and the contract, there was an available reference date as at 8 November 2014 to support the impugned payment claim then its notice of contention must fail.

*Ground 1 – s 13(1) of the Act*

- 29 Lewence points to the words “or who claims to be” in s 13(1) to show that the legislature intended that a payment claim could validly be made not only by a person who *is* entitled to a progress payment under s 8(1) but also by a person who *claims to be* so entitled. That is hardly a controversial submission. McDougall J observed in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 (at [22]), the words “or who claims to be” were inserted into s 13(1) to overcome the contrary effect of the decision of this Court in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2003] NSWCA 4; (2003) 56 NSWLR 576.
- 30 The proposition that a claimed entitlement is sufficient to trigger the progress payment mechanisms of the Act was recognised by McDougall J in *Consolidated Constructions Pty Ltd v Ettamogah Pub* [2004] NSWSC 110; (2004) 20 BCL 373 at [61] and in *Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd* [2013] NSWSC 707, where Hammerschlag J emphasised (at [19]) that the express words of s 13 make it clear that the assertion of entitlement is sufficient to enliven the operation of the Act. In *Ampcontrol*, Hammerschlag J, referring with apparent approval to the decision in *Consolidated Constructions*, stated that it would be out of step with the express wording of s 13 for the Court to become enmeshed in a determination of the contractual efficacy of the plaintiff's claim or the defendant's response to it ([25]).
- 31 Lewence contends that it follows from this that the question whether a claimed entitlement exists in fact and law is a matter for an adjudicator appointed under the Act to decide, not for the Court. It is submitted that, were this not so, the

words “claims to be” in s 13(1) would be redundant since a person who claims to be entitled to a progress payment would not be able to serve a payment claim unless that person were actually so entitled.

- 32 Lewence points to two other features of s 13(1) in support of the construction for which it contends.
- 33 First, it submits that the reference to a “progress payment” in s 13(1) must be a reference to a progress payment under s 8; and hence that a person claiming that a reference date has arisen is a person claiming to be entitled “under s 8”. In oral argument it was accepted by Counsel for Lewence that to read into s 8 the definition of “progress payment” contained in s 4 of the Act would involve some circularity, as recognised by Ball J in *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413 at [30], since that definition makes clear that a payment is still a progress payment for the purposes of s 13 even if it is a claim for a final payment, a single payment or a milestone payment. Nevertheless, he points to this as a feature providing some support for Lewence’s construction.
- 34 Second, Lewence notes that s 13(1) directs attention, relevantly, to a person who claims to be “entitled” to a progress payment (under s 8). Lewence contends that s 8(1) identifies two classes of person: a person who has undertaken to carry out construction work under the contract (s 8(1)(a)) and a person who has undertaken to supply related goods and services under the contract (s 8(1)(b)); and that the person identified in s 13 is someone falling within one or both of those classes *and* who is or claims to be entitled to a progress payment under s 8(1). Lewence’s argument in this context is that where such a person’s claimed entitlement depends on whether a reference date has arisen under the contract, that person nevertheless satisfies the description in s 13(1) even if its contention as to an available reference date is ultimately determined (by the adjudicator) to be incorrect.
- 35 For its part, Southern Han contends, in effect, that s 13(1) must be construed against the background of s 13(5) and that, because it is clear from s 13(5) that there must be an “unused” reference date to support a claim, the existence of a reference date for the purpose of s 8 is a precondition to the exercise of an

adjudicator's power; and the Court thus has jurisdiction to determine whether there is a reference date to support the impugned payment claim.

36 The primary judge considered that the expression "person referred to in s 8(1)", as used in s 13(1), was ambiguous ([30]) and that it could mean *either* any person meeting the requirements set out in s 8(1)(a) or s 8(1)(b) (as Lewence contends) *or* that it could mean a person who satisfies *all* of the requirements of s 8(1), i.e., a person who has undertaken to carry out construction work, or to supply related goods and services under a construction contract *in respect of which a reference date has arisen* (Southern Han's contention).

37 His Honour preferred the latter construction on the basis that s 13 identifies a person who is entitled to serve a payment claim by reference to the whole of s 8(1), not simply by reference to s 8(1)(a) and s 8(1)(b) ([31]). His Honour accepted that the existence of a reference date is not a characteristic of the person identified in s 8(1) but considered that it was an essential characteristic of the rights of such a person that are created by s 8(1) and hence concluded that "[a] person referred to in s 8(1)" is a person having those rights ([31]).

38 Thus his Honour interpreted s 13 as saying that a person who meets the essential requirements set out in s 8 is entitled to make a progress claim and said (at [37]) that:

[t]he entitlement to make a claim does not depend on the success or otherwise of the claim. But it does depend on satisfying the essential requirements. Section 13(1) uses the words "or claims to be" to address the first of these points. It uses the words "[a] person referred to in s 8(1)" to address the second. It is apparent from the wording of s 8 that the occurrence of a reference date is as essential as the existence of a construction contract and the performance of construction work or the supply of related goods and services under that contract.

39 His Honour drew support for that construction of s 13(1) from the Second Reading Speech for the Building and Construction Industry Security of Payment Amendment Bill, in which the then Minister for Public Works and Services, Mr lemma, recognised the potential for claimants to abuse the intent of the legislation and said that "[c]onsequently, the bill restricts claimants to one payment claim under the Act in respect of each reference date" (Second Reading Speech (New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, 6541). In particular, his Honour extracted (at

[38]) a passage from the speech from which he considered it apparent that the requirement of a reference date (as was the requirement that only one claim could be made in respect of each reference date) was intended to be an important mechanism by which abuses of the right to make a payment claim were to be prevented.

40 Pausing there, I do not consider that the Second Reading Speech provides any significant support for Southern Han's construction of s 13(1). The potential for abuse of the statutory right to make payment claims, to which the Minister referred, is in my view a matter addressed by s 13(5).

41 Lewence argues that if his Honour's approach is adopted, then it would always be open to the principal to challenge any adjudication determination made in the contractor's favour where a milestone payment regime was adopted in the contract on the ground that the payment claim was not supported by a reference date. It is submitted that a construction of the Act which would require an extensive enquiry as a pre-requisite to the adjudicator's jurisdiction is a most unlikely construction having regard to the objects of the Act and that this provides a factor which, in addition to the others, tends against the adoption of the approach preferred by the primary judge.

42 His Honour accepted that on Southern Han's interpretation the question whether a reference date had arisen might raise difficult factual issues going to the adjudicator's jurisdiction (as might other issues going to the question of jurisdiction) but did not accept that this was a reason for not treating the factual question as a jurisdictional one (see [40]).

43 Southern Han in response argues that the hypothetical example posed by Lewence is unrealistic and says that the flaw in reading s 13(1) in the manner for which Lewence contends is highlighted by the fact that, on that construction, a contractor could (assuming a construction contract providing for reference dates at two month intervals) be able validly to serve a payment claim, or even several payment claims, before the first reference date had actually arisen under the contract.

44 In response to Lewence's submission to the effect that the legislature cannot have intended this to be a jurisdictional fact because its determination might

embroil the court in lengthy factual disputes, Southern Han contends (as his Honour accepted at [40]) that other jurisdictional matters in relation to the Act can raise similarly difficult factual issues (such as whether there is an arrangement; whether the work comes within the definition of construction work; whether the goods and services come within the definition of related goods and services; and whether the exceptions in s 7 apply).

- 45 Pausing there, while inconvenience is not a reason in itself for not treating the requirement for a reference date as a jurisdictional fact, it has been recognised as a factor which may be taken into account in determining on the proper construction of a statutory provision whether a fact is jurisdictional in the sense of being an essential condition to the exercise of a particular power, as was recognised in *Trives v Hornsby Shire Council* [2015] NSWCA 158 (at [9], [13]).

#### *Determination of ground 1*

- 46 In *Kembla Coal & Coke v Select Civil* [2004] NSWSC 628, to which the primary judge was not referred in the present case, McDougall J directly addressed the question whether the existence of a reference date for the purposes of s 8(1) was a jurisdictional fact. There, Kembla had submitted (and Select had agreed) that it was, but his Honour J disagreed, saying (at [37]):

It is one thing to say that s 8 of the Act specifies the entitlement to a progress payment as something existing “[o]n and from each reference date under a construction contract.” It is quite something else to say that the reference date is thereby made a jurisdictional fact if the matter goes to adjudication. If the payment claim has no reference to a reference date, that may be a valid basis of opposition. But it does not mean that the claimant is anything other than “a person who ... claims to be entitled to a progress payment”.

- 47 Southern Han seeks to distinguish *Kembla* on the basis that McDougall J did not have the benefit of submissions on this point and no issue as to s 13(5) was raised in that case. It refers to *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905 (later overturned on a separate point) where an issue was raised as to the jurisdiction of the adjudicator to determine an application made under the Act by reference to the question whether s 13(5) prevented the claimant from serving the payment claim in question and McDougall J there said (at [40]-[41]):

In my judgment, GJ was not entitled to serve the fourth payment claim. That is because s 13(5) prevents a claimant from serving more than one payment

claim in respect of any one reference date under the contract. I therefore conclude that the adjudicator had no power to determine the application. The existence of a reference date in relation to which a payment claim is made there is a jurisdictional matter: *Isis Projects v Clarence Street Limited* [2004] NSWSC 222 at [33]. Alternatively, the adjudicator had no power because of the provisions of s 13(5). On either basis, therefore, there is jurisdictional error.

There is another reason why this is so. On no view of the Act and the subcontract is 27 July 2004 a reference date; yet that is the date that GJ nominated as the reference date to which the payment claim related.

48 As can be seen from the passages extracted above, in *Holdmark* his Honour first concluded that there was no power to determine the application on the basis that there had been more than one payment claim served in respect of the one reference date under that particular contract (although that was then expressed as an alternative basis). His Honour's citation of *Isis Projects Pty Ltd v Clarence Street Ltd* [2004] NSWSC 222 for the proposition that the existence of a reference date in relation to which a payment claim is made was a jurisdictional matter refers to a paragraph in that decision in which Einstein J (on a summary dismissal appeal), said that the precondition to liability to make a progress payment under s 4(a) of the Act depended on proof that a valid payment claim had been served and also proof as to what was the due date for the progress payment.

49 Southern Han also called in aid the observations made by Bergin J, as her Honour then was, in *Lucchitti v Tolco Pty Ltd* [2003] NSWSC 1070 (at [37]). There, when dismissing an application to restrain a party from taking steps in relation to an adjudication determination under the Act, her Honour said:

S. 8(2) of *the Act* provides that a reference date in relation to a construction contract means a date determined by or in accordance with the terms of the contract and if the contract makes no express provision the last day of the named month in which the construction work was first carried out. There was a point raised by reason of the inclusion of a reference date in the progress claim. I do not regard that point as going anywhere. If the work is done pursuant to a construction contract then on and from the reference date, that being either in the contract or at the end of the month on which the work was done, the progress payment can be claimed.

50 In that case a point had been raised with the adjudicator as to whether there was a jurisdictional question in that the claim was out of time. It was apparently contended that the adjudicator had not considered that issue. Her Honour concluded that he had done so but that, even if he had not had regard to the submissions on that issue this was not a jurisdictional error. The status of the

requirement for a reference date as a jurisdictional matter does not appear to have been argued before her Honour. In those circumstances, Southern Han gains no support from her Honour's observations at [37].

- 51 Southern Han also points to various Queensland authorities dealing with analogous provisions. It argues that in *John Holland Pty Ltd v Coastal Dredging and Construction Pty Ltd* [2012] QCA 150; (2012) 2 Qd R 435 the Queensland Court of Appeal decided the matter on the premise that the existence of a reference date was a matter for the Court to determine and that in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 the identification of the reference date was an essential step in determining whether the adjudicator had exceeded his or her jurisdiction (referring to [37], [45]). More recently, in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd* [2014] QSC 293 Applegarth J considered broadly analogous provisions to those in the present case and said (at [15]):

There is no contest that the contract is governed by the Act and that the first respondent carried out "construction work" within the meaning of the Act. The parties also accept that an adjudication decision may be set aside or declared void for jurisdictional error. A jurisdictional error will arise where one of the requirements for a valid payment claim under the Act is not met. One such requirement is that a reference date has arisen under the contract at the time the payment claim is made.

- 52 What must be borne in mind is that the fundamental distinction between ss 8 and 13 of the Act is between the entitlement to a progress payment under the Act (dealt with in the former) and the right or entitlement to make a claim for a progress payment (dealt with in the latter). The consequence of making a valid payment claim is that it then falls to the adjudicator to determine the claim and, absent jurisdictional error, entitlement to such a payment on the particular facts of a particular case is not for the court to determine.
- 53 Thus, s 8(1) provides a statutory entitlement to a progress payment, on and from each reference date under a construction contract, for a person satisfying the description in either (a) or (b), whereas s 13(1) deals with the making of a payment claim and identifies who it is that may validly make a payment claim.
- 54 It has in the past been suggested that use of the language of jurisdictional error in this context is not the preferable way to proceed when considering the

consequence of non-compliance with requirements of the Act. Hodgson JA, in *Brodyn*, considered it preferable to approach the question as to the consequence of non-compliance with the more detailed requirements of the Act (of which his Honour gave as an example those in s 13(2)) by asking whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination ([54]). In *obiter* (at [66]) his Honour expressed the opinion that, if a document purporting to be a payment claim under the Act was served, questions whether the document complied in all respects with the requirements of the Act were generally for the adjudicator to decide.

- 55 Again, in *Minister for Commerce v Contrax Plumbing (NSW) Pty Limited* [2005] NSWCA 142, Hodgson JA, considering the consequences of errors of fact or law in adjudication determinations, said at [49]:

In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act.

- 56 Those passages were referred to by McDougall J in *Energetech*. His Honour considered that there could be no doubt that what was served in that case purported to be a payment claim under the Act. His Honour said that the payment claim complied with s 13(1), noting that the entitlement to make a claim was given not just to someone so entitled to a progress payment but to someone who claims to be so entitled. His Honour went on to say (at [21]):

Clearly, the assertion of an entitlement to a progress payment includes an assertion that the relevant reference date, on or from which the entitlement accrues, has past. In the present case, that assertion necessarily involves an assertion that practical completion – the date of which forms the relevant reference date – has occurred. In that context, I think, the requirement to serve the payment claim within the period determined by or in accordance with the terms of the contract must mean that the payment claim is to be served after the claimant claims that the relevant time has accrued. That is consistent with the scheme of s 13, from which it is evident not only that there may be a dispute, ultimately capable of resolution by adjudication, as to the amount of progress payment but also – a dispute as to the actual entitlement.

- 57 *Energetech* had contended that service by the claimant of a payment claim within the period determined by or in accordance with the terms of the contract was an essential requirement non-compliance with which rendered the claim not a valid payment claim for the purposes of the Act. McDougall J considered

that such a construction would read down the words “or who claims to be” in s 13(1) to a point where they would have very little work to do ([22]).

Unsurprisingly, Lewence relies upon *Energetech* as support for its construction of s 13(1).

58 McDougall J went on (at [23]) to adopt the position put by Hodgson JA in *Brodyn*, namely that the question as to whether the document complied in all respects with the requirements of the Act (particularly where that question involved doubtful questions of fact and law) was for the adjudicator to decide and hence where the adjudicator addressed the question in good faith an error in the conclusion would not render the determination invalid. His Honour concluded that an error in determining that the relevant milestone had been achieved would not vitiate the determination.

59 There have been other first instance decisions which have proceeded on the basis or assumption that the existence of a reference date was intrinsic to a payment claim (*Patrick Stevedores and Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837). There, however, as in *Kembla*, it does not appear that the parties challenged that proposition.

60 I consider that McDougall J was correct in *Kembla* in concluding that the existence of a reference date to support a payment claim is not a jurisdictional fact or essential pre-condition for the making of a valid payment claim (and hence if there is a dispute about that issue it is for the adjudicator to determine).

61 Linguistically, the opening words of s 8(1) (“[o]n and from each reference date”) do not purport to identify a person; rather, they identify the time on and from which a person who satisfies the description in either (a) or (b) of that sub-section is entitled to a progress payment. I therefore respectfully differ from the primary judge in that I read the words “a person referred to in s 8(1)” in s 13(1) as referring in their ordinary meaning simply to a person falling within either s 8(1)(a) or s 8(1)(b). I do not consider that such a construction is weakened by the fact that neither of the sub-paragraphs of s 8(1) is referred to expressly in s 13(1). The claim of such a person to be entitled to a progress payment may be disputed (whether on the basis that a relevant reference date has not arisen

or for other reasons) but what the words “or who claims to be entitled to a progress payment” in s 13(1) make clear is that the existence of a dispute as to the entitlement does not preclude the making of a valid payment claim. Section 13(1) may be contrasted with s 13(5) in this regard, the latter being expressed as a prohibition on the making of a claim in the circumstances there specified.

62 Accordingly, I consider that ground 1 of Lewence’s notice of appeal is made out.

*Ground 1 of Notice of Contention – s 13(5)*

63 Linked to the argument on ground 1 of the notice of appeal, and the way in which the issue seems to have been approached when the matter was before the primary judge, is the question whether there was a contravention of s 13(5) of the Act.

64 In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; (2009) 74 NSWLR 190 (at [14]), Allsop P, as his Honour then was, having referred to s 13(5) as a prohibition said that:

The words “cannot serve more than one payment claim” are a sufficiently clear statutory indication 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 and does not attract the statutory regime of the Act.

65 Similarly, McDougall J concluded in *Trustees of Roman Catholic Church for Diocese of Lismore v T F Woollam and Son* [2012] NSWSC 1559 (at [49]) that the statutory prohibition in s 13(5) would be set at naught if a payment claim served in breach of that sub-section nonetheless initiated the statutory enforcement or recovery mechanisms, a view his Honour affirmed in *Kitchen Xchange Pty Ltd v Formacon Building Service Pty Ltd* [2014] NSWSC 1602 (at [23]). McDougall J there concluded that a payment claim served in breach of s 13(5) had the consequence that it was not open to the adjudicator, as a matter of jurisdiction, to consider the payment claim and make a determination thereon ([30], [31]). (His Honour reached a similar conclusion in relation to the non-compliance by the claimant with the specific and mandatory requirement in s 13(7).)

66 Lewence did not suggest that compliance with s 13(5) was not a matter going to the jurisdiction of the adjudicator. However, it maintains that, to succeed on

its notice of contention, Southern Han must establish that service of the impugned payment claim was in contravention of s 13(5). The primary judge did not so find and it was not submitted that the adjudicator had made an error of law in that regard.

- 67 It was agreed between the parties that a reference date arose on 8 October 2014 and, although a copy was not in evidence, that a payment claim was made in respect of that date. However, it is not conceded, and in my opinion has not been established, that the impugned payment claim was a second or subsequent payment claim in respect of that same reference date (or some other reference date in respect of which a claim had already been made).
- 68 The impugned payment claim did not on its face assert that it was in respect of the 8 October 2014 (or indeed any particular) reference date. It included work done after 8 October 2014. Lewence argues that the fact that the impugned payment claim was for work done up to 27 October 2014 supports the characterisation of the claim as not being one that was “in respect of” the earlier 8 October date. It maintains that the objective criterion to determine how to characterise the impugned payment claim is by reference to the particular work claimed to have been done.
- 69 Counsel for Lewence did not concede that if no available reference date had arisen after 8 October 2014 (for example, if it did not succeed on one of grounds 2 and 3 of the grounds of appeal) then the impugned payment claim must necessarily have been in respect of the earlier date. While it maintained before the adjudicator that the impugned payment claim was a claim in respect of the 8 November 2014 reference date, it submits in this Court that if it succeeds on ground 1 of the appeal (the s 13(1) issue) then the claim was prima facie valid and it was for Southern Han to establish that it was a second or subsequent claim in respect of a particular reference date.
- 70 In other words, Lewence maintains that unless Southern Han establishes that the impugned payment claim was served in breach of s 13(5), the determination by the adjudicator that 8 November 2014 was an available reference date is not appellable in this Court on the construction of s 13(1) for

which it contends (and which I consider to be correct), the existence of a reference date under the contract being for the adjudicator to determine.

71 This Court was not taken to the adjudicator's reasons to suggest that there was any error of law on the face of the record in relation to the existence of an available reference date. On its face the impugned payment claim includes a claim for work done after 8 October 2014 and hence logically one would expect it to be in respect of a reference date after that time. Insofar as Southern Han submits that this would not necessarily be the case, referring to s 13(4) which permits the making of a payment claim within a year (notwithstanding the contractual obligation to make the payment claim in accordance with cl 37.1), the difficulty is that there is nothing before this Court on which it could be concluded that the impugned payment claim was the second or subsequent payment claim "in respect of" the 8 October 2014 (or any other) reference date.

72 Ground 1 of the notice of contention therefore fails irrespective of the outcome of grounds 2 and 3 of Lewence's notice of appeal.

*Grounds 2 and 3 of the notice of appeal*

73 For the reasons above, grounds 2 and 3 do not arise in light of the determination of ground 1 of the notice of appeal and can therefore be disposed of briefly. They were raised on the basis that if the primary judge was correct in finding that the existence of a reference date was a jurisdictional fact his Honour nevertheless erred in concluding that the impugned payment claim was not supported by a reference date.

*Ground 2 – assumption that termination was valid*

74 In *Brodyn*, it was made clear by Hodgson JA that whether reference dates ceased on termination of the contract or cessation of work may depend on construction of the relevant contract. There it had been submitted that the payment claim was not a valid payment claim under the Act because the termination of the contract and cessation of the work under it meant that there was thereafter only one reference date in respect of which only one final payment claim could be made. Hodgson JA pointed out that s 8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work and went on to say (at [63]):

This may be the case under s 8(2)(a) if the contract so provides but not otherwise; while s 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s 13(4): reference dates cannot support the serving of any payment claims outside these limits.

- 75 Whether or not a contractual term operates after termination, as Ball J noted in *Patrick Stevedores* at [37], is a question of construction (*Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827).
- 76 In construing the contract in this case, his Honour had regard to cl 39.10. His Honour considered (at [50]) that it made little sense for Lewence to have a continuing right to claim payment progressively under the contract when the contract was terminated and any obligation to perform work under the contract had come to an end. His Honour thus concluded that at the time of termination the only right to a progress payment was the right that had accrued on 8 October 2014 but since that right had already been exercised any further payment claim in respect of that date was precluded by s 13(5).
- 77 Lewence argues that cl 39.10 of the contract provides no support for his Honour's reasoning since it applies only where the contract is terminated pursuant to cl 39.4(b) or cl 39.9 and, in the present case the contract was terminated at common law by its acceptance of Southern Han's repudiation (Lewence's right to do so being preserved by cl 39.1).
- 78 Lewence argues that the contract makes clear that the contractor will progressively earn and be paid the contract sum (cl 37.1) and that it would be a strange result if that entitlement could be defeated by the principal wrongly repudiating the contract and the contractor then electing to exercise the right to terminate which arises on such a repudiation. It is submitted that such a construction would offend the general rule of contractual construction that a contract should not be construed so as to permit a party to take advantage of his or her own wrong (Lewence citing *Alghussein Establishment v Eton College* [1988] 1 WLR 587).
- 79 It is further submitted that the Court should apply by analogy the approach which applies in the law of damages to the effect that the consequence of termination at common law for repudiation is generally attributed to the

repudiatory conduct of the party in breach rather than to the election of the innocent party to terminate (referring to *Castle Constructions Pty Ltd v Fekala Pty Ltd* [2006] NSWCA 133; (2006) 65 NSWLR 648 at [28], citing *The Solholt* [1983] 1 Lloyd's Rep 605 at 607).

- 80 Southern Han relies upon the well-known reasoning of Dixon J in *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457 at 476-477 and argues that if Lewence's termination was valid then both parties are discharged from the further performance of the contract and no further reference dates accrue under the contract. It refers to *Qline Interiors Pty Ltd v Jezer Construction Group Pty Ltd* [2002] QSC 88; [2009] 2 Qd R 566 at [55]-[57], [71] where Muir J did not accept that a claim in respect of a particular progress claim could be categorised as an accrued right which survived termination of the contract.
- 81 In both *Patrick Stevedores* and *Omega House*, the Court (Ball J and Darke J, respectively) considered whether, on the proper construction of the contract in that case, the contract continued to provide reference dates following its termination. In both cases, the parties' contract made specific provision for what should happen following a termination for convenience and in those circumstances their Honours held that the contract did not continue to provide a reference date.
- 82 Had it been necessary to determine, I would have concluded that once the contract was terminated the contractual right to make further progressive payment claims under cl 37.1 came to an end. However, the impugned payment claim is made pursuant to a statutory entitlement to do so "[o]n and from each reference date". Termination of the contract does not alter the fact that under the contract a reference date arises on the 8th of each month for work done under the contract up to the 7th of that month. Therefore, I consider that 8 November 2014 was an available reference date to support the making of the impugned payment claim. There not being a contractual provision to preclude the exercise of the statutory right to make a progress payment claim on that date, I would have held that ground 2 of the appeal is made out on that basis.

*Ground 3 - on the assumption that the take out was a valid exercise of power*

- 83 The alternative basis on which it is said that, if the existence was a jurisdictional fact, his Honour nevertheless erred in making the declaration turns on the proper construction of cl 39.4 of the contract.
- 84 At [44], his Honour said that the effect of cll 39.4 and 39.6 of the contract was that Southern Han was entitled by notice to suspend *all* payments under the contract (not only all future payments) since, apart from the possibility of a payment following the reconciliation required by cl 39.6, there would be no future payments if Southern Han took over the whole of the work. His Honour considered that this construction made commercial sense as it provided a form of security in the event that costs of completion were greater than the price payable if the contractor had completed the work itself ([46]).
- 85 It is submitted by Lewence that his Honour's reasoning assumes that if the contract expressly provides that all payments are suspended then it impliedly provides that all claims for payment are also suspended.
- 86 This issue turns on the meaning of the word "it" in the phrase "suspend payment until it becomes due and payable pursuant to clause cl 39.6" where appearing in cl 39.4(a). Linguistically, "it" must refer to a payment that will (or may) later become payable pursuant to cl 39.6. That amount is, by reference to cl 39.6, the difference between the cost of completion of the work and the amount which would otherwise have been paid to the contractor if the work had been completed by the contractor.
- 87 Lewence submits that cl 39.6 only deals with payment in relation to work which has been taken out of the contractor's hands and says nothing about work that has not been taken out of the contractor's hands. That being so, it is submitted that the better view of cl 39.4 is that that clause only suspends payment in relation to work taken out of the contractor's hands and does not, whether expressly or impliedly, provide that reference dates cease on the exercise of power under cl 39.4. Accordingly, it submits that the contractor remains entitled to make claims for payment even after work has been taken out of its hands (although it would not be entitled to payment for any work taken out of its hands).

- 88 Southern Han submits that, under the contract, where all the work is taken out of the contractor's hands the contractor is not entitled to be paid for the work performed until the reconciliation under cl 39.6 is carried out. It argues that this contractual regime reflects the position at general law (referring to the statement in Dennys, N et al (eds), *Hudson's Building & Engineering Contracts*, (12th ed, 2010, Sweet & Maxwell) at p 990 as to the prima facie measure of damages where, in breach of contract, work has been left incomplete or is defective).
- 89 It is submitted by Southern Han that the commercial purpose of the contractual provisions is clear since the cost of completion may vastly exceed the amount which the contractor would have been paid by the principal had the work been completed by the contractor and paid for by the principal. It is submitted that cll 39.4 and 39.6 are designed to ensure that payments to the contractor are suspended until the principal's costs to complete are calculated, in order to ensure that the principal is not left out of pocket and that this necessarily requires suspending payment for work which has been performed to date. All payment having been suspended under cl 39.4, the amount which would otherwise have been paid to the contractor if the work had been completed by the contractor (cl 39.6) includes payments which have been suspended under cl 39.4.
- 90 Lewence contends that cl 37.1 is not impliedly excluded by cll 39.4 and 39.6. Rather, it contends that the practical operation of the suspension of payment is to avoid the consequence that the contractor might be liable to pay the whole of the contract price once work is taken out of the contractor's hands since in that circumstance practical completion will have been achieved of whatever work of the contractor is then required to do under the contract and it would prima facie be entitled to the whole of the contract price.
- 91 Insofar as Lewence draws a distinction between suspension of payment and suspension of payment claims, this at first blush is a distinction without a difference because if cl 39.4(a) operates as a contractual suspension of all further payments under the contract then it is arguable that Lewence would be precluded from enforcing a determination for payment in respect of a payment

claim made pursuant to the statutory progress payment regime. However, that point was not debated in oral submissions.

92 Had it been necessary to determine this issue I would have reached the same conclusion as the primary judge for the reason that what is suspended is the payment that will or may later become payable on an adjustment pursuant to cl 39.6 and such an adjustment does not in terms exclude amounts that would be payable by the principal (on the completion of the work taken over by the principal) for work already performed by the contractor prior to the exercise by the principal of its rights under cl 39.4(a). I would therefore have found that ground 3 was not made out.

### **Conclusion**

93 The words “on and from each reference date” specify the time on and from which a payment claim can be made. They do not specify a characteristic of the person who is or claims to be entitled to a progress payment. The appellant was a person who claimed entitlement under the construction contract to progress payments in the general sense contemplated by the Act. It satisfied the description in s 8(1)(a) and (b). Whether that claim was valid (including whether it was valid because it was supported by a reference date) is not a jurisdictional fact.

94 Whether s 13(5) applied was a jurisdictional fact capable of determination by this Court. However, there is no reason to conclude that the impugned payment claim was a second or subsequent claim “in respect of” the 8 October 2014 reference date when the claim covered work under the contract after that date and the earlier claim was not in evidence.

95 The appeal should be allowed. I propose the following orders:

- (1) Appeal allowed.
- (2) Set aside orders 1, 2 and 4 made by the Equity Division of the Supreme Court of New South Wales on 15 May 2015 and in lieu thereof order:
  - (i) That the summons filed in Court on 2 April 2015 is dismissed with costs.
  - (ii) That the funds in Court (including any interest which has accrued thereon) be paid out to the first defendant or the first defendant’s solicitor.

(3) Order the first respondent to pay the appellant's costs of this appeal.

96 **EMMETT JA:** This appeal is concerned with the effect of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) in relation to a construction contract (**the Contract**) between the first respondent, Southern Han Breakfast Point Pty Ltd (**the Principal**) and the appellant, Lewence Construction Pty Ltd (**the Contractor**). The Contract was entered into on 18 January 2013 substantially in the form of General Conditions of Contract AS 4000-1997 and related to the construction of an apartment block in Breakfast Point, New South Wales for a lump sum contract price of \$14,226,244 excluding GST. A dispute has arisen between the Principal and the Contractor as to the Contractor's entitlement to a progress payment under the Act in circumstances where the Principal purported to exercise a right under the Contract to take out of the Contractor's hands the whole of the work remaining to be completed under the Contract.

97 The Contractor purported to make a claim for a progress payment under the Act. On 30 March 2015, the second respondent, Mr Ian Hillman, an adjudicator appointed under the Act (**the Adjudicator**), made a determination (**the Adjudication Determination**) that the Principal is liable to the Contractor for the payment of \$1,221,051.08, including GST. By summons dated 2 April 2015 filed in the Technology and Construction List of the Equity Division, the Principal claimed a declaration that the Adjudication Determination is void. On 15 May 2015, a judge of the Equity Division, sitting in the Technology and Construction List (**the primary judge**), declared that the Adjudication Determination is void and ordered that the Contractor return to the Principal the sum of \$1,266,672.76 that had been paid into Court by the Principal. The primary judge also ordered the Contractor to pay the Principal's costs of the proceedings. By notice of appeal filed on 18 May 2015, the Contractor appeals from the orders made by his Honour.

### **The Relevant Provisions of the Act and of the Contract**

98 The factual background, as well as the relevant provisions of the Act and of the Contract, have been extracted and summarised by Ward JA. However, I will outline my understanding of the effect of the relevant parts of the Act.

99 The object of the Act, as outlined in s 3, is to ensure that any person who, relevantly, undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work. The means by which the 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. The means by which the Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

- the making of a **payment claim** by the person claiming payment,
- the provision of a **payment schedule** by the person by whom the payment is payable,
- the referral of any disputed claim to an adjudicator for determination, and
- the payment of the progress payment so determined.

100 To achieve those objects, Pt 2 of the Act, which consists of ss 8 to 12 inclusive, deals with rights to progress payments and Pt 3 of the Act, which consists of ss 13 to 32 inclusive, deals with the procedure for recovering progress payments. The critical provisions for present purposes are s 8 and s 13.

101 Section 8(1) provides:

#### **8 Rights to progress payments**

- (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.

Section 8(2) relevantly provides that **reference date** in relation to a construction contract means a date determined by 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 under the contract.

102 Clause 37.1 of the Contract relevantly provides that the Contractor must claim payment progressively in accordance with Item 28. Item 28 relevantly provides that the times for progress claims are the eighth day of each month for work

that the Contractor is or may be required to carry out and complete under the Contract done up to the seventh day of that month.

103 Under s 9 of the Act, the amount of a progress payment to which a person is entitled in respect of a construction contract is, relevantly, the amount calculated in accordance with the terms of that contract. Section 11 provides that a progress payment to be made by a principal to a head contractor under a construction contract becomes due and payable on the date occurring 15 days after a payment claim is made under Pt 3 in relation to the payment, except to the extent that an earlier date is provided in accordance with the terms of the relevant contract.

104 Section 13(1) of the Act provides:

**13 Payment claims**

(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.

The payment claim must identify the construction work to which the progress payment relates and must indicate the amount of the progress payment that the claimant claims to be due. A payment claim may be served only within the period determined by or in accordance with the terms of the construction contract or the period of 12 months after the construction work to which the claim relates was last carried out, whichever is the latest.

105 Under s 13(5), a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. However, that provision does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

106 Relevantly, ss 8 and 13 are contained within different parts of the Act. Section 8 appears in Pt 2, which is entitled “Rights to progress payments”, while s 13 appears in Pt 3, which is entitled “Procedure for recovering progress payments”.

107 Section 17 provides for a claimant to apply for adjudication of a payment claim in the event of a dispute. Section 21 provides for adjudication procedures. Section 22 provides that an adjudicator is to determine the amount of the

progress payment, if any, to be paid by the respondent to the claimant (**the adjudicated amount**) and the date on which the adjudicated amount became or becomes payable. Section 22(2) limits the matters that may be considered by an adjudicator in determining an adjudication application. The adjudicator's determination must be in writing and must include the reasons for the determination. Under s 25, an adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

108 The regime provided for in Pts 2 and 3 does no more than ensure that a person is entitled to receive and is able to recover a progress payment under a construction contract. Further, the adjudication procedure provided for is clearly intended to offer a simple and quick method of resolution of disputes between parties to construction contracts.

109 The provisions of the Act have effect despite any provision to the contrary in any construction contract, and any provision of an agreement under which the operation of the Act is or is purported to be excluded, modified or restricted is void (s 34). However, under s 32, subject to that restriction, nothing in Pt 3 affects any right that a party to a construction contract may have under that contract, may have under Pt 2 of the Act in respect of that contract, or may have, apart from the Act, in respect of anything done or omitted to be done under the construction contract.

110 Further, nothing done under or for the purposes of Pt 3 affects any civil proceeding arising under a construction contract. However, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal must allow for any amount paid to a party to the contract under or for the purposes of Pt 3 in any order or award it makes in such proceedings and may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

### **The Primary Judgment and the Appeal**

111 The primary judge identified three issues raised by the Principal in relation to the Adjudication Determination. First, it contended that the Adjudicator made a

jurisdictional error because he wrongly determined that a reference date within the meaning of s 8(2) of the Act had arisen in respect of work that was the subject of the impugned claim for a progress payment, whereas, in fact, no such reference date had arisen. The second and third issues raised were decided against the Principal, and are not relevant to the appeal.

112 In relation to the first issue raised, the primary judge concluded that the Adjudication Determination exhibited jurisdictional error. His Honour concluded that the expression “a person referred to in section 8(1)” as used in s 13(1) means a person who satisfies all the requirements of s 8(1), namely, a person who has undertaken to carry out construction work under a construction contract “in respect of which a reference date has arisen”. His Honour held that s 13 seeks to identify a person who is entitled to serve a payment claim by reference to the whole of s 8(1) and that, although the existence of a reference date was not a characteristic of a person identified in s 8(1), it was an essential characteristic of the rights of such a person that are created by s 8(1) and “a person referred to in s 8(1)” is a person having those rights.

113 The primary judge considered that, on the proper construction of the Act, the question whether a reference date has arisen under a construction contract raises a jurisdictional fact that, if there was a challenge to the adjudication determination, would have to be determined by the Court. His Honour concluded that the existence of a reference date was an essential requirement triggering the right to make a payment claim which, in turn, triggered the Adjudicator’s jurisdiction.

114 The notice of appeal raises three grounds. First, the Contractor contends that the primary judge erred in holding that a purported payment claim is not a valid payment claim for the purpose of s 13(1) of the Act if it is served by a person who is not, in law, entitled to a progress payment within the meaning of s 8(1) of the Act. The Contractor says that a construction contractor is entitled to make a payment claim if it “claims to be” entitled to a progress payment. Whether or not a construction contractor is so entitled is a matter for an adjudicator, not a court on an application for judicial review.

- 115 The second ground is that the primary judge erred in holding that the accrual or occurrence of any “reference dates” would be brought to an end if the Contractor terminated the Contract for repudiation by the Principal. The Contractor contends that termination by the Contractor for repudiation by the Principal did not deprive the Contractor of the right to make a payment claim for construction work performed up to the date of termination.
- 116 The third ground is that the primary judge erred in holding that the accrual or occurrence of any “reference dates” would be suspended if the Principal validly exercised a right under the Contract to take out of the Contractor’s hands the whole of the work remaining to be completed. The Contractor asserts that the Principal’s act of purporting to take the whole of the work remaining to be completed out of the Contractor’s hands did not deprive the Contractor of the right of making a payment claim for construction work performed up to the date of the “take out”.
- 117 In addition, the Principal, by notice of contention, raises the question of whether the purported payment claim that is the subject of the proceedings was served in contravention of s 13(5) of the Act and was therefore not a valid payment claim. The Principal accepts that that contention could only be maintained if it is assumed that there was no longer any reference date upon which a claim could be founded.

### **Consideration**

- 118 Clearly, the Contractor was a person who had undertaken to carry out construction work under the Contract within the meaning of s 8(1). The Contractor also claims to be entitled to a progress payment. Accordingly, by the operation of s 13(1), the Contractor was entitled to serve a payment claim on the Principal, who was the person under the construction contract who is or may be liable to make the payment. However, the next question is whether the Contractor is actually entitled to a progress payment. That depends upon whether there is a reference date, as defined in s 8(2), on and from which the Contractor is entitled to a progress payment.
- 119 I have had the advantage of reading in draft form the proposed reasons of Ward JA. I agree with her Honour that, for the reasons proposed, the words “on

and from each reference date” specify the time on and from which a payment claim can be made. They do not specify characteristics of the person who is or claims to be entitled to a progress payment. The Contractor was a person who fell within the terms of either s 8(1)(a) or s 8(1)(b) and who claimed entitlement under the Contract to progress payments in the sense contemplated by the Act. Whether that claim was valid, including whether it was valid because it was supported by a reference date, is not a jurisdictional fact.

120 That conclusion is further supported by the context of the Act, in particular the fact that Pt 2 (which includes s 8) is concerned with entitlements to progress payments, while Pt 3 (which includes s 13) is concerned with the procedure by which such an entitlement may be claimed. In those circumstances, it would be surprising if Parliament had intended that the reference to “section 8(1)” in s 13(1) pick up not only the characteristics of a claimant outlined in ss 8(1)(a) and 8(1)(b) but **also** the fact of arrival of a reference date referred to in the opening words of s 8(1) (and pursuant to the definition in s 8(2)), which fact is essential to entitlement to a progress payment. I also agree with Sackville AJA that the construction of ss 8 and 13 advanced by the Principal is difficult to reconcile with both the language and context of the Act and the swift mechanism intended by the Act for the resolution of disputes relating to progress payments.

121 In relation to the notice of contention, I agree with Ward JA that there is no reason to conclude that the impugned payment claim was a second or subsequent claim “in respect of” the 8 October 2014 reference date, when the claim covered work under the Contract after that date and the earlier claim was not in evidence.

122 In the light of the above conclusions, it is not necessary to consider grounds 2 and 3 of the notice of appeal. It follows that the appeal should be allowed. I agree with the orders proposed by Ward JA.

123 **SACKVILLE AJA:** I have had the advantage of reading the judgment of Ward JA. I am grateful to her Honour for recounting the facts and the arguments advanced by the parties.

124 I agree with the orders proposed by Ward JA and generally with her Honour's reasons. However, I wish to add some observations of my own.

### Background

125 The proceedings were commenced by the first respondent (**Southern Han**). It sought a declaration that an adjudication determination made by the second respondent (**the Adjudicator**), in respect of a payment claim made on 4 December 2014 (**December Payment Claim**) by the appellant (**Lewence**) was void. The Adjudicator made the determination on 30 March 2015 pursuant to s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**BCI Act**). The Adjudicator determined that Southern Han was liable to Lewence in the sum of \$1,221,051.08.

126 Oddly enough, Southern Han did not seek relief in the nature of certiorari quashing the decision of the Adjudicator. It might have sought such relief either on the ground that the determination was made on the basis of an error of law on the face of the record<sup>1</sup> or that it was affected by a jurisdictional error. Southern Han's Amended Technology and Construction List Statement (**Statement**) appears to assume that if Lewence's payment claim was not made in accordance with the requirements of the BCI Act, the adjudication determination was void. The correctness of this assumption was not debated on the appeal.

### Ground 1 of the Notice of Appeal

127 Ground 1 of the Notice of Appeal challenges the primary Judge's holding that a person who claims to be entitled to a progress payment (**the claimant**) does not make a valid claim for the purposes of s 13(1) of the BCI Act, unless the claimant satisfies all the requirements of s 8(1) – that is, unless the claimant is a person who has undertaken to carry out construction work under a construction contract (or supply related goods and services) in respect of which a reference date has in fact arisen.<sup>2</sup> In my view, the outcome of the appellant's challenge is determined by the tolerably clear language of ss 8 and 13 of the BCI Act, when read in the context of the legislation as a whole.

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<sup>1</sup> Supreme Court Act 1970 (NSW), s 69.

<sup>2</sup> *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd* [2015] NSWSC 502 (Primary Judgment) at [30]-[31] (Ball J).

128 Section 8 of the BCI Act is in Pt 2, which is headed “Right to progress payments”.<sup>3</sup> Section 8(1) creates an entitlement to a progress payment on and from each “reference date under a construction contract”. The statutory entitlement is created in favour of 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.”

129 The term “reference date”, in relation to a construction contract, is defined in s (8)(2) of the BCI Act. The amount of a progress payment to which a claimant is entitled in respect of the construction contract is specified in s 9. That amount is ordinarily to be “calculated in accordance with the terms of the contract”.<sup>4</sup> Under s 10 of the BCI Act, the due date for making a progress payment under a construction contract is determined by the terms of the contract, subject to express provisions that apply to certain kinds of construction contracts.

130 A claimant who satisfies either sub-par (a) or sub-par (b) of s 8(1) of the BCI Act must demonstrate that the reference date has arrived in order to gain the benefit of a determination that a progress payment is payable. Part 2 of the BCI Act is not concerned, however, with the procedure by which a claimant may establish his or her entitlement to a progress payment. That is the province of Pt 3 of the BCI Act.

131 Section 13 of the BCI Act is in Pt 3, which is headed “Procedure for recovering progress payments”. As the heading to Pt 3 implies, s 13 establishes a procedure for a person “who is **or who claims to be entitled** to a progress payment” to enforce the claimed entitlement. The claimant may serve a payment claim on the “person who under the contract is **or may be liable** to make the payment”.

132 It is a strained interpretation of the introductory words to s 13(1) of the BCI Act (“[a] person referred to in section 8(1) who is or who claims to be entitled to a progress payment”) to read them as referring to a claimant who not only

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<sup>3</sup> The heading to Pt 2 is taken to be part of the BCI Act: Interpretation Act 1987 (NSW), s 35(1). The same heading is used for s 8 itself. However, the heading to a particular provision does not form part of the legislation: Interpretation Act 1987 (NSW), s 35(2).

<sup>4</sup> BCI Act, s 9(a).

satisfies either sub-par (a) or sub-par (b) of s 8(1), but who is also able to show that the relevant reference date under the construction contract has in fact arrived. The very point of the procedure created by Pt 3 of the BCI Act is to establish a mechanism, in the event of a dispute, for an adjudicator to determine precisely that question.

133 A claimant can only obtain a determination as to his or her entitlement to a progress payment by invoking the procedure established by s 13. It is true that s 13 imposes limitations on the availability of the procedure. It is also true that if the limitations apply, a claimant will not be able to enforce the entitlement to a progress payment. For example, a claimant must serve a claim within the periods specified in s 13(4) of the BCI Act and a claimant cannot serve more than one payment claim in respect of each reference date (s 13(5)). But the fact that the statutory procedure is subject to these limitations does not detract from the conclusion that Pt 2 of the BCI Act creates a claimant's substantive entitlement to a progress payment, while Pt 3 creates the procedural mechanism for enforcing that entitlement.

134 This conclusion is consistent with the object of the BCI Act, stated in s 3:

“(1) The object of this Act is to ensure that any person who undertakes to carry out construction work[http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s5.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s5.html) - construction work (or who undertakes to supply related goods and services[http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s6.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s6.html) - related goods and services) under a construction contract[http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - construction contract is entitled to receive, and is able to recover, progress payments[http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - progress payment in relation to the 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**[http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - progress payment **is by granting a statutory entitlement** to such a payment regardless of whether the relevant construction contract[http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - construction contract makes provision for progress payments[http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - progress payment.

(3) The means by which this Act ensures that a person is able to recover a progress

payment [http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - progress payment is by establishing a procedure that involves:

- (a) the making of a payment claim [http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - payment claim by the person claiming payment, and
- (b) the provision of a payment schedule [http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - payment schedule by the person by whom the payment is payable, and
- (c) the referral of any disputed claim to an adjudicator [http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - adjudicator for determination, and
- (d) the payment of the progress payment [http://www5.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/s4.html](http://www5.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/s4.html) - progress payment so determined.”

(Emphasis added.)

135 It can be seen that the language of s 3(2) and (3), respectively, reflects the different work performed by Pt 2 and 3 of the BCI Act. Part 2 “matches” s 3(2), in that it grants the statutory entitlement to a progress payment. Part 3 “matches” s 3(3) in that it establishes the procedure by which a claimant is able to recover a progress payment from the person liable to make the payment.

136 The conclusion I have expressed is also consistent with the structure and evident purpose of Pt 3 of the BCI Act. If s 13(1) is construed as I think it should be, it permits a claimant to serve a valid payment claim if the following conditions are satisfied:

- the claimant has undertaken to carry out construction work under a construction contract (or has undertaken to supply goods and services under the contract);
- the claimant is or claims to be entitled to a progress claim under the construction contract; and
- the claim is served on the person who, under the construction contract concerned, is or may be liable to make the payment.

137 Section 14 provides for the person on whom the claim is served (**respondent**) to reply to the claim by providing a payment schedule. Depending on whether a schedule is provided and the contents of the schedule, the respondent may

become indebted to the claimant. For example, s 14(4) states that if a claimant serves a payment claim and the respondent does not provide a payment schedule within a specified time:

“the respondent becomes liable to pay the claimant amount to the claimant on the due date for the progress payment to which the payment claim relates”.

138 In the event of a dispute, s 17(1) of the BCI Act permits the claimant to apply for an adjudication of a payment claim (that is, a claim under s 13(1)), subject to observing certain procedures. Section 22(1) provides that the 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.”

139 In making the determination the adjudicator is to consider only the matters specified in s 22(2) as follows:

- “(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.”

140 In order to determine whether a respondent must make a progress payment, it may be necessary to decide whether the reference date has arrived. If so, an adjudicator has the authority to make that decision. If in making the determination, the adjudicator commits an error of law on the face of the record, the determination is subject to judicial review pursuant to s 69 of the *Supreme Court Act 1970* (NSW). If the adjudicator’s determination is affected by a jurisdictional error, judicial review will also be available.<sup>5</sup>

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<sup>5</sup> *Kirk v Industrial Court of New South Wales* [2010] HCA 1; 239 CLR 531.

141 In the absence of a challenge on these grounds, a determination by the adjudicator that a respondent is required to pay an amount obliges the respondent to pay that amount to the claimant within five business days of service of the determination.<sup>6</sup> Should the respondent not comply, the claimant may obtain an adjudication certificate from the authorised authority.<sup>7</sup> Such a certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.<sup>8</sup> However, the enforcement of a determination through a summary procedure in the BCI Act does not affect the right that any party to the construction contract has under the contract or in respect of anything done or omitted to be done under the contract.<sup>9</sup>

142 Part 3 of the BCI Act thus establishes a summary procedure for determining whether a claimant satisfies the criteria governing the statutory entitlement to a progress payment. The procedure includes a mechanism to ensure that the claimant can swiftly enforce a favourable determination. The statutory scheme enables a claimant to recover quickly the progress payments to which it is entitled, yet otherwise leaves undisturbed the parties' contractual rights. The construction of ss 8 and 13 of the BCI Act advanced by Southern Han is not only difficult to reconcile with the statutory language, but adds a layer of uncertainty and complexity to a legislation intended to achieve certainty and to operate simply. Accordingly, its construction of the legislation should not be accepted.

### **The Notice of Contention**

143 The Notice of Contention filed by Southern Han seeks to uphold the decision of the primary Judge on the ground that:

“The purported payment claim the subject of the proceedings was served in contravention of [s] 13(5) of the [BCI Act] and therefore was not a valid claim.”

144 This ground was not raised in Southern Han's Statement filed in the Equity Division proceedings. On the appeal, both parties accepted that the point had been argued before the primary Judge, but there was disagreement as to whether his Honour resolved or even addressed the point. As I have noted,

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<sup>6</sup> BCI Act, s 23(2).

<sup>7</sup> BCI Act, s 24.

<sup>8</sup> BCI Act, s 25.

<sup>9</sup> BCI Act, s 32

Southern Han's submissions appear to assume that if the payment claim was served in contravention of s 13(5) of the BCI Act, the adjudicator's determination is void, independently of whether Southern Han succeeds in the opposition to Ground 1 in the Notice of Appeal.

145 The primary Judge referred briefly to s 13(5) of the BCI Act, but I do not read his judgment as deciding that the payment claim contravened that provision or that the adjudicator's determination was rendered invalid by reason of any such contravention. It is therefore necessary to address the Notice of Contention.

146 Southern Han's written submissions acknowledge that its argument that the payment claim contravened s 13(5) of the BCI Act depends on establishing that no reference date arose after 8 October 2014. Indeed its argument appears to be that since there was no reference date after the October reference date and Lewence had already made a claim in respect of that date, it follows that the December Payment Claim was "in respect of" the October reference date, within the meaning of s 13(5) of the BCI Act.

147 As has been seen, Southern Han's first challenge to the validity of the Adjudicator's determination is based on the argument that the payment claim was not valid unless a reference date, after the October reference date, had arrived before the claim was made. That challenge has been rejected, with the consequence that the existence of a reference date after the October reference date was a matter for the Adjudicator to determine (as he did). As I have also noted, Southern Han has not sought judicial review of the Adjudicator's determination.

148 In the absence of a challenge to the Adjudicator's determination, I do not think that it is open to Southern Han to allege that the payment claim was lodged in contravention of s 13(5) of the BCI Act on the ground that no post-October reference date had arisen. The existence of a reference date was a matter for the adjudicator to determine. If the existence of a post-October reference date was not a precondition to the Adjudicator's exercise of jurisdiction to make a determination and if there is no application for judicial review of that determination, I do not think that Southern Han can impugn the adjudicator's determination by contending that no post-October reference date had arisen. In

effect, Southern Han seeks to repeat its unsuccessful jurisdictional fact argument but in a different form.

149 In any event, in my view the assumption underlying Southern Han's contention is not correct. Section 13(5) of the BCI Act provides that a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. Section 13(5) does not say that a payment claim is deemed to be in respect of a past reference date if the payment claim is lodged after the last reference date but before another reference date has in fact arisen. The omission of any language to this effect is not surprising, once it is accepted that it is the adjudicator who is entrusted with the task of determining whether the claimant is entitled to a progress payment and, if necessary, whether the relevant reference date has arrived. The inquiry required by s 13(5) is therefore simply whether the payment claim is "in respect of" a reference date for which a payment claim has already been made.

150 Southern Han's contention that Lewence's December Payment Claim was served in contravention of the prohibition in s 13(5) of the BCI Act has to take account of s 13(6). This provision states that s 13(5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

151 There are difficulties in determining the inter-relationship between s 13(5) and (6). Whatever those difficulties, it seems clear enough that a payment claim relating to work done after a particular reference date is not a claim "in respect of" that reference date merely because the payment claim includes some amounts that were the subject of a previous claim. The scanty evidence relied on by Southern Han goes no further than suggesting, at most, that Lewence's December Payment Claim may have incorporated some small amounts that were the subject of a previous payment claim, but were not resolved by that claim. That evidence is insufficient to establish that the December Payment Claim was served on Southern Han in contravention of s 13(5) of the BCI Act.

### **Other Grounds**

152 I agree with Ward JA in her analysis of Grounds 2 and 3 of the Notice of Appeal.

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**Amendments**

29 September 2015 - Typographical error at [51]