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Status quo Returns: the High Court Weighs in on Reference Dates and the NSW Court of Appeal Clears up the Grounds for Challenge

Australia Real Estate and Construction Alert

By Sandra Steele and Michael O'Callaghan

The decisions of the High Court in *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52 and the New South Wales Court of Appeal in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 were delivered on 21 December 2016 and 23 December 2016 respectively and provide some certainty in respect of the importance of reference dates and the grounds upon which an Adjudicator's determination can be challenged.

The High Court's Decision in Southern Han

The Southern Han decision confirms that the existence of a reference date under a construction contract is a necessary pre-condition to the making of a valid payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act).

Southern Han and Lewence were parties to a contract for the construction of an apartment block at Breakfast Point in Sydney. The contract made provision for Lewence to make payment claims on the 8th day of each calendar month for work completed up to the 7th day of the same month (referred to as the "reference date" under the SOP Act). A reference date is a date when a party becomes entitled to make a payment claim (either determined in accordance with the terms of a construction contract or, if a construction contract makes no express provision, a date determined in accordance with the applicable security of payment legislation).

On 27 October 2014, Southern Han took all of the work remaining to be completed under the contract out of Lewence's hands. Lewence treated Southern Han's conduct as a repudiation of the contract and elected to terminate. Under the terms of the contract, if works were taken out of Lewence's hands, Southern Han's payment obligations were to be suspended. On 4 December 2014, Lewence served a document on Southern Han, purporting to be a payment claim under the SOP Act, for work carried out under the contract up to 27 October 2014 (i.e. for works carried out from the last reference date (8 October 2014) to the date the contract was terminated). The matter proceeded to adjudication and Southern Han contended that the Adjudicator did not have jurisdiction to determine the Adjudication Application on the basis that the payment claim was invalid because it was not made in respect of an available reference date. The Adjudicator determined that the payment claim was valid and that monies were payable to Lewence.

Southern Han challenged the Adjudicator's determination in the Supreme Court of New South Wales, arguing that the determination was void because Lewence's payment claim was not valid under the SOP Act because it was not made in respect of an available reference date.

At first instance, the Court held that the payment claim was void and ordered that the Adjudicator's determination be set aside. Lewence appealed the decision. The NSW Court of Appeal upheld the appeal in reversing the decision and finding that the existence of a reference date was not a precondition to the making of a valid payment claim under the SOP Act. This decision was met with surprise in the building and construction industry as it went against the established status quo. The case then proceeded to the High Court.

The High Court held by unanimous joint judgment that the reference in section 13(1) of the SOP Act to a *"person referred to in s 8(1) who is or who claims to be entitled to a progress payment"* required the existence of a reference date under a construction contract, and within the meaning of section 8(1), as a pre-condition to the making of a valid payment claim – the status quo was restored. If a reference date was not available, any purported payment claim would be void.

The Court of Appeal's Decision in Shade Systems

The Shade Systems decision confirms that adjudication determinations made under the SOP Act may only be subject to judicial review when it is established that an adjudication determination is affected by a jurisdictional error of law. The decision provides a higher level of certainty for the building and construction industry by confirming that the scope for a Court to review adjudication determinations made under the SOP Act is confined to circumstances of jurisdictional error only. It is anticipated that this decision will be viewed positively by the building and construction industry and alleviate initial concerns of an increase in the number of adjudication determinations subject to non-jurisdictional error of law challenges. Confining the bases of challenge to jurisdictional errors of law only, may result in a decrease in applications to set aside adjudication determinations.

An Adjudicator will commit jurisdictional error when he or she purports to exercise a power beyond the power given to the Adjudicator under the SOP Act, or if an Adjudicator fails to comply with the "basic and essential requirements" of the SOP Act. For example, it would be a jurisdictional error for an Adjudicator to make a determination on the basis of materials not put before him or her by the parties. Conversely, non-jurisdictional errors of law refer to situations where an Adjudicator may make an error in interpreting the facts or law presented in the materials. For example, the misinterpretation of a time bar provision in a construction contract would be a non-jurisdictional error and not challengeable.

The decision confirms that the scope for the Court to review adjudication determinations made under the SOP Act is confined to circumstances of jurisdictional error only.

What This Means for you

By way of general reminder and incorporating some of the lessons learnt from Southern Han and Shade Systems:

- the existence of a reference date under a construction contract is a necessary pre-condition to the making of a valid payment claim. A Claimant should be confident that a reference date exists under its contract before bringing an adjudication application and should make submissions about it
- parties making payment claims should ensure that only one payment claim is submitted for each reference date in compliance with the Act
- no early payment claims – payment claims can only be made on and from reference dates

- where a dispute arises under a construction contract and a party contemplates suspension or termination, the timing of any proposed action should be considered in conjunction with the timeframes for reference dates arising under a construction contract
- the scope for the Court to review adjudication determinations made under the SOP Act is confined to circumstances of jurisdictional error only. An aggrieved party cannot seek to judicially review an Adjudicator's determination if the Adjudicator simply gets it wrong in fact or at law.

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