IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S199 of 2016

BETWEEN:

Southern Han Breakfast Point Pty Ltd (in liq)
ACN 155 283 239
Appellant

and

Lewence Construction Pty Ltd
ACN 155 305 507
First Respondent

Ian Hillman
Second Respondent

Australian Solutions Centre
Third Respondent

APPELLANT'S SUBMISSIONS IN REPLY

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Ground 2: The jurisdictional fact issue

1. The first issue in this appeal is whether the existence of a reference date is a jurisdictional fact.
2. The respondent directs the vast bulk of its submissions (**RS**) to the proposition that a payment claim can validly be served even if there is no reference date. It addresses the argument that the existence of a reference date is a jurisdictional fact for an adjudicator – that is, a fact the existence of which is essential to the making of a valid adjudicator's determination – in only two paragraphs at [102]-[103]. The contention in those paragraphs is that it would be illogical if a person could, absent a reference date, validly serve a payment claim, but an adjudicator could not validly determine that a progress payment was due.
3. There are two problems with this contention. The first is that it undermines the respondent's own argument: it suggests that if Parliament did not intend to permit an adjudicator to make a valid determination absent a reference date, then Parliament also did not intend a valid payment claim to be served absent a reference date. The second is that there is no illogicality in that position at all. There is no difficulty in the proposition that Parliament would intend to permit a decision-maker to *consider* whether to exercise a power while not permitting the decision-maker, having so considered the exercise of the power and if certain circumstances obtain, to exercise the power in a particular way. That was the point made by French CJ in the *Public Service Association Case* cited at [81] of the AS.
4. The respondent argues that the appellant should not be entitled to contend that the existence of a reference date is a jurisdictional precondition to the exercise of the power to make a valid determination under s 22(1). To the extent that the respondent suggests that this argument is not covered by ground 2 of the Notice of Appeal, that suggestion should not be accepted. Ground 2 (see **AB 419**) asserts: "The Court erred in concluding that the existence of a reference date to support a payment claim under the [Act] is not a jurisdictional fact (and that hence it is for an adjudicator under the Act to determine)." That ground on its face concerns the point in time at which an adjudicator is exercising power, not the point in time at which a payment claim is served. What an adjudicator adjudicates at that time is a payment claim: s 17(1). The appellant's point is that, absent a reference date to support such a claim, the adjudicator has no power to determine that there is an entitlement to a progress payment under s 22(1). That point is well covered by the ground.
5. The point was also in issue below. The appellant's pleading states: "The Plaintiff contends that as there were no reference dates available to the first defendant under the Act, the Second Defendant ("the adjudicator") had no jurisdiction to make a determination under the Act": **AB 12.16-18**. Further, under "Issues Likely to Arise", the appellant identified the following: "Whether the adjudicator committed a jurisdictional error by determining there were reference dates available under the Act": **AB 12.28-29**. In the Court of Appeal, the appellant relied upon cases in which the courts have acted on the premise that the existence of a reference date was for the Court to determine or where the identification of a reference date by the Court was an essential step in determining whether the adjudicator had exceeded his or her jurisdiction: eg *BM Alliance Coal Operations Pty Ltd v BGC Contracting Ltd* [2012] QSC 346, where Applegarth J made the comments referred to in paragraph 16 below (***BM Alliance***).
6. The s 22(1) and s 13(1) points are in truth both aspects of the same underlying contention – an adjudicator's determination is invalid if it was not supported by a valid reference date. That underlying contention was squarely pleaded by the appellant: see paragraphs 21(a) and (c) of

the Amended Technology and Construction List Statement (**AB 15**). That underlying contention was also squarely put on the special leave application: see [2016] HCATrans 173 at 291-296.[1]

7. The s 22(1) aspect of the appellant's question involves a pure question of law. The respondent correctly identifies no prejudice to it. Indeed, on the respondent's case, the s 22(1) aspect is wholly dispensed with by the reasoning on the s 13(1) aspect of the argument. The respondent advances no reason why this case is not an appropriate vehicle to decide the s 22(1) aspect of the argument: cf RS [97].

8. Even if attention is confined to the s 13(1) aspect of the argument, ground 2 should be allowed. The constructional arguments advanced at [57]-[77] of the appellant's submissions (**AS**) are all reasons why a reference date is a jurisdictional precondition to service of a valid payment claim.

9. The respondent's primary contention is that, absent a reference date, a valid payment claim can be served because s 13(1) permits service of payment claims by persons who only "claim" to be entitled to a progress payment: RS [28]-[29]. The answer to this contention is at AS [71]-[77]: Parliament's concern was to ensure that a payment claim could be served even if there was a dispute as to quantum; it was no part of Parliament's concern to ensure that those who could not have an entitlement to a progress payment be entitled to serve payment claims.

10. It is significant in this respect that the respondent fails altogether to deal with the appellant's argument at AS [83] that service of a payment claim gives rise to significant contingent rights. On the respondent's approach, an obligation to pay could arise (pursuant to s 14(4)) even if there is no entitlement under s 8(1): cf **AB 383 [43]**.

11. Contrary to the respondent's submissions at RS [23]-[27], the statutory phrase "a person referred to in section 8(1)" does not encompass persons who cannot have an entitlement to a progress payment because no valid reference date has arisen. The persons referred to in s 8(1) are persons who have "undertaken to carry out construction work, or ... to supply related goods and services under the contract" (emphasis added). The term, "the contract", is a reference back to the introductory words in s 8(1), which read "On and from each reference date under a construction contract ...". The term, "the contract", in s 8(1)(a) and (b) is thus a reference to a contract "under" which there is a reference date. There is no such contract if there is no reference date. The respondent's submissions at RS [26] obscure this point by omitting the relevant statutory language, "the contract".

12. The respondent appears to accept at RS [27] that a person cannot serve a valid payment claim if the person has not undertaken to carry out a relevant kind of work under "a construction contract" of the statutory kind. If that be so, then ground 2 should succeed – for there is no contract of the statutory kind if there is no reference date under it.

13. The respondent's submissions regarding legislative history at RS [30]-[43] also do not prove its point. The respondent emphasises that the Discussion Paper referred to "a person who has undertaken to carry out construction work or who has supplied related goods or services" – and from that the respondent suggests that that was the only class of persons which Parliament intended to refer to in s 13(1). However, on the respondent's logic, because the Discussion Paper did not refer to a construction contract, the existence of a construction contract would not be a jurisdictional precondition to the service of a valid payment claim. But the respondent accepts that there is a jurisdictional need for such a contract: RS [62]. The respondent's arguments regarding the Discussion Paper are an example of this Court's statement in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [74]: "little is to be gained by trawling through the extrinsic material with a fine gauge net".

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1 "We respectfully submit that an adjudicator does not have the power to award an amount where no entitlement at all arises because there is no – there is an absence of this central requirement, and we emphasise that the Act draws a distinction between the questions of the amount of the progress payment, which is solely a matter for the adjudicator, a valuation exercise, and questions of entitlement in the first place."

14. The respondent also submits that its contention is consistent with a statutory purpose of requiring a "statutory early warning": see RS [44]. The respondent's point is that recipients of payment claims should not be able to take jurisdictional objections to the claim. The respondent makes a similar point at [48]-[49], that the object of the Act is to implement a "pay now, argue later" scheme. These points prove are overbroad – they suggest, contrary to the respondent's concession at RS [62] that there should be no jurisdictional constraints on service of a payment claim. The real question for the Court is which facts are jurisdictional and which are not.

15. It is an error to attempt to construe the Act by reference to the facts of this case, as the respondent invites the Court to do at RS [51]-[54]. It is also an error to construe the Act by reference to "extreme examples and distorting possibilities", as the respondent invites with its analysis of milestone payments at RS [56]-[57]: cf *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [32]. See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [99].

16. The respondent disputes (at RS [64]-[67]) the appellant's submission at AS [59] that Parliament has relevantly drawn a line between questions of **entitlement** to a progress payment and questions of the **amount** of that payment. The respondent relies upon Applegarth J's statement in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at [66] that adjudicators are required to construe the terms of the contract, and disputes "are often attended with considerable complexity". There are two answers to this. First, it is undoubtedly correct that calculation of the amount of the progress payment (if any) pursuant to sections 9 and 10 can involve difficult, contentious issues; *John Holland* was such a case (concerning variations). Secondly, Applegarth J has elsewhere drawn a distinction between entitlement and quantification: *BM Alliance* at [6],[2] under the heading "The Scheme of the Act and 'jurisdictional error'": "In general terms, in a case in which the jurisdiction of the adjudicator to make a decision is engaged, the adjudicator is empowered to determine under s 26 of the Act the extent and value of construction work and related goods and services."[3] (Applegarth J has also held that the existence of a reference date is a jurisdictional matter: *Lean Field Development Pty Ltd v E & I Global Solutions Pty Ltd* [2014] QSC 293; [2016] 1 Qd R 30 at [15], referred to but not followed by the Court of Appeal in these proceedings: AB 386.22).

17. In response to RS [93], the key point is that the amendment to s 13(1) was in response to an argument of the type put at first instance in *Beckhaus Pty Ltd v Brewarrina Shire Council*: AS [74]. Contrary to RS [93], in the paragraph of the appellant's submissions in the Court below relied upon by the respondent, the appellant expressly stated that the Court of Appeal's decision ((2003) 56 NSWLR 576) "did not expressly deal with this matter and in any event the judgment post-dated the amendment to s 13(1)": fn 25.

Notice of Contention Ground 1(a): the contractual question on the assumption that the contract was not validly terminated

18. The issue raised by the Notice of Contention is whether the parties intended reference dates to continue to accrue after the appellant took the work out the respondent's hands. Nowhere in its submissions does the respondent properly attend to that question. Rather, it makes the same error as the Court of Appeal made on the termination assumption – by assuming that reference dates accrue unless some positive intention to the contrary can be discerned: see RS [111]. The error is that the Act creates no positive right to reference dates, such that the court's task is to discern a contractual intention to derogate from that right. The question is, instead, that stated in s 8(2), namely, whether the contract makes "express provision" with respect to the matter of reference dates.

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2 Overturned on other grounds, sub. nom., *BM Alliance Coal Operations Pty Ltd v BGC Contracting* [2015] 1 Qd R 228.

3 Section 26(1)(a) of the *Building and Construction Industry Payments Act 2004* (Qld) is relevantly analogous to s 22(1)(a) of the NSW Act.

19. The respondent's argument on this ground depends on reading qualifications into the word "payment" in cl 39.4 of the Contract [see **AB 68**]. The respondent reads "payment" as if it meant "some payments". There is no occasion to read limitations into the otherwise broad words of the Contract. This is particularly so once it is recalled that these provisions concern a defaulting Contractor – one who has committed a substantial breach of contract and has not shown cause.

20. The commercial purpose of cll 39.4 and 39.6 was correctly stated by the trial judge, Ball J, at **AB 346 [44]**: "Clause 39.6 provides for a reconciliation of the payments due by the parties when the work is complete. The suspended payments are included in that reconciliation. From a practical point of view, the retention of payments that would have been due but for the suspension provides a form of security to Southern Han in the event that the costs of completion are greater than the price Southern Han would have had to have paid if Lewence had completed the work itself. Any other interpretation involves a strained meaning of the words used and makes little commercial sense."

21. The use of the word "it" in cl 39.4 **[AB 68]** does no more than identify the time at which payments, including progress payments, become payable: cf RS [115]-[118].

22. The "doorknob" scenario relied on by the respondent at RS [119]-[121] is another of the distorting possibilities relied on by the respondent, this time in the context of contractual interpretation. At the outset, it can be noted that this scenario could only arise if the "doorknob" breach was a "substantial breach" for which the contractor had failed to show cause. Further, the scenario depends on reading the Principal's power to take out "part" of the work under cl 39.4 [**AB 67**] as permitting the Principal to take out any part of the work in its discretion, including parts of the work unrelated to any existing breach by the Contractor. That is a wholly uncommercial construction. The better view is that the power to take out part of the work applies where there has been a specific breach in respect of that part of the work, such as a wrongful suspension of that work for the purposes of cl 39.2(b)) [**AB 67**]. In that case, the Principal has a power to take out that part of the work and must "complete" it in accordance with cl 39.5 [**AB 68**]. Alternatively, there may be an implied term "to the effect that when the [Principal has] expressly stated or by [its] conduct showed that [it] did not intend to complete the works or when after a reasonable time [it] failed to re-start them, the bar on [its] liability to make payments to the contractors must have lifted": cf *Tern Construction Group Ltd v RBS Garages Ltd* (1992) 34 Con. LR 137 at 146. Either way, the risk of abuse hypothesised by the respondent disappears.

Ground 3 and Notice of Contention Ground 1(b): the contractual question on the assumption that the contract was validly terminated

23. The respondent's contention on ground 3 is that the Act permits reference dates to accrue under s 8(2)(a) even if the parties did not intend them to accrue. The respondent's argument assumes that Parliament intended to give courts an unregulated power of extrapolation – to discern a reference date that is "determined by or in accordance with the terms of the contract" even if it is not determined "under" the contract: see RS [127].

24. The respondent identifies no proper basis upon which a court could find that a reference date was determined "by or in accordance with" a contract in circumstances where the parties manifested no intention that that reference date arise. The role which the respondent proposes for the court appears to be one of speculation, ungoverned by legal principle. Such an intention should not be attributed to Parliament.

25. The respondent's argument does not, in any event, assist in supporting Ward JA's reasoning below: cf RS [130]-[131]. Her Honour asked whether reference dates continued to arise "under" the Contract [**AB 393**], not the question posited by the respondent.[4]

26. The respondent puts an alternative position at RS [132]-[136]. That alternative position makes the error identified at AS [88], namely, to assume that the Act gives some right to reference dates such that it is appropriate to ask whether the parties intended that the respondent "would ... be precluded from making a claim for a progress payment": see RS [132]. This reverses the common law position, which is that, upon termination, both parties are discharged from further performance *unless* the parties have provided in advance for such an event and stipulated to the contrary: see AS [92(c)].

27. The respondent contends that this would deprive a sub-contractor of its right to progressive payments if the sub-contractor accepted the principal's repudiation, thus permitting the Principal to take advantage of its own wrong: RS [135]. There are two answers to this argument. The sub-contractor would, ordinarily, retain its right to accrued reference dates, those being unconditionally acquired right. Further, upon termination, all rights and liabilities under the contract can be resolved in final proceedings.

28. The respondent advances no reason – whether of statutory construction or contractual interpretation – for the contention that a contractor will always have a right to at least one further claim following termination: RS [136].[5] The contention is mere assertion. Such a contention was correctly doubted by Peter Lyons J in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90 at [49]-[50]. In that case, his Honour also said (at [42]): "[t]he conclusion that a reference date does not occur after termination of a contract is, in my view, also consistent with the general nature of the payments for which provision is made in the *BCIP Act*, that is to say, payments which are of a provisional nature, made over the life of the contract."

Ground 4: the section 13(5) ground

29. The respondent mischaracterises the appellant's s 13(5) argument. The appellant does not contend that the Act deems a payment claim to be in respect of the most proximate reference date: cf RS [145]. The question is one of characterisation and is, therefore, multifactorial. In that multi-factorial analysis, the proximity of a reference date is relevant. The respondent does not appear to deny that proposition.

30. The respondent also does not address the basic point made by the appellant on this ground: that, absent an available reference date on 8 November 2014, the payment claim should be characterised as being with respect to the earlier date, 8 October 2014. So characterised, the claim is the very kind of claim which the respondent accepts the Act was intended to prohibit.

Dated: 4 October 2016

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4 The authorities relied upon at RS [126]-[128] are irrelevant to this issue. Further, all of them (except the last in footnote 73) concern the question of whether, in calculating the progress payment (s 9), the adjudicator is bound by the contract superintendent's valuation, to which the answer is "no". That question is far removed from the issues in this appeal.

5 This contention does not come within the scope of the respondent's notice of contention, but the appellant does not take the point.