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Supreme Court

New South Wales

Case Name:	Southern Han Breakfast Point Pty Limited v Lewence Construction Pty Limited
Medium Neutral Citation:	[2015] NSWSC 502
Hearing Date(s):	27 April 2015
Decision Date:	5 May 2015
Before:	Ball J
Decision:	See paragraphs 63 and 64 of this judgment.
Catchwords:	BUILDING AND CONSTRUCTION – adjudication determination – jurisdictional error – whether adjudicator committed jurisdictional error due to non-existence of a jurisdictional fact – Building and Construction Industry Security of Payments Act 1999 (NSW) s 8, s 13 – whether existence of a reference date is an essential requirement for a valid payment claim under the Act and consequently for the adjudicator's jurisdiction ADMINISTRATIVE LAW – natural justice – whether adjudicator denied natural justice to party due to failure to have due regard to submissions – content of duty to provide natural justice dependent on context – whether adjudicator determined dispute on a basis not advocated by either party
Legislation Cited:	Alghussein Establishment v Eton College [1988] 1 WLR 587; [1991] 1 All ER 267 Hill as Trustee for the Ashmore Superannuation Benefit Fund v Halo Architectural Design Services Pty Ltd [2013] NSWSC 865 Omega House Pty Ltd v Khouzame [2014] NSWSC 1837 Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2014]

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	NSWSC 1413 Photo Production Ltd v Securicor Transport Ltd [1980] AC 827l [1980] 1 All ER 556 Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168
Cases Cited:	Alghussein Establishment v Eton College [1988] 1 WLR 587; [1991] 1 All ER 267 Hill as Trustee for the Ashmore Superannuation Benefit Fund v Halo Architectural Design Services Pty Ltd [2013] NSWSC 865 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 827l [1980] 1 All ER 556 Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168
Texts Cited:	Second Reading Speech (New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6541)
Category:	Principal judgment
Parties:	Southern Han Breakfast Point Pty Limited ACN 155 283 239 (Plaintiff) Lewence Construction Pty Limited ACN 155 305 507 (First Defendant) Ian Hillman (Second Defendant) Australian Solutions Centre ABN 68 085 917 219 (Third Defendant)
Representation:	Counsel: S Goldstein (Plaintiff) S Robertson (First Defendant) Solicitors: CCS Legal Pty Limited (Plaintiff) Maddocks (First Defendant)
File Number(s):	2015/98617

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Publication Restriction: Nil

JUDGMENT

Introduction

1 By a summons filed on 2 April 2015, the plaintiff, Southern Han Breakfast Point Pty Limited (***Southern Han***), seeks a declaration that an adjudication determination dated 30 March 2015 made by the second defendant, Mr Hillman (the ***Adjudicator***), under s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (***the Act***) in respect of a payment claim made on 4 December 2014 by the first defendant, Lewence Construction Pty Limited (***Lewence***), is void. Southern Han also seeks other ancillary relief in respect of the determination.

Background

2 On or about 18 January 2013, Southern Han and Lewence entered into a contract substantially in the form of AS 4000-1997 General conditions of contract for the construction by Lewence of a 5 storey, 60 unit apartment block known as "Augusta Apartments" in Magnolia Drive, Breakfast Point for a contract price of $14,226,244.00 excluding GST.

3 Clause 37.1 of the contract provided that Lewence "shall claim payment progressively in accordance with Item 28". Item 28 provided in effect that progress claims were to be made on the 8th day of each month for work done to the 7th day of that month.

4 Clause 39.2 provided that if Lewence committed a substantial breach of the contract, Southern Han may "by hand or by certified post, give [Lewence] a written notice to show cause". Clause 39.4 provided:

> Principal's Rights
>
> If [Lewence] fails to show reasonable cause by the stated date and time, [Southern Han] may by written notice to [Lewence]:
>
> a) take out of [Lewence's] hands the whole or part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6; or
>
> b) terminate the Contract.

Clause 39.5 then relevantly provided that Southern Han must complete the work taken out of Lewence's hands.

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5 Clause 39.6 of the contract relevantly provided:

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

6 On 10 October 2014, Southern Han issued a show-cause notice under cl 39.2 of the contract. Lewence responded to that notice on 20 October 2014.

7 On 27 October 2014, Southern Han purported to exercise its rights under cl 39.4 and took the whole of the work remaining to be completed out of the hands of Lewence. Lewence treated that conduct as a repudiation of the contract and purported to accept the repudiation and terminate the contract. Southern Han did not accept that termination.

8 On 4 December 2014, Lewence purported to serve a payment claim for $3,229,202.50 described as "payment claim no 18". It is agreed that the payment claim related to work done by Lewence up to 27 October 2014, when the work was taken out if its hands.

9 On 18 December 2014, Southern Han served a payment schedule in response. According to the payment schedule Lewence had been overpaid by the sum of $64,909.67.

10 On 9 January 2015, Lewence lodged an adjudication application with Adjudicate Today. Mr Sean O'Sullivan was nominated as the Adjudicator although he subsequently withdrew his nomination on 13 February 2015. On 14 February 2015, Lewence then withdrew its adjudication application pursuant to s 26 of the Act and, on 17 February 2015, it lodged a new application with the third defendant, Australian Solutions Centre, which nominated the Adjudicator as the adjudicator of Lewence's claim.

11 On 26 February 2015, Southern Han lodged an adjudication response. Among other things, it submitted that the Adjudicator did not have jurisdiction because the payment claim was not a valid claim under the Act. The Adjudicator

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rejected that submission and, on 30 March 2015, the Adjudicator determined Lewence's claim in the sum of $1,221,051.08 including GST.

The issues

12 Southern Han takes issue with the Adjudicator's determination on three bases.

13 First, it submits that the Adjudicator made 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 payment claim no 18 whereas in fact no such reference date had arisen.

14 Second, Southern Han submits that the Adjudicator denied it natural justice because he determined a dispute concerning the return of retention moneys on a basis that had not been advocated by either party.

15 Third, Southern Han alleges that the Adjudicator denied it natural justice because he improperly sought to reverse the onus of proof and failed to have regard to submissions in evidence provided by Southern Han concerning the deduction of an amount of liquidated damages.

Jurisdictional error

16 The question whether the Adjudicator made a jurisdictional error turns on the correct construction of ss 8 and 13 of the Act.

17 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

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(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.

18 Section 13 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.

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***), and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(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.

19 Southern Han submits that a person who seeks to be paid a progress payment in accordance with the Act must satisfy the requirements of s 8, and that satisfaction of those requirements goes to the jurisdiction of the Adjudicator, since an adjudicator can only adjudicate a payment claim and a payment claim must, among other things, be a claim by a person referred to in s 8(1) – that is, a person who is or claims to be entitled to a progress payment on and from a reference date under a construction contract. In support of that submission,

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Southern Han relies on *Hill as Trustee for the Ashmore Superannuation Benefit Fund v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 865; *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413 at [39] and *Omega House Pty Ltd v Khouzame* [2014] NSWSC 1837 at [48].

20 In Southern Han's submission, there was no reference date that could support payment claim no 18. There was a reference date on 8 October 2014. However, Lewence had already served a payment claim in respect of that reference date and any further payment claim was ruled out by s 13(5). If the contract had been validly terminated as Lewence asserted, no reference date could arise under the contract following termination, since the determination of reference dates was governed by cl 37.1 of the contract and not s 8(2)(b) of the Act and it is plain that clause 37.1 did not survive termination: see *Patrick* at [38]; *Omega House* at [47]. On the other hand, if Southern Han was correct in its assertion that the contract had not been validly terminated but that it had exercised its contractual right to take over the work, then any right to a progress payment was suspended by cl 39.4a) of the contract and consequently no reference date could have arisen at least until a payment was due under cl 39.6.

21 Lewence, on the other hand, submits that a payment claim must meet the conditions set out in s 13 of the Act. A claim for payment is a valid payment claim for the purposes of that section if relevantly it is made by a person referred to in section 8(1) "who is **or who claims to be** entitled to a progress payment" (emphasis added). A person "who claims to be entitled to a progress payment" includes a person who claims to be entitled to a progress payment because a new reference date has arisen by reference to which the payment claim can be made, whether or not such a date has actually arisen. To hold otherwise would involve ignoring the emphasised words.

22 Lewence accepts that only one payment claim can be made in respect of the same reference date; and that a payment claim had already been made in respect of the 8 October 2014 reference date. However, payment claim 18 could not be characterised as a payment claim in respect of that reference

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date. That was so because, apart from anything else, the claim included a claim for work done after 8 October 2014. Consequently, it was a matter for the Adjudicator to determine whether a further reference date had arisen under the contract and whether the payment claim made by Lewence was in respect of that reference date. Southern Han is bound by the Adjudicator's determination on those issues.

23 Lewence accepts that the approach for which it contends is not supported by the decision in *Patrick* and *Omega House*. However, in its submission, those decisions proceeded on the false assumption – not challenged by any of the parties in those cases – that a reference date was intrinsic to a payment claim. In doing so, the decisions overlooked the words "who claims to be" in s 13(1) and consequently should not be followed.

24 According to Lewence, the interpretation for which it contends is supported by the purpose of the Act. The Act provides a mechanism by which disputes concerning the payment of progress claims can be resolved promptly so that contractors who have done work under a building contract are paid promptly for their work. If ss 8 and 13 of the Act have the meaning for which Southern Han contends there is a risk that the resolution of a payment claim could become bogged down in lengthy court proceedings concerning the question whether a reference date has arisen under the relevant construction contract. To take an example, if in this case Lewence had not purported to terminate the contract, the question whether a reference date had arisen after 8 October 2014 would depend on whether Southern Han had validly exercised its rights under cl 39.4. That would involve a factual enquiry concerning whether Lewence had committed a substantial breach of the contract, which could be lengthy. It is not difficult to think of other examples that make the same point.

25 In any event, Lewence submits that Southern Han has failed to establish that payment claim no 18 was not supported by a reference date. In its submission, Southern Han has not sought to demonstrate that it was entitled to take the building work out of the hands of Lewence. Consequently, it can only establish that no relevant reference date arose under the contract if it establishes both that there was no available reference date on the assumption that Southern

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Han was entitled to take the work out of the hands of Lewence and no available reference date on the assumption that Lewence had validly terminated the contract relying on Southern Han's conduct.

26 As to the former, if Southern Han was entitled to take the work out of the hands of Lewence, the contract remained on foot. Clause 39.4 permitted Southern Han to suspend payment but it did not prevent Lewence from making a claim for work that had already been done or the accrual of reference dates under the contract. As a result, a further reference date arose under the contract and it was a matter for the Adjudicator to determine what amount, if any, was payable on that reference date.

27 Moreover, according to Lewence, cl 39.4 only suspends payments due under cl 39.6. It does not suspend payments that had accrued before Southern Han purported to exercise its rights to take over the works. That interpretation of cl 39.4 is reinforced by cl 39.6, which provides for an adjustment based on the cost of completing the work compared to the costs that would have been incurred if Lewence had completed the work. But that adjustment is to the value of future work, not the value of work done before Southern Han exercised its rights. Consequently, what must be suspended is the right to payments in respect of future work, not payment in respect of work that has already been done.

28 As to the latter, if the contract was validly terminated, it was validly terminated because of Southern Han's breach. Unlike the contracts in *Patrick* and *Omega House*, there was no express provision in the contract which made it clear that the right to progress payments for work done under the contract ceased on termination of the contract, and it would be odd to construe the contract in that way. To construe the contract in that way would permit Southern Han to take advantage of its own wrong.

29 In my opinion, the position advanced by Southern Han is the preferable one.

30 The expression "[a] person referred to in section 8(1)" as used in s 13(1) is ambiguous. It may mean any person who meets the requirements set out in either s 8(1)(a) or s 8(1)(b) – that is, any person who has undertaken to carry out construction work under a construction contract or to supply related goods

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and services under such a contract. Alternatively, it may mean a person who satisfies all the requirements of s 8(1) – that 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 arisen.

31 Of those two interpretations, I prefer the latter. Section 13 seeks to identify a person who is entitled to serve a payment claim by reference to the whole of s 8(1) and not simply s 8(1)(a) and s 8(1)(b). Although the existence of a reference date is not a characteristic of the person identified in s 8(1), it is an essential characteristic of the rights of such a person that are created by s 8(1) and "[a] person referred to in section 8(1)" is a person having those rights.

32 Lewence submits that the point made in the previous paragraph cannot be reconciled with the words "or who claims to be" in s 13. Those words must mean a person who claims to have the rights conferred by s 8(1) – which includes a person who claims that a reference date has arisen under the construction contract. Unless those words are interpreted in that way, they are redundant.

33 There are, however, difficulties with that submission.

34 The words "or who claims to be" were introduced to the Act by the *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW). Prior to that amendment, s 13(1) read:

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

35 The explanatory note for the relevant clause of the Bill introducing the amendment simply states that the amendment to s 13(1) was made to make it clear that "a payment claim may be made by a person who claims to be entitled to a progress payment". However, it is apparent from the introduction of the words "[a] person referred to in section 8(1)" at the same time that the amendment was not intended to permit all persons who claimed to be entitled to a progress payment to make a claim. Only those identified in section 8(1) are entitled to do so.

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36 A person may claim to be entitled to a progress payment but not actually be entitled to such a payment for a variety of reasons. The claim may not be under a construction contract. The work in respect of which the claim is made may not be for construction work (or for related goods and services). A reference date may not have arisen under the contract. The work may not have been done. The claimant may not be entitled to be paid for that work under the contract (because, for example, the contract is a lump sum contract and the work is not properly work done under a variation to the contracted-for work). The claimant may already have been paid for the work. No doubt, there are other examples. Contrary to Lewence's submission, it is not correct to say that the words "or claims to be" have no work to do if the phrase "[a] person referred to in section 8(1)" is interpreted broadly to include a person having the right to make a progress claim because that person satisfies the requirements of s 8(1). The words "or claims to be" would still cover cases where, for example, a person claims to have done work that has not been done, or claims to be entitled to be paid for work where no such entitlement exists or where payment has already been made.

37 Section 8 of the Act sets out the essential requirements that a person must satisfy in order to become entitled to a progress payment. However, it is concerned with that right at an abstract level. Whether a claimant is actually entitled to a payment depends on the particular work that has been done and the terms of the relevant construction contract. Section 13 must be interpreted as saying that a person who meets the essential requirements set out in s 8 is entitled to make a progress claim and other sections of the Act set out how that claim is to be resolved. The 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 section 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.

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38 The point made in the previous paragraph is supported by the Second Reading Speech for the Building and Construction Industry Security of Payment Amendment Bill. The then Minister for Public Works and Services, Mr Iemma, said this of the changes introduced by the Bill:

> The changes are not only designed to prevent abuses of the intent of the legislation by respondents. We recognise the potential for claimants to abuse also the intent of the legislation. Consequently, the bill restricts claimants to one payment claim under the Act in respect of each reference date. Reference dates will be either dates specified in the construction contract for making progress claims or, if not stated, the last day of each month of the year. … (Second Reading Speech (New South Wales, *Parliamentary Debates,* Legislative Assembly, 12 November 2002, 6541)).

39 It is apparent from this passage that the requirement of a reference date and the requirement that only one claim can 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 are to be prevented.

40 It is true that, on the interpretation which I prefer, the question whether a reference date has arisen under a construction contract raises a jurisdictional fact which, if there is a challenge to the adjudicator's determination, will have to be determined by the Court. In many cases, that will depend on the correct construction of the construction contract. But in some, it may raise difficult factual questions. But that is not a reason for treating the factual question as a jurisdictional one. Other issues may, on occasion, raise difficult factual questions going to an adjudicator's jurisdiction. For example, in the case of an oral contract, there may be difficult factual questions concerning whether a contract has come into existence and who the parties to the contract are. But that does not mean that the existence of a construction contract should not be treated as a jurisdictional one. Rather, the question must be whether the legislature intended to leave the relevant facts to be determined by the adjudicator or whether the existence of those facts is a pre-condition to the adjudicator's jurisdiction. In my opinion, it is apparent from the legislation and the second reading speech that the existence of a reference date is an essential requirement triggering the right to make a payment claim, which in turn triggers the adjudicator's jurisdiction. It is an important mechanism by which respondents to payment claims are protected against the administrative burden of dealing with multiple claims.

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41 It follows that Southern Han is entitled to succeed if it can establish that there was no reference date that supported payment claim no 18.

42 I accept Lewence's submission that, in the circumstances of the case, Southern Han must establish that no reference date arose whether or not Lewence was entitled to terminate the contract. Southern Han suggested, albeit tentatively, that Lewence had elected to terminate the contract and that it was bound by that election so the only question was whether a reference date arose following termination. However, in my opinion, the doctrine of election has no application in this context. The question is whether as a matter of objective fact a reference date arose under the contract after 8 October 2014 by reference to which payment claim no 18 could be made. Southern Han could have sought to make out that case by proving that it was entitled to take over the work and that no reference date arose following the exercise of that right. However, it chose not to do that. As a result, it was left with the possibility that the contract had been validly terminated. It had to establish that no reference date could have arisen in that eventuality as well.

43 However, in my opinion, no reference date arose in either eventuality.

44 The effect of cls 39.4 and 39.6 of the contract is clear. When cl 39.4 says that Southern Han may by written notice "suspend payment until it becomes due and payable pursuant to subclause 39.6" that must mean suspend all payments under the contract. It cannot mean suspend all future payments under the contract since, apart from the possibility of a payment following the reconciliation required by cl 39.6, there will be none if Southern Han takes over the whole of the work.

45 "Reference date" is relevantly defined in s 8(2) of the Act to mean "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 … under the contract". However, if the contract says that all payments are suspended there can be no date under the contract on which a claim for a progress payment may be made and consequently no reference date.

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46 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.

47 On the other hand, if the termination was valid, it seems to me that that brought an end to the accrual of reference dates.

48 In this case, whether the term of the contract concerning the accrual of reference dates survived termination depends on the correct construction of the contract: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; [1980] 1 All ER 556. There is nothing in the contract to suggest that that question should be answered differently depending on which party exercises the right of termination; and, in the absence of an express term dealing with that question, it is difficult to see why such a term should be implied.

49 Lewence points to the principle of construction that a contract should not be construed so as to permit a party to take advantage of his or her own wrong, citing *Alghussein Establishment v Eton College* [1988] 1 WLR 587; [1991] 1 All ER 267. As Lord Jauncey of Tullichettle (with whom other members of the House of Lords agreed) pointed out in that case, the principle is often applied where, for example, a lessee seeks to rely on its own default as a reason for why the lease is void or terminated, although it is plain that it is of general application. However, the principle has no application in this case. This is not a case where Southern Han seeks to rely on its election to take over the work as giving rise to some other right. Rather, it involves the working out of the consequences of an election by Lewence to terminate the contract as a result of the purported exercise of that right.

50 The relevant right in this case is a right under cl 37.1 to "claim payment progressively in accordance with Item 28" and Item 28 states that a claim may be made on the 8th day of each month for work done to the 7th day of that

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month. The contract contains no express provision relating to the continued operation of cl 37.1. However, cl 39.10 provides:

> If the Contract is terminated … 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.

In the light of that clause, it is difficult to see how the parties could have intended that right conferred by cl 37.1 to continue following termination of the contract. It makes little sense for Lewence to have a continuing right to claim payment progressively under the contract when the contract is terminated and any obligation to perform work under the contract has come to an end. Rather, what the parties anticipated was that they were to be left to the rights and remedies set out in cl 39.10. At the time of termination, the only right to a progress payment was the right that had accrued on 8 October 2014. However, that right had already been exercised.

Natural justice

51 Having regard to the conclusions I have reached, it is not strictly necessary to deal with Southern Han's case that the Adjudicator breached the rules of natural justice. However, in the event that I am wrong, I should say something about it.

52 As I have said, Southern Han submits that it was denied natural justice for two reasons.

53 The first concerned the Adjudicator's conclusions in relation to the return of retention moneys. The question relevantly was whether Lewence was entitled to the return of retention moneys of $740,431.95 in circumstances where Southern Han had taken over the work and Lewence had purported to terminate the contract, with the result that practical completion under the contract would never be achieved.

54 It is apparent from the submissions addressed to the Adjudicator that the principal issue between the parties was whether Southern Han was entitled to withhold the retention amount pending the reconciliation under cl 39.6. It was Lewence's contention that there was nothing in the contract that permitted it to do so. On the other hand, Southern Han submitted that there was nothing in

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the contract that entitled Lewence to a return of the retention money before the reconciliation under cl 39.6 was complete. It pointed to other clauses that dealt specifically with the return of the retention moneys on termination or completion of the contract in other circumstances – such as cl 40, which provided for the return of retention moneys in the event the contract was frustrated, and the provisions that provided for the return of the retention moneys once the works had reached Practical Completion. In its submission, the contract would have provided specifically for the return of retention moneys in advance of completion of the reconciliation required by cl 39.6 if that is what the parties had intended. Implicit in this submission was a submission that the Superintendent was to take into account the retention moneys in carrying out the reconciliation required by cl 39.6.

55 In the alternative, Southern Han submitted that Lewence was not entitled to a return of the retention moneys because the work had not reached Practical Completion.

56 In rejecting Southern Han's submissions, the Adjudicator said:

> 204. Clause 39.6 of the contract states: "*When work taken out of the Contractor's hands has been completed, the Superintendent shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor.*"
>
> 205. The Claimant asserts Clause 5.4 of the Contract (Reduction and release) is the clause that specifically deals with the release of retention and nothing in Clause 5.4 links the ability of the Respondent to continue to withhold security until the Superintendent has made the assessment as detailed in Clause 39.6.
>
> 206. As at least 50% of the total retention money is withheld for a period of 12 months after the completion of the work I am not satisfied retention money forms part of "*…the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor.*"
>
> 207. Clause 39.6 of the contract makes no specific mention of withholding retention.
>
> 208. The second reason is "*… the Works had not reached Practical Completion at the date of Payment Claim 18 so that Lewence Construction has no right to the return of any retention monies at that date.*" The Claimant rightly states this position is untenable. As the contract has been either 'taken-over' by the Respondent under Clause 39.4 or terminated by the Claimant, Practical Completion can never be achieved.

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> 209. The Respondent has not convinced me the above two reasons provide an entitlement to withhold retention money.

57 In my opinion, the Adjudicator fairly addressed Southern Han's arguments. He rejected the first because he did not think that retention moneys were part of the moneys that the Superintendent was required to take into account under cl 39.6 and, in doing so, rejected a premise that was implicit in Southern Han's submission.

58 The Adjudicator expressly addressed Southern Han's second argument in para [208]. The Adjudicator must be understood as saying that the submission was untenable because it would lead to the absurd conclusion that the retention moneys would never be paid because Practical Completion could never be achieved.

59 Neither reason involved a denial of natural justice. The reasons given addressed the specific submissions that Southern Han had put.

60 The second basis on which Southern Han says it was denied natural justice concerned the Adjudicator's determination in relation to liquidated damages.

61 In considering this submission, the context is significant. The amount of liquidated damages in dispute was $48,000 in a claim for $3,229,202.50. There were a substantial number of issues. Southern Han's submissions to the Adjudicator were 117 pages in length and in addition the Adjudicator had been given approximately 14 folders of documents. The content of the obligation to give the parties natural justice must take account of those matters and the short time available to the Adjudicator in which to make a determination: see *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 at [142] per McDougall J.

62 It is not easy to follow Southern Han's submissions to the Adjudicator on liquidated damages. It appears that its contention was that the Superintendent had certified liquidated damages of $29,000 in connection with progress claim 17 and then a further $19,000 in a progress certificate that was not before the Court but that appears to have been issued after termination. Southern Han also submitted that the date for Practical Completion was 9 September 2014 and that the Adjudicator should reject EOT claim 15 for a further 36.5 days for

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reasons set out in a section of its submissions concerned with "Time Based Issues", which themselves are not easy to follow. The Adjudicator dealt with these submissions by saying:

> 213. The Respondent has failed to provide any evidence in support of the claim that delays between 10 September and 2 December 2014 were caused by the Claimant.
>
> 214. It should be noted that the contract came to an end on either 28th or 29th November 2014 making the claim for delays up to the 2 December 2014 not possible.
>
> 215. I am not satisfied the Respondent has provided sufficient supporting to justify such a claim. [sic]
>
> 216. I find in favour of the Claimant.

63 The reasons given by the Adjudicator are very brief. However, given the amount involved, the other issues that he had to deal with and the material that he had to address, it is not surprising that the Adjudicator chose to deal with the matter in the way that he did. It cannot be inferred from what he said that he did not consider Southern Han's submissions. If he made an error concerning who bore the onus of proof, that error did not involve a denial of natural justice.

Orders

64 Southern Han is entitled to a declaration in the terms that it seeks. It should also be entitled to its costs.

65 The parties should bring in short minutes of order to give effect to this judgment. If they can agree on the form of orders, I will make them in chambers. Otherwise, the matter should be relisted by arrangement with my Associate to deal with any outstanding issues.

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