IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2017 00163

WESTBOURNE GRAMMAR SCHOOL — Plaintiff

v

GEMCAN CONSTRUCTIONS PTY LTD & ORS — Defendants

JUDGE:	ROBSON J
WHERE HELD:	Melbourne
DATE OF HEARING:	2 October 2017
DATE OF JUDGMENT:	26 October 2017
CASE MAY BE CITED AS:	Westbourne Grammar School v Gemcan Constructions Pty Ltd
MEDIUM NEUTRAL CITATION:	[2017] VSC 645

BUILDING AND CONSTRUCTION – Application for certiorari by the principal under a building contract – Determination by an adjudicator in favour of builder under an adjudication under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether 'show cause' validly given to builder – Whether s 48 of the *Building and Construction Security of Payment Act 2002* (Vic) rendered void a clause entitling the principal to take over the balance of the works and to suspend builder's entitlement to payment under the contract – Section 48 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) not enlivened – *Southern Han Breakfast Points Pty Ltd v Lewence Constructions Pty Ltd* [2016] HCA 52 applied – Whether show cause notice validly specified the date and time in which the builder was to show cause – Application granted.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Andrew	Champions Lawyers
For the Defendants	Mr L J Connolly	Maddocks Lawyers

HIS HONOUR:

Introduction

1 A builder, Gemcan Constructions Pty Ltd (Gemcan), obtained an adjudication determination under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the Act) that it be paid by the principal, Westbourne Grammar School (Westbourne), $241,073.33 for work done under a construction contract between Gemcan and Westbourne. Westbourne seeks an order quashing the adjudication on the grounds of jurisdictional error by the adjudicator and errors of law on the record.

2 For the following reasons, the Court allows the application and quashes the adjudication.

The Background facts

3 On 25 July 2016, Gemcan was engaged by Westbourne under a contract, to construct alterations to Westbourne's Williamstown campus (the contract).

4 Under clause 39 of the contract, if Gemcan committed a substantial breach of the contract, Westbourne could by hand, or by certified post, give to Gemcan a written notice to show cause.

5 Clause 39 of the contract provided that a show cause notice was to state, inter alia, that Gemcan was required to show cause, in writing, as to why Westbourne should not exercise a right conferred by subclause 39.4, and the date and time by which Gemcan must show cause, which should not be less than 7 clear days after the notice was received by the Contractor.

6 Subclause 39.4 provided that if Gemcan failed to show reasonable cause by the stated date and time, Westbourne could by written notice to Gemcan, take out of Gemcan's hands the whole or part of the work remaining to be completed and suspend payment to Gemcan until such payment becomes due and payable pursuant to subclause 39.6 (which, in substance, was after the work taken out of the hands of Gemcan was completed), or terminate the contract.

7 On 14 February 2017, Westbourne purported to serve on Gemcan a show cause notice (the first show cause notice).

8 In the first show cause notice, Westbourne contended that Gemcan was in substantial breach of the contract in that Gemcan had failed to proceed with work required under the contract with due expedition and without delay, and that Gemcan had substantially departed from the construction program, and for other alleged breaches of the contract.[1]

9 On 27 February 2017, Westbourne served on Gemcan a written notice asserting that Gemcan had not shown reasonable cause as to why Westbourne should not exercise a right referred to in clause 39.4 of the contract, and that Westbourne took out of the hands of Gemcan, the whole of the work remaining to be completed. Westbourne did not terminate the contract. The parties have described this notice as the first "takeout notice."

10 Gemcan asserted that the first show cause notice had been invalidly served. As it is, Westbourne did not rely thereafter on the first show cause notice and the subsequent first takeout notice.

11 On 24 March 2017, Westbourne purported to serve on Gemcan a second show cause notice in similar terms to the first show cause notice. Gemcan contended that the second show cause notice was invalid as it was not addressed to the address specified in the contract; it did not include a statement of the date and time by which Gemcan was to show cause; and it did not give Gemcan sufficient time to respond.

12 On 3 April 2017, Westbourne served on Gemcan a second purported takeout notice.

13 On 3 April 2017, Gemcan's solicitors, Maddocks, wrote to the solicitors for Westbourne, Champion Lawyers, responding to the second show cause notice and the second purported take out notice, taking the objections referred to above.

14 On 4 April 2017, Westbourne purported to serve on Gemcan a further show cause

[1] CB 287-289.

notice (the third show cause notice) in similar terms to the second show cause notice.

15 On 10 April 2017, Maddocks wrote to Champion Lawyers, responding to the third show cause notice stating, amongst other things, that Westbourne had already taken all of the works under the contract out of the contractor's hands and Gemcan had demobilised from the site on 3 April 2017. The letter stated that in the circumstances, Westbourne was not entitled to issue a further show cause notice. Gemcan submitted that "the further show cause notice is invalid and not capable of curing defects in the earlier show cause notices and on the basis of which the School unlawfully took the works out of [Gemcan's] hands."[2]

16 On 12 April 2017, the school served its third take out notice under clause 39.4 of the contract (the third take out notice)[3] relying on Gemcan's failure to show cause in response to the third show cause notice.

17 On 2 May 2017, Gemcan served on Westbourne a claim for payment for work done under the contract, being claim no 8, a "payment claim" under the Act.[4] The claim was for $430,229.69. The Superintendent under the contract, Strategic Project Management Pty Ltd, emailed Gemcan asking for a breakdown of the variation amount ($219,539.13) claimed in claim no 8.[5]

18 On 3 May 2017, Gemcan emailed the Superintendent attaching claim no 8 with the inclusion of the variation breakdown page.[6] On 16 May 2017, the Superintendent served on Gemcan by email a "Payment Schedule," provided under s 15 of the Act, in relation to the payment claim dated 2 May 2017, and served by email on 2 May 2017. The Payment Schedule stated that the amount Westbourne proposed to pay

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2 CB 351; 10 April 2017 letter.

3 CB 357-359.

4 CB 361-366.

5 CB 367.

6 CB 369-377.

was "Nil."[7]

19 The email sent by the Superintendent further stated that the amount which Westbourne proposed to pay was less than the claimed amount because the payment claim was not a valid payment claim, as the obligation to make payment under the relevant contract had been suspended and, as a consequence, there was no relevant reference date in respect of which a payment claim could be made.

20 On 30 May 2017, Gemcan applied for an adjudication pursuant to s 18(1)(a)(i) of the Act with respect to claim no 8. Gemcan claimed $391,117.90 excluding GST.[8] Mr David Francis, a solicitor in NSW, accepted the nomination as the adjudicator by the Resolution Institute, an authorised nominating authority.

21 On 7 July 2017, Mr Francis published his determination of the payment claim, referred to as the payment claim dated 3 May 2017, being inclusive of the additional information concerning the variations. His determination was amended on 14 July 2017.[9] The adjudicator determined that Westbourne should pay Gemcan $241,973.33. The adjudicator found that the reference date to which the claim of 3 May 2017 was referable was 30 April 2017. He determined 30 June 2017 to be the due date for payment of the payment claim dated 3 May 2017.

22 On 28 July 2017, Digby J gave leave to Westbourne to file and serve an amended originating motion substantially in the form provided by Westbourne's solicitors to Gemcan's solicitors on 27 July 2017. The amended originating motion sought: an order by way of certiorari to quash the adjudication; a declaration that the adjudication was void; and, an injunction to restrain Gemcan from seeking an adjudication certificate under the Act based on the adjudication determination and commencing proceedings to enforce the adjudication.

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7 CB 395.

8 CB 405-439.

9 Exhibit MFI D2.

23 On 18 July 2017, the matter came on before Almond J. By consent, the Court ordered that until the final determination of the proceeding, Gemcan was to be restrained from obtaining an adjudication certificate under the Act. Westbourne was also ordered to pay into its solicitors' trust account the sum of $268,488.33 and the adjudicator's fees together with interest, to be held until the determination of this application or by agreement between Westbourne and Gemcan.

24 The matter has come on before me for hearing. In its statement of claim, Westbourne relied on five grounds. Ground 3 of the statement of claim was abandoned during the hearing and has not been dealt with in these reasons.[10] The remaining four grounds are as follows.

25 First, Westbourne contends that the adjudicator committed jurisdictional error, or alternatively erred in law, in determining that clause 39.4 of the contract was void pursuant to s 48 of the Act.

26 Second, that the adjudicator committed jurisdictional error, or alternatively erred in law, in finding that the second show cause notice was invalid and that therefore even if clause 39.4 of the contract was effective, Westbourne was not entitled to suspend payment under clause 39.4, and therefore a further reference date arose for the purposes of making a payment claim under the Act on 30 April 2017.

27 Thirdly, that the adjudicator committed jurisdictional error, or alternatively erred in law, in failing to take into account the third show cause notice and the third take out notice.

28 Fourthly, that the adjudicator erred in law in including in the adjudication determination amounts for variations which were disputed and therefore excluded amounts under s 10B of the Act.

29 Gemcan submitted that if I found that the first ground had not been made out, then I need not consider the second and third grounds. As it is, for the following reasons, I

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10 *Transcript of hearing, Westbourne Grammar School v Gemcan Constructions Pty Ltd* (3 October 2017) T101, L4-8.

have found the first ground has been made out and I have therefore considered the second and third grounds.

Ground 1 - section 48 of the Act

30 Westbourne submits that the adjudicator erred in concluding that insofar as clause 39.4 entitled Westbourne to suspend payment under the contract, the provision was void under s 48 of the Act.

31 Section 48 provides:

> **48 No contracting out**
>
> (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
>
> (2) A provision of any agreement, whether in writing or not–
>
> (a) under which the operation of this Act, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
>
> (b) that may reasonably be construed as an attempt to deter a person from taking acting under this Act–
>
> is void.

32 Gemcan argued that if clause 39.4 had the effect for which Westbourne contends, it would be void on the basis that it purports to exclude, modify or restrict the operation of the Act in contravention of s 48.[11]

33 Gemcan submitted that clause 39.4, read in conjunction with clause 39.6 purports to empower Westbourne, in certain circumstances, to 'suspend payment' to the contractor. Gemcan submits that this clause strikes at the core of the Act by purporting to suspend the contractor's statutory entitlement to be paid a progress claim for construction work performed. Gemcan submits that axiomatically, the clause's purported effect, is to "exclude", "modify" or "restrict" the operation of the Act.

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11 Exhibit MFI D2 [56].

34 The adjudicator referred to several cases where attempts to impose contractual preconditions on the right to submit a payment claim or to obtain payment were held to be contrary to the 'no contracting out' provisions of the equivalent legislation to s 48 of the Act in other states. The adjudicator referred to the NSW Court of Appeal decision in *Transgrid v Siemens*,[12] where Hodgson JA discussed the availability of certiorari and considered the operation of the Act within the meaning of s 34.[13]

35 The adjudicator made reference to Hodgson JA's decision at paragraph [54] in *Transgrid v Siemens*. It is possible that the adjudicator intended to refer to Hodgson JA's decision at paragraph [54] in *Minister for Commerce v Contrax Plumbing*.[14] In that case, Hodgson JA opined that a 'provision of a contract as to the determination of reference dates could be such as to restrict the operation of the Act within the meaning of s 34.'[15] His Honour said this was so, even though:[16]

> … the Act in s 8(2)(a) and s 9(a) expressly defers to such provisions. For example, if a contract provided for yearly reference dates, or provided that progress payments should be calculated on the basis of 1% of the value of work done, in my opinion such provisions could be so inimical to s 3(1), s 3(2) and s 8(1) as to be avoided by s 34. If, contrary to the first ground, cl 46 is a provision as to calculation, the relevant parts of cl 42 could still be seen as restricting the operation of the Act. In my opinion, it is preferable not to finally determine this question in a case where it is not necessary to do so.

36 The adjudicator said that neither party referred him to any caselaw directly on point. The adjudicator referred, however, to a decision of Anderson J of the Victorian County Court in *Newearth Constructions Pty Ltd v Scrohn Pty Ltd*,[17] where the

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12 [2004] NSWCA 395 ('*Transgrid v Siemens*').

13 The adjudicator also referred to: *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* & Ors [2015] QSC 218 ('*BRB Modular*'); *John Holland Pty Ltd v Coastal Dredging & Construction Pty Ltd Limited & Ors* [2012] QCA 150 ('*John Holland*'); *BHW Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC 214 ('*BHW Solutions*') and *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126 ('*Hutchinson v Glavcom*').

14 [2005] NSWCA 142 ('*Minister v Contrax*').

15 *Minister v Contrax* [54].

16 *Minister v Contrax* [54].

17 [2014] VCC 1735 ('*Newearth v Scrohn*').

defendant contractor exercised a contractual right under clause 1.10 of the contract which suspended payment of the contract. His Honour said:

> … section 48 of the Act prevents parties contracting out of the provisions of the Act. If clause 1.10 of the contract had the operation suggested by the (defendant principal) it is likely, in my view, that it would be void by reason of section 48.

37 The adjudicator concluded that in those circumstances, he considered that he was obliged to regard Anderson J's opinion as persuasive and to accept Gemcan's submission that clause 39.4 was void by virtue of s 48 of the Act.[18]

38 In my opinion, in so finding, the adjudicator fell into error. As explained below, his decision is contrary to the reasoning in the High Court's decision in *Southern Han Breakfast Points Pty Ltd (in liquidation) v Lewence Constructions Pty Ltd*.[19]

39 *Southern Han* concerned entitlements to make a payment claim under the NSW equivalent of the Act, *Building and Construction Industry Security of Payment Act 1999* (NSW) (the NSW Act). Southern Han, as principal, and Lewence, as contractor, had entered into a building contract on similar terms to the standard contract AS4000, a varied form of which is the form of contract between Gemcan and Westbourne.

40 In *Southern Han*, section 34 of the NSW Act (the equivalent of s 48 of the Victorian Act) was not argued during the trial or the appeals, nor discussed in the judgments of the trial judge, the NSW Court of Appeal or the High Court. The only reference to s 34 in the High Court's decision is where the Court was summarising the provisions of the Act. Nevertheless, in my opinion, the High Court's judgment makes clear why s 48 is not engaged in this case.

41 In *Southern Han*, the High Court examined the NSW Act.[20] The issue before the Court was whether the existence of a reference date under a construction contract

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18 Exhibit MFI D2 [60].

19 [2016] HCA 52 ('*Southern Han*').

20 See also *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119, where Santamaria, Beach and McLeish JJA address the purpose of the Act.

was a precondition to the making of a valid payment claim and whether such a reference date existed in the case before them.

42 Of particular significance was s 13(1) of the NSW Act in Part 3 that provided:[21]

> "Procedure for recovering progress payments"
>
> (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 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 is made under this Act.
>
> ….
>
> (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.

43 The Court noted that within the meaning of the NSW Act, a claim referred to in s 13 is a "payment claim"; the person by whom a payment claim is served is the "claimant"; the amount of the progress payment claimed to be due for construction work carried out, or for related goods and services supplied is the "claimed amount;" and the person on whom the payment claim is served is the "respondent."

The relevant facts

44 Southern Han and Lewence were parties to a contract for the construction of an apartment block in New South Wales.

45 On 10 October 2014, Southern Han gave Lewence a show cause notice. Then on 27 October, Southern Han gave Lewence a further notice purporting to exercise its right

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[21] The equivalent of s 14 of the Victorian Act.

under clause 39.4 to take out of Lewence's hands, the whole of the work remaining to be completed under the contract and suspended payment. Lewence treated the giving of that further notice as a repudiation of the contract by Southern Han and, on 28 October 2014, purported to accept the repudiation and terminate the contract.

46 Subsequently, on 4 December 2014, Lewence served on Southern Han a document which purported to be a "payment claim" for work carried out under the contract. The document complied with the formal requirements of s 13(2) of the Act,[22] but it did not nominate a reference date. It was not disputed that it claimed payment for work carried out by Lewence up to 27 October 2014, including for work carried out to 7 October 2014, which had been the subject of a prior payment claim served on Southern Han on or after 8 October 2014. Southern Han replied by providing a payment schedule to Lewence indicating that the scheduled amount Southern Han proposed to pay was "nil."

47 Lewence subsequently made an application for an adjudication. Southern Han argued that the adjudicator lacked jurisdiction to determine the application. This submission was rejected and the adjudicator purported to determine the application, and made a determination under the NSW Act as to the amount of a progress claim to be paid by Southern Han to Lewence.

48 Southern Han sought a declaration that the adjudicator's purported determination was void or alternatively, an order in the nature of certiorari under the *Supreme Court Act 1970* (NSW), quashing the purported determination so as to remove its purported legal effect.

49 Southern Han contended that the document that Lewence served on Southern Han on 4 December 2014, was not a valid payment claim under the NSW Act as it did not relate to a reference date, being a date under the contract when a valid payment claim could be made. Southern Han contended that the document served could not be a valid payment claim under the NSW Act as the events of 27 and 28 October 2014

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22 The equivalent of s 14 of the Victorian Act.

(referred to above) meant that no date for making a progress payment could have arisen under the contract after 8 October 2014.

50 The trial judge found that it was necessary for a reference date to have arisen under the contract as a precondition to the making of a valid payment claim under the NSW Act and, in turn, as a precondition to the making of a valid adjudication application and determination.

51 The trial judge went on to find that there was no reference date to support the purported payment claim of 4 December 2014. That finding of the absence of a reference date was made on alternative hypotheses, it being common ground between the parties that Southern Han could only succeed by establishing that there was no reference date on both hypotheses.

52 On the hypothesis that Southern Han had on 27 October 2014, exercised its right under clause 39.4 to take out of Lewence's hands the whole of the work remaining to be completed under the contract, the trial judge found that Lewence's right to make a progress claim under clause 37.1 was suspended by clauses 39.4 and 39.6. On the hypothesis that Lewence had, on 28 October 2014, accepted Southern Han's repudiation and terminated the contract, his Honour found that Lewence's only right to make a progress claim was the right which had previously accrued on 8 October 2014, and which had already been exercised.[23]

53 On appeal, the NSW Court of Appeal (Ward, Emmett, and Sackville JJA) held that the trial judge had erred, and that it was not a precondition for a valid payment claim to be made, that a reference date exist under the contract. Ward and Sackville JJA agreed with the primary judge that the right to a progress claim under the contract was suspended, but disagreed that the termination of the contract by Lewence prevented continuing reference to the contract for the purposes of determining Lewence's statutory right to a payment claim.

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23 *Southern Han* [33].

54 The High Court overturned the decision of the Court of Appeal and reinstated the orders of the trial judge.

55 The High Court,[24] in a joint judgement, reviewed the NSW Act, including noting that the provisions have effect despite any provisions to the contrary in any contract, referring to s 34, the NSW equivalent of s 48 of the Victorian Act.

56 The Court held that the accrual of a reference date is a precondition to making a valid payment claim.

57 After reviewing the history of s 13(1) of the NSW Act, the Court said:[25]

> That distinction drawn in Pt 2, between a present entitlement to a progress payment and the future ascertainment of the amount of the progress payment to which that present entitlement relates, explains the two-part description in s 13(1) of a person who is able to make a payment claim so as to trigger the procedure for recovery set out in Pt 3. The first part of the description – "[a] person referred to in section 8(1)" – refers to a person whom s 8(1) makes "entitled to a progress payment". The second part of the description – "who is or who claims to be entitled to a progress payment" – neither contradicts nor qualifies the first part of the description. The second part of the description rather recognises, consistently with s 9, that the amount of the progress payment to which that person is entitled might ultimately be ascertained, according to the procedure set out in Pt 3, to be less than the amount that the person claims to be due and might even be ascertained according to that procedure to be nothing.
>
> The construction of s 13(1) consonant with the structure of the Act is accordingly that advanced by Southern Han. The description in s 13(1) of a person referred to in s 8(1) is of a person whom s 8(1) makes entitled to a progress payment. Section 8(1) makes a person who has undertaken to carry out construction work or supply related goods and services under a construction contract entitled to a progress payment only on and from each reference date under the construction contract. In that way, the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1).

58 The Court said that "section 13(1) operates to require that each payment claim be supported by a reference date and s 13(5) operates to require that each reference date support no more than one payment claim."[26]

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24 Kiefel, Bell, Gageler, Keane and Gordon JJ.

25 *Southern Han* [60], [61].

26 *Southern Han* [62].

59 The Court held that the suspension of payment under clause 39 of the contract by Southern Han was a suspension of the totality of rights conferred and obligations imposed, in relation to payment by the principal under clause 37. The rights so suspended included Lewence's right to make a progress claim under clause 37 for work carried out up to the time of the work being taken out of its hands.[27]

60 On the second hypothesis that Lewence had terminated the contract, the Court held that Lewence's rights under the contract were limited to those already accrued before he terminated the contract, unless the contract provided for rights to survive after termination. The Court found that the rights under clause 37, for payment by the principal, did not survive termination.

61 The Court held that on either hypotheses, no relevant reference had accrued which entitled Lewence to lodge the payment claim, either under the terms of the contract between the parties or by reason of the termination of the contract.

62 The Court held that the contract made express provision for fixing the reference date in clause 37.1, thus s 8(2)(b) could have no application.[28] It was necessary for the contract between the parties to identify a reference date.

63 In substance the High Court held that the statutory rights under the NSW Act were only available to enforce contract rights. The NSW Act did not grant an independent right to payment; it was only a mechanism to enforce rights under the contract. In other words, the statutory rights depended on the accruing of a reference date under the contract.

64 The Court said:[29]

> That limitation implicit in the design of the Act explains the express temporal limitation in the opening words of s 8(1), by which a statutory entitlement to a progress payment exists only on and from each reference date. The reference date, defined for the purpose of s 8(1) in s 8(2), is the date for

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27 *Southern Han* [78].

28 *Southern Han* [73]; the equivalent of s 9 of the Victorian Act.

29 *Southern Han* [69]-[71].

> making a claim for payment of the whole or part of the amount contracted to be paid for work carried out or undertaken to be carried out, or for related goods and services supplied or undertaken to be supplied.
>
> The reference date for which s 8(2)(a) provides is a date set by contractual force as a date for making a contractual claim to be paid the whole or part of the contracted amount. The mention in s 8(2)(a) of "a date determined by or in accordance with the terms of the contract" is of a date fixed by operation of one or more express provisions of the construction contract. The mention is not of a date that is determined independently of the operation of the contract merely having regard to the contractual terms.
>
> The reference date for which s 8(2)(b) provides is applicable only where a construction contract contains no express provision for determining a date for making a contractual claim to be paid the whole or a relevant part of the contracted amount. Absent an express contractual provision for determining a reference date, s 8(2)(b) operates of its own force to provide a reference date for the purpose of s 8(1). In so applying, s 8(2)(b) fulfils the statutory promise in s 3(2) of granting a statutory entitlement to a progress payment regardless of whether the relevant construction contract makes provision for progress payments. The provision does not, however, alter the nature of a progress payment in respect of which a claim can be made.

65 The Court said that on the hypothesis that Southern Han had exercised its right under clause 39 to take the whole of the work remaining to be completed out of the hands of Lewence, clause 39.4 operated expressly to suspend payment (including for work already undertaken) until completion of the process for which clause 39.6 provided (i.e. completion of the works by the principal). The Court said that the commercial purpose of the suspension in the event of such a breach by Lewence, was, as the primary judge explained, to provide a form of security to Southern Han in the event that the costs of completion of the works taken out of Lewence's hands were greater than the amount Southern Han would have to pay, if Lewence completed the work itself. The Court said that commercial purpose would be undermined were clause 39.4 interpreted as suspending payment only for the work taken out of Lewence's hands.[30]

66 The Court added that as the suspension was capable of occurring only where there was a substantial breach of the contract, such a result was "hardly surprising."[31]

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30 *Southern Han* [76].

31 *Southern Han* [77].

67 Importantly for the case before me, the High Court decided, on the case before them, that the statutory right to enforce payment was dependent on the existence of a contractual right payment and a contractually specified reference date. In the circumstances of Southern Han, on the argument put by Southern Han, Southern Han in accordance with the contract had removed the reference date that Lewence sought to rely on in making a payment claim and the right to payment. Further, on Lewence's own case the contract, including the provision for the reference date and the right to payment, had been terminated.

68 As mentioned above, s 34 of the NSW Act[32] was not argued during the trial or the appeals. The only reference in the High Court's decision was in summarising the provisions of the NSW Act.

69 As discussed above, Gemcan submitted that clause 39.4, read in conjunction with clause 39.6, purports to empower Westbourne in certain circumstances to "suspend payment" to Gemcan and purports to suspend the statutory entitlement to be paid a progress claim for construction work performed. Gemcan submits that the suspension of payment must be void by reason of s 48 of the Act. Gemcan says the adjudicator's finding is consistent with the relevant case law.[33] Gemcan refers to the following cases.

70 In *Clarence Street v Isis*, Mason P said:[34]

> The right to a progress payment cannot be bargained away entirely (see s 34 which precludes contracting out). This appeal does not throw up any issue about the scope of s34.

71 In *Trysams v Club Constructions*, McDougall J said:[35]

> I do not think that the adjudicator's conclusion, that the contractual

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32 The equivalent of s 48 of the Victorian Act.

33 Referring to *Newearth v Scrohn*; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399, ('*Trysams v Club Constructions*'); *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448 ('*Clarence Street v Isis*').

34 *Clarence Street v Isis* [49].

35 *Trysams v Club Constructions* [65].

> provisions on which Trysams relied were void by operation of s34, is necessarily (or at all) inconsistent with the reasoning of the Court of Appeal in *John Holland*. On the contrary: if the contractual provisions had the effect of denying Club's entitlement to the retention fund, simply because no final certificate or special certificate had been issued, it might well be correct to say that those provisions restricted, or had the effect of restricting, the operation of the Act in relation to a final payment claim that included a claim for the retention sum.

72 As noted above, in *Newearth v Scrohn,* Anderson J said that if the operation of a clause of a contract, as it was therein suggested, had the effect of contracting out of the provisions of the Act, it is likely that it would be void by reason of s 48.

73 Despite these authorities, as explained by the High Court in *Southern Han*, the right to make a payment claim under the Act is premised on a contractual right to that claim. Further, such a contractual right must include a reference date.

74 In my opinion, what the Act does is to prevent the principal from refusing to pay on grounds such as claims that the work has not been properly done or has otherwise been done in breach of contract. The Act provides that those issues can be raised and resolved by the adjudicator for the purposes of enforcing the contractual right to payment. However, if under the terms of the contract a right to make a claim for a progress payment has been removed by suspending a reference date or the right to payment, then there is no contractual right of the builder's which the Act enables the builder to enforce.

75 If a reference date is removed under the terms of the contract, then the inability of the claimant to make a valid payment claim is due to the terms of the contract. The contractual term that took away the contractual right to make a payment claim is not a provision under which the operation of the Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of the Act. The Act only operates upon contractual rights as agreed between the parties. In those circumstances, the non-engagement of the Act is not due to any contractual term purporting to affect the operation of the Act. Rather, under the contract, the necessary entitlement to a payment by reference to a reference date does not exist or has been extinguished.

76 Accordingly, I find that s 48 is not engaged and the adjudicator erred in law in holding that it did.

77 That, however, does not resolve the issue between the parties as, if Westbourne had not validly suspended payment under the contract, then a contractual right to payment and reference date would have existed and the adjudicator would have had jurisdiction to determine the claim. Grounds 2 and 3 raise these issues.

Ground 2 - the second show cause notice

78 Ground 2 contends that the adjudicator committed jurisdictional error, or alternatively erred in law, in finding that the second show cause notice was invalid, and that therefore even if clause 39.4 of the contract was effective, Westbourne was not entitled to suspend payment under clause 39.4, and it therefore follows that a further reference date arose for the purposes of the Act on 30 April 2017.

79 As noted, the first take out notice and show cause notice is not relied on.

80 The adjudicator found that the second show cause notice was defective and could not be relied upon by Westbourne to issue the second take out notice, because the second show cause notice did not specify the date and time for showing cause.[36]

81 Clause 39.3 provides:[37]

> **39.3 Principal's notice to show cause**
>
> A notice under subclause 39.2 shall state:
>
> ….
>
> (d) the date and time by which Gemcan must show cause (which shall be not less than 7 clear days after the notice is received by the Contractor) and
>
> …

82 The second show cause notice stated:[38]

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36 Exhibit MFI D2 [81]-[83].

37 CB 179.

> You must show cause to the School by the expiration of 7 clear days after this notice is received by you.

83 Westbourne contended that the test as to what is required for a valid show cause notice is that required matters must be "reasonably comprehensible,"[39] "tolerably clear"[40] or "sufficiently specified, in a practical sense."[41] Westbourne submitted that the second show cause notice was validly served and sufficiently identified the date and time by which cause had to be given. As no response was given, Westbourne said that the service of the notice taking work out of the hands of Gemcan on 3 April 2017[42] was therefore effective.[43]

84 In the response to the second show cause notice, Gemcan contended in its solicitors letter of 3 April 2017, as follows:[44]

> The purported 'show cause' notice does not comply with clause 39.3(d) of the contract in that it does not state the date and time by which our client may show cause. Instead, it purports to specify a *timeframe* within which our client may 'show cause'. Even if the provision of the timeframe complied with clause 39.3(d) which, plainly, it does not, the timeframe given is less than the minimum time which the clause requires the School to give Gemcan to respond.

85 The adjudicator found that the date and time requirements of clause 39.3 were mandatory. He held that it was necessary to state the date and time as required by clause 39.3. He said:[45]

> Failure to specify the date and time in the notice means that the recipient of the notice does not known the latest time and date by which performance is required. The recipient may not know when the notice was received, especially if delivered to an accountant's office. I consider that Gemcan's

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38 CB 305.

39 *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 [154].

40 *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 [154].

41 *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 [160].

42 CB 332.

43 CB 802-3.

44 CB 339.

45 Exhibit MFI D2 [82].

> point about the drastic consequences which follow from a failure to show cause by the nominated date and time is well made and provides a rationale beyond the clear words of the text why the provisions of clause 39.3 should be regarded as mandatory.

86 Westbourne contends that the notice did comply with the requirements of clause 39.3(d).[46] In particular, Westbourne argues that the seven days began at midnight on the date the notice was received, so that Gemcan was required to show cause before the expiration of seven days thereafter. That is, if the notice was received on day 1, day 2 constituted the first of the seven days and Gemcan had to show cause before midnight on day 8. Westbourne said that it is a well-known canon of construction that contracts should be read to give effect to the provisions and to read them in a common sense business way.

87 Westbourne contended that the provision of a time frame within which the builder was to show cause is as matter of common sense quite consistent with the expressed words of clause 39.3.

88 Gemcan submitted that a common sense approach is not the appropriate test for construing mandatory requirements of the contract governing termination. Gemcan pointed to the drastic consequences to the builder if the works are taken out its hands, and submitted that the notice provisions must be strictly complied with.

89 In *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)*,[47] in addressing the legal requirements for a valid notice, and in particular the content of a show cause notice under a building contract that entitled the principal to take over the works or terminate the contract, Dixon J said:[48]

> *Hudson's Building and Engineering Contracts*,[49] state the general rule concerning modern contractual determination clauses that require written notice in one form or another at the time of determination of the contract in these terms:

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46 *Transcript of hearing*, *Westbourne Grammar School v Gemcan Constructions Pty Ltd* (2 October 2017) T61-63.

47 [2012] VSC 99 (*'Dura Constructions'*).

48 *Dura Constructions* [388].

49 12th ed., (2009) Sweet & Maxwell [8-045] (citations omitted).

> Express notice requirements are often in 'two tier' form … In every case the clause must be carefully considered and closely followed in all respects, both as to the contents and timing of the notices, but the courts will usually regard the notices as commercial documents, and the modern approach is to interpret notice clauses with regard to their commercial purpose (*Mannai Investments Co Ltd v Eagle Star Assurance).* Provided a reasonable recipient of the notice can be left in no reasonable doubt as to its meaning the form of words used will usually not be important. The contents of the notice then have to be matched against the relevant requirements in order to determine whether it meets them (*Trafford MBC v Total Fitness (UK) Ltd*). Applying this principle notices referring the reader to the applicable clause of the contract and identifying the default are generally likely to be sufficient (*Re Stewardson Stubbs & Collett Pty Ltd & Bankstown Municipal Council* see also *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd*). On the other hand, time limits or requirements will ordinarily require strict compliance, particularly those requiring continuation of a default for a specified period (*Eriksson v Whalley*). Particularly where a determination clause is conditioned on a number of different eventualities or defaults of the contractor, it is evident that any required preliminary notice should sufficiently identify the particular ground relied upon, if that is called for by the contract (and particularly where continuation of the default is made a condition of any second notice), but further detail, particularly in regard to a generalised ground like due diligence, will not usually be called for.

90 As is shown in the passage cited, the degree of information of the builder's conduct that must be provided to the builder in the show cause notice is treated differently to the compliance required where time limits or other such requirements are laid down.

91 *Hudson's Building and Engineering Contracts* provides that "[e]xact compliance with time limits for notices will usually be required, and will be treated as a condition precedent to a valid contractual termination."[50] In dealing with the formalities of notices, Hudson observes that the object of these clause is to protect the interest of the determining party, and not to convey some special protection or advantage on the defaulting party.[51] Similarly in this case, one might expect exact compliance to avoid any risk to the determining party in taking over the contract or terminating the contract.

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50 *Hudson's Building and Engineering Contracts* 13th ed., (2015) Sweet & Maxwell ('*Hudson's*') [8-039].

51 *Hudson's* [8-040].

92 There does not seem to be any doubt about the construction of the clause. The appropriate test to construction is set out in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[52] where French CJ, Nettle and Gordon JJ said:[53]

> The rights and liabilities of parties under a provision of a contract are determined objectively,[54] by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.[55]
>
> In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean.[56] That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.[57]

93 In this case, the question of what a reasonable business person would have understood the terms in clause 39.3(d) to mean is that the notice must state the date and time. In my opinion, the provision of information by which the builder could determine the date and time by making calculations based on when the notice was served does not comply with the contract.

94 The notice is of critical importance to both parties. The builder potentially may lose its right to payments under the contract. The principal wishes to achieve certainty that it can take over the works or terminate the contract. To work out the date and time the builder would need to make inquiries as to how and when the notice was received. The terms of the notice was designed to put beyond any doubt the time and date by which the builder had to show cause.

95 I find that the second show cause notice was invalid and the adjudicator did not fall

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52 (2015) 256 CLR 104 ('*Mt Bruce*'), 134.

53 *Mt Bruce* [46]–[53].

54 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 [35] ('*Electricity Generation*').

55 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (Action Nos 71 and 72 of 1981)* (1982) 149 CLR 337, 350 (citing *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995–6; and at 352. See also Sir Anthony Mason, "Opening Address" (2009) 25 *Journal of Contract Law* 1, 3.

56 *Electricity Generation*, [35].

57 *Electricity Generation*, [35].

into error in so finding.

Ground 2B-the third show cause notice

96 Thirdly, Westbourne submits that the adjudicator committed jurisdictional error, or alternatively erred in law, in failing to take into account the third show cause notice and the third take out notice.

97 On 4 April 2017, while reserving its rights in regards to the first and second notices, Westbourne served a third show cause notice. Westbourne contends that if the first and second notices were invalid, as submitted by Gemcan, then the third notice was valid. Westbourne says that beyond any argument, it put Gemcan on notice that it was required to show cause by 8.00AM on 12 April 2017. Gemcan failed to show cause nor did it purport to do so. Westbourne gave a further notice taking the work out of Gemcan's hands.

98 Gemcan submits that at the time that Westbourne served the third purported show cause notice on 4 April 2017, Westbourne had already purported to take the work out of Gemcan's hands[58] and consequently Gemcan's workforce had demobilised from the site on 3 April 2017.[59]

99 The third show cause notice specified a date and time by which Gemcan was required to show cause.[60] Gemcan contends that given that at the time Westbourne had already purported to take the work out of Gemcan's hands (and Gemcan had therefore demobilised from the site), the third show cause notice was invalid.

100 In response to the third show cause notice, Gemcan's solicitors wrote to Westbourne's solicitors and highlighted why Gemcan contended that the third show cause notice was invalid in circumstances where Westbourne had already taken over all of the works under the contract.

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58 Affidavit of Kieran Warrin dated 30 May 2017 [5] – [12].

59 Affidavit of Kieran Warrin dated 30 May 2017 [26].

60 Affidavit of Kieran Warrin dated 30 May 2017 [14].

101 The letter invited Westbourne to remedy the situation in stating:[61]

> In light of the School's actions, if it requires our client to provide information requested of it in your letter and in the most recent 'show cause' notice, the proper course is for it to confirm in writing that it withdraws both 'take out' notices, in which case our client will remobilise to site and continue progressing the works. If the School then considers our client to be in substantial breach, it may issue a valid 'show cause' notice, to which our client will respond. It is open to the School to then seek advice as to whether our client's response to a valid 'show cause' notice shows reasonable cause, and to take action accordingly.
>
> Please advise by 15 pm [sic] on Tuesday 11 April 2017 whether the School will withdraw its 'take out' notices.

102 Gemcan submits that the contract expressly contemplates that a show cause notice will be issued before Westbourne is to issue a notice under clause 39.4 of the contract purporting to take the work out of the contractor's hands. Gemcan submits that there is no power to "retrospectively" issue a show cause notice in circumstances where Westbourne has already taken the work out of the contractor's hands.

103 Turning to the adjudication, after considering the first and second show cause notices, the adjudicator considered the third show cause notice. The adjudicator referred to Gemcan's argument that, as Westbourne had already taken into its hands all of the works remaining, it was not entitled to issue a further show cause notice. The adjudicator said:[62]

> Westbourne submits that if the second show cause notice was invalid it must follow that it was not effective in taking work out of the hands of Gemcan. It is inconsistent, and simply wrong, to maintain on the one hand that the notice served 3 April 2017 was invalid but at the same time that it was effective to take all of the works under the contract out of Gemcan's hands. If the notice dated 3 April was ineffective it must follow that there was no bar to issuing a further show cause notice and no other basis alleged for contending that the third show cause notice was ineffective.

104 After this paragraph, the adjudicator then considered the various submissions and found that the first and second notices were invalid. He concluded, by referring to Gemcan's submission, that the deficiencies in the notices were best illustrated by the

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61 CB 351.

62 Exhibit MFI D2 [74].

fact a third show cause notice "was issued by Westbourne *after* having already taken the works out of Gemcan's hands and which, was delivered to the address for service specified under the contract and specified a date and time by which the Claimant was required to 'show cause'."[63]

105 The adjudicator then considered the arguments and concluded the show cause notices of 14 February 2017 and 24 March 2017 were defective and could not be relied on.[64] The adjudicator did not expressly state his findings with respect to the third show cause notice.

106 The adjudicator concluded:[65]

> Whether because clause 39.4 of the contract was void by virtue of section 48 of the Act, or because Westbourne did not validly suspend Gemcan's entitlement to payment under the contract, a further reference date arose for the purposes of the Act on 30 April 2017 and Gemcan's payment claim dated 2 May 2017 was not invalid for want of a reference date.

107 Westbourne submits that nowhere has the adjudicator made any finding or determination about the third notice. Westbourne submits that the adjudicator appears to have overlooked the third notice. Westbourne says that this is a serious oversight, because the third notice suspended payment under clause 39.4. Therefore, the adjudicator erred at law and committed jurisdictional error when he found that the payment claim was a valid payment claim.

108 Gemcan submits that the contention that the adjudicator "appears to have overlooked the third notice"[66] is incorrect. Gemcan submits that it can be inferred that the adjudicator considered the arguments articulated before him and accepted Gemcan's submissions. Alternatively, Gemcan says that if the adjudicator did not address the arguments, he did not fall into error as the third show cause notice was

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63 Exhibit MFI D2 [80] (adjudicator's emphasis).

64 Exhibit MFI D2 [83].

65 Exhibit MFI D2 [84].

66 Westbourne's outline of submissions [31].

invalid.[67]

109 In my opinion, it is apparent from the determination that the adjudicator did accept the submission that the third show cause notice was invalid as Westbourne had already taken possession of the works. I take the ground of objection to include that the adjudicator did not correctly address the validity of the third notice.

110 I find that the adjudicator erred, however, in finding by implication, that the third show cause notice was invalid and thus the third take out notice was invalid.

111 The third show cause notice stated that "[y]ou are required to show cause in writing why the School should not exercise a right referred to in subclause 39.4 of the Subcontract Conditions."[68] Clause 39.4 provides that:[69]

> If [Gemcan] fails to show reasonable cause by the stated date and time, [Westbourne] may by written notice to [Gemcan]:
>
> (a) take out of [Gemcan'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.

112 Assuming Westbourne had earlier purported to take out of Gemcan's hands the whole or part of the work remaining to be completed, it still had not exercised the right to suspend payment until it became due and payable pursuant to subclause 39.6, or to terminate the contract. Further, if it had unlawfully taken out of Gemcan's hands the work remaining to be completed, then in my opinion the third show cause notice could validate Westbourne's right to take the whole works remaining to be completed, out of Gemcan's hands.

113 In any event, what is clear, is that the third show cause notice still had work to do in that it could validate Westbourne taking out of Gemcan's hands the works

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67 *Transcript of hearing, Westbourne Grammar School v Gemcan Constructions Pty Ltd* (3 October 2017) T134-135.

68 CB 348.

69 CB 179.

remaining to be completed, enliven Westbourne's right to suspend payment or to terminate the contract.

114 As it is, as a result of the valid third show cause notice, Westbourne did validly take out of Gemcan's hands the works remaining to be completed, and suspend payment until it became due and payable pursuant to subclause 39.6 of the contract.

115 The adjudicator did not address the exercise of these rights under the contract and in my opinion, erred in finding, as, by implication, he did, that the third show cause and take out notices were invalid.

116 I therefore find that the adjudicator erred in law.

117 As discussed above, as the right to payment was suspended on 12 April 2017, the previously contractually determined reference date of 30 April 2017, was thereby extinguished, or the reference date did not accrue on 30 April 2017. When the payment claim was lodged, be it 2 or 3 May 2017, it was invalid as it did not relate to an accrued reference date and no moneys were due for payment to Gemcan to which the Act could apply.

Ground 4 - variations

118 In the circumstances, it is not necessary for me to consider the fourth ground which contends that the adjudicator wrongly included excluded variations in his determination.

Conclusion

119 I find the adjudicator's determination ought to be quashed. I will make orders accordingly. I will hear the parties on costs. I direct that Westbourne bring in short minutes of order.