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HIGH COURT RULING ON REFERENCE DATES

INTRODUCTION

Reference dates are the dates on which a payment claim can be made. Such dates are usually stipulated under contract and if not, can be calculated by reference to section 8(2) *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act').

The High Court ruled that the existence of a reference date is a precondition to making a valid claim under the Act in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52.

CASE SUMMARY

The construction contract between Southern Han Breakfast Point Pty Ltd ('Southern Han') and Lewence Construction Pty Ltd ('Lewence') was terminated on 28 October 2014. On 4 December 2014, Lewence issued a payment claim and Southern Han disputed its validity, arguing that it was invalid as no reference date arose after 8 October 2014 - the last reference date.

The dispute went to adjudication and Lewence was awarded $1.2 million. Southern Han sought to quash the adjudicator's determination by issuing court proceedings.

DECISION

The High Court ruled that reference dates are an essential precondition to making a progress payment. That is, if a payment claim is made without reference to a valid reference date, the claim will be invalid.

The Court stated that there was no valid reference date on two grounds:

1. The contract suggested that no reference dates arise after termination;
2. Since Southern Han suspended payment to Lewence under clause 39.4, Lewence was barred from making a progress claim under clause 37. This meant that no reference dates were available until the suspension concluded.

Since there were no reference date existed when the payment claim was made, the Court found that the claim was invalid and the adjudicator's decision was quashed.

CONCLUSION

The High Court have made it clear that the entitlement to progress payments depends on the existence of a valid reference date. Parties should ensure that the reference dates used to make payment claims have not been extinguished by termination, suspension of payment, or other contractual rights.

For more information

For more information on Security of Payment legislation contact our Principal Solicitor/ Director



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