

COURT TURNS "PRACTICAL COMPLETION" ON ITS HEAD

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The New South Wales Court of Appeal has recently considered the concept of "practical completion" in *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113. The decision is likely to have far reaching implications for many participants in the building and construction industry.

The decision found that practical completion under an amended AS4000 contract occurs on the date that the certificate of practical completion is issued (not the earlier date provided for in that certificate).

In effect, the decision means that the practice of 'back dating' or retrospectively certifying practical completion (which is common place in the industry) may be ineffective at law depending on the terms of the relevant construction contract. As many contracts use the same formulation as the practical completion provisions of this amended AS4000 contract, this decision is likely to have wide application.

The Court of Appeal held that:

- the achievement of practical completion depends upon the satisfaction of the superintendent as to the elements of the defined term
- state of satisfaction is effective when communicated by the issue of a certificate of practical completion (in effect, a party cannot 'know' whether practical completion has been reached until it receives the certificate of practical completion); and
- the date of practical completion evidenced by the certificate is the date of the certificate.

BACKGROUND

On 18 August 2015, Fairfield City Council (the **Council**) and Abergeldie Contractors Pty Ltd (**Abergeldie**) entered into a contract in the form of an amended Australian Standard AS 4000 (**Contract**).

The Contract provided that for the purposes of section 8(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) (i.e. the provision of the SOP Act used to determine reference dates under construction contracts), only two reference dates arose after practical completion. Abergeldie could only make two progress claims after practical completion as follows.

- Immediately after practical completion on the 28th day of the month.
- Within 28 days after the expiry of the last defects liability period under the Contract.

On 16 September 2016, Abergeldie wrote to the superintendent requesting that the superintendent issue a certificate of practical completion. The superintendent responded but did not issue a certificate of practical completion. On 28 October 2016, Abergeldie submitted a payment claim (**October Payment Claim**).

On 25 November 2016, the superintendent issued a document (**Certificate of Practical Completion**) certifying that practical completion of the relevant part of the works was achieved on 16 September 2016 (**Date of Practical Completion**). Shortly before receiving the Certificate of Practical Completion, Abergeldie submitted a payment claim (**November Payment Claim**) in substantially the same form as the October Payment Claim.

The Council responded to the November Payment Claim and scheduled an amount of \$NIL. In the payment schedule, the Council raised as a ground for non-payment that the November Payment Claim did not have a reference date. Abergeldie made an adjudication application under the SOP Act and the adjudicator determined that an amount was payable to Abergeldie by the Council.

The Council sought to quash the determination on the basis that there was no valid reference date to support the payment claim.

The matter came before Justice Ball of the New South Wales Supreme Court and the parties' positions were as follows.

- The Council contended that practical completion occurred on 16 September 2016 (i.e. the Date of Practical Completion certified in the Certificate of Practical Completion). The October Payment Claim had utilised the reference date "immediately after practical completion" and the November Payment Claim did not have a valid reference date.
- Abergeldie contended that the November Payment Claim had a valid reference date because practical completion did not occur until the date that the superintendent issued the Certificate of Practical Completion (i.e. 25 November 2016) (notwithstanding that practical completion had been 'back dated').

Justice Ball rejected Abergeldie's contentions and found that the Date of Practical Completion under the Contract depended on objective facts and, as such, occurred on the 'back dated' date. The November Payment Claim was therefore not a valid payment claim under the Act.

Abergeldie appealed. The Court of Appeal unanimously overturned Justice Ball's decision and found that the date of the Certificate of Practical Completion was the relevant date for determining when practical completion had been reached (i.e. 25 November 2016), rather than the 'back dated' date. It followed that the November Payment Claim had been validly issued (i.e. the payment claim had a valid reference date).

WHAT THIS MEANS FOR YOU

This decision has far reaching implications for participants in the building and construction industry, including:

- a party's right to submit a payment claim if the relevant construction contract specifies that a reference date is to be calculated by reference to "practical completion"
- the date of practical completion is ordinarily the trigger for a number of key risks (and obligations) in construction contracts, including:

- the defects liability period
 - liquidated damages
 - the responsibility and care of the works; and
 - the obligation to effect insurances for the works.
- the impetus on superintendents to promptly issue certificates of practical completion.

KEY CONTACTS



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