

## Article Information

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Service: Projects & Construction

Sector: Infrastructure

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## Determining the date of practical completion: Abergeldie Contractors Pty Ltd v Fairfield City Council

**The recent decision in Abergeldie Contractors Pty Ltd v Fairfield City Council [2017] NSWCA 113 concerned the identification of the date of practical completion under cl 34.6 of the AS4000 standard form contract but will have application to other forms of contracts as well. The case involved the review of an adjudicator's decision which was accepted at first instance by the trial judge.**

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*The Court relevantly found that the date of practical completion was the date on which the certificate of practical completion was issued. The Court rejected the respondent's argument that the date of practical completion was the date specified in the certificate as to when practical completion had been achieved. As such the payment claim was found by the Court to be valid. **Megan Calder, Partner** and **Emer Sheridan, Law Clerk** discuss.*

### Background

In August 2015, Fairfield City Council entered into an agreement with the contractor, Abergeldie Contractors ("the contractor"), to undertake major roadworks. The contractor was to make progress payment claims in accordance with the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act") and the parties agreed that the existence of a valid "reference date" was a necessary precondition for the service of a payment claim.<sup>1</sup> The contract also specified two reference dates following practical completion, the first (and the relevant reference date to the dispute) being the 28th day of the month immediately following practical completion. On 16 September 2016 the contractor's project manager wrote to the Council indicating its belief that practical completion had been achieved and requesting that the Council's superintendent issue a certificate of practical completion. The superintendent did not however issue the certificate until 25 November 2016 but the certificate stated that practical completion of the relevant works was achieved over two months earlier on 16 September 2016. The contractor then sent a payment claim to the superintendent on the day the certificate of practical completion was issued. On 7 December 2016, the Council issued a payment schedule with a scheduled amount of nil on the basis that no valid reference date existed which would permit a payment claim to be made in November.<sup>2</sup>

### Determination at first instance

At trial, Ball J found that in the event of a dispute, the existence of a reference date was to be determined by the court and that it was open to the court to determine on which date practical completion occurred.<sup>3</sup> Ball J agreed with the adjudicator that the date for practical completion should be backdated.

### The issue on appeal

The essential issue on appeal was whether the date of practical completion was 16 September 2016, (as assessed by the superintendent in the text of the certificate of practical completion) or 25 November 2016 (the date upon which the

certificate was issued). A finding of the latter would mean that the payment claim issued by the contractor on 25 November was valid.

## **Judgment**

Basten JA took an altogether different approach to that of the trial judge. Firstly, His Honour determined that, as a matter of construction, the date of practical completion is the date on which the certificate is issued. Baston JA found that the language of cl 34.6 supports the contractor's argument that the issuance of the certificate both records and gives notice of practical completion and that, as such; the date of issue is the date of practical completion. Here, His Honour considered the structure of cl 34.6 which requires anticipatory notice, being when the contractor gives notice of their opinion as to completion and subsequently, the superintendent issuing a certificate of practical completion. As such, Basten JA (with Beazley ACJ and Meagher JA agreeing) asserted that the date of practical completion must be the issuance date of the certificate of practical completion.<sup>5</sup>

Secondly, Basten JA considered whether courts should determine the issue in question as a matter of fact (inquiring as to whether a state of affairs of practical completion existed) or as a matter of law (by construing the contract and as such giving credence only to whether the superintendent was satisfied and issued a valid certificate). His Honour considered that great uncertainty would arise if the former approach was routinely taken. Instead he asserted that the courts should accept the superintendent's satisfaction as to practical completion unless there is very clear language in the contract that the matter should be determined otherwise.<sup>6</sup>

The decision was framed by the practical consideration that parties should, with certainty, know the date of practical completion 'both contemporaneously and simultaneously'.<sup>7</sup> It is not only essential for making payment claims (as was the case here), but also for determining the end point for the contractor's responsibility for the care of the whole of the work and the time by which a contractor must remove temporary works and construction plant. Basten JA pointed out that uncertainty as to the date of practical completion may inadvertently put one of the parties in breach or unwittingly leave the principal without necessary insurance.<sup>8</sup>

## **Key Principles**

The decision highlights two key principles, being:

1. whether practical completion has been achieved is a question of fact to be determined by the Superintendent; and
2. the date of practical completion is taken to be the date on which the certificate is issued.

## **Practical implications**

Although the case concerned payment claims under the Act, it will likely have further implications. The date of practical completion is relevant to whether (and from when) liquidated damages accrue, the time from when a portion of security is to be released, commencement of the defects liability and (in some contracts) the date after which no further variations may be ordered. Determining the date of practical completion is crucial to a myriad of requirements and inquiries which may arise under contract or statute.

Whilst in this case the decision provided the contractor with a reference date and a right to claim payment, the short term gain of this contractor is likely to provide long term pain for contractors who could have greater exposure to liquidated damages and, in effect, longer defect liability obligations as a result of the superintendent not being able to "backdate" practical completion. In circumstances where the superintendent is being tardy in issuing practical completion, contractors may need to give consideration to whether the delay is a substantial breach of contract (which it is under many unamended Australian Standard forms of contract) for which a notice to show cause should be issued or alternatively whether a notice of dispute should be issued, even if the certificate backdates the date of practical completion.

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~~ Abergeldie Contractors Pty Ltd v Fairfield City Council [2017] NSWCA 113 at [2].

Ibid at [8]-[10].

Ibid at [26].

1. Abergeldie Contractors Pty Ltd v Fairfield City Council [2017] NSWCA 113 at [2].
2. Ibid at [8]-[10].
3. Ibid at [26].
4. Ibid at [34]-[36].
5. Ibid at [40]-[41].
6. Ibid at [46].

7. Ibid at [42].
8. Ibid at [42]-[43].