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Practically Completed or not? When practical completion comes with conditions

H & M Constructions (NSW) Pty Ltd v Golden Rain Development Pty Ltd (No 4)
[2023] NSWSC 925

SUMMARY

On 9 August 2023, the Supreme Court of NSW handed down its decision in *H & M Constructions (NSW) Pty Ltd v Golden Rain Development Pty Ltd (No 4)* [2023] NSWSC 925.

This case relates to a question of whether a developer is entitled to the benefit of security and to liquidated damages where its superintendent issued to a builder a conditional certificate of practical completion to confirm the date of practical completion.

The Court concluded that a conditional certification of practical completion had no contractual effect and that, even if it had contractual effect, it did not establish when practical completion took place.

The Court further found that the builder had failed to prove its alternative arguments of estoppel, unconscionable conduct and the prevention principle.

THE FACTS AND DISPUTES

On 20 October 2015, H & M Constructions (**Builder**) and Golden Rain Development Pty Ltd (**Developer**) entered a contract for the construction of "Sugarcube apartments" in Erskineville. The project included apartments, terraces, and roads. Agreed practical completion dates were 19 March 2018 for apartments and 3 May 2018 for terraces.

On 24 September 2018, Urban Pty Ltd (**Superintendent**) issued a Conditional Certificate of Practical Completion (**Conditional Certificate**).

This document, while specifying 7 September 2018 as the practical completion date, contained conditions, including the need for an occupation certificate and compliance with remediation conditions in the development approval.

However, no final occupation certificate was issued due to outstanding remediation conditions. The Builder claimed that practical completion occurred on 7 September 2018 as indicated in the Conditional Certificate, while the Developer disagreed, seeking liquidated damages.

The central dispute revolved around whether 7 September 2018 constituted the actual practical completion date. The Builder also raised alternative arguments of estoppel, unconscionable conduct under Australian Consumer Law and the 'prevention principle'.

THE DECISION

The Court held that the Builder had not established any of its claims. In arriving to this conclusion, the Court provided the following reasoning for each argument advanced by the Builder, which we summarise below.

Legal effect of Conditional Certificate of Practical Completion

The Court held that the Conditional Certificate had no contractual effect, and even if it had, it did not establish when practical completion took place.

The Court examined the criteria required for a "Certificate of Practical Completion" under the contract.

Clause 34.7 of the contract gives the Superintendent two options in response to the certificate of the practical completion request from the Builder: 1) issue a practical completion certificate or 2) provide reasons for non-completion.

The Court held that the Conditional Certificate had no contractual effect as the certificate did not fit either option.

Further, the Conditional Certificate was contingent upon the resolution of outstanding issues, including the non-issuance of the occupation certificate, and non-compliance with the development approval.

As the occupation certificate had not been issued due to non-compliance with the development approval, the Court found that practical completion had not been achieved.

Estoppel

Additionally, the Court dismissed the Builder's estoppel claim, holding that a representation by the Developer to the Builder that the Conditional Certificate was 'valid', could not have, by itself and without more, reasonably induced the Builder to make the assumption that it was indeed valid.

This was because the Developer's inducements including the Developer's issuance of the Conditional Certificate, the Developer's non-clarification of the Certificate's legal effect, and even the bonus payment for practical completion, were not enough to prove the Builder's assumption of a valid certificate under the contract.

In so holding, the Court highlighted the Builder's conduct in terms of its representations to subcontractors that practical completion had not been achieved, representations which in turn contradicted the Builder's claims of reliance on the Developer's representations.

The Court went on to say that there was no detrimental reliance by the Builder as the Conditional Certificate made it clear that the Builder remained responsible for the outstanding issues set out upon the Certificate including the procurement of the occupation certificate and the performance in relation to the remediation conditions, thereby holding that the Builder had not established its estoppel case.

Unconscionable Conduct

When assessing the unconscionable conduct claims, the Court considered changes in the Builder's position.

Initially, the Builder pleaded that the Developer's conduct was unconscionable under the ACL whilst initially not challenging the Conditional Certificate's legal effect.

However, the Builder later diverted from its initial case especially in its closing submissions, emphasising that the Developer's actions were unfair because presumably the Developer knew that the Certificate lacked legal effect and yet it still issued it in order to stop Builder's delay cost claims.

The Court determined that the Developer believed the Builder was not entitled to delay costs, regardless of the issuance of the Conditional Certificate.

Ultimately, the Court found the Builder's unconscionability case was insufficient, because it had neither presented its arguments consistently, nor had it supported its newly cast case from the very early stages of the litigation, within its early List Statements.

Prevention Principle

The "prevention principle" literally prevents one party from demanding that another party fulfil a contract obligation if the demanding party's actions caused the failure.

For more details about the prevention principle, please see our previous article prepared by our senior associate, Anish Wilson here: <https://kreisson.com.au/the-prevention-principle-and-liquidated-damages/>

In the present case, the Builder argued that the prevention principle applied, effectively preventing the Developer from insisting on the payment of liquidated damages because:

1. the Developer took over the Builder's obligations to meet the remediation conditions required under the development approval; and
2. the Builder did not have sufficient information to claim an extension of time because the Developer dealt with the Council in relation to the remediation conditions.

However, the Court found that the Builder's case was unsubstantiated because the Builder's own misconceptions, rather than the Developer's conduct, led to the situation at hand.

In particular, the Court pointed out that the Builder erroneously claimed it had no further obligations under the Conditional Certificate and the Builder never indicated a desire to participate in negotiations with the Council with respect to the compliance with the development approval.

Regarding the extension of time claim, the Court held that the Builder did have knowledge about the Developer's dealings with the Council to claim the extension of time but failed to do so due to its misunderstanding of the status of the Conditional Certificate.

KEY TAKEAWAYS

This case highlights the following important lessons regarding practical completion in construction contracts:

1. **Interpretation of practical completion:** The achievement of practical completion in a construction project is a matter of interpretation based on the terms of the contract. Conditions stated in the certificate of practical completion can affect the certificate's legal significance.
2. **Caution required:** When a certificate of practical completion is issued with ambiguous terms or conditions, caution is necessary. Parties involved should not automatically assume that all contractual obligations are fulfilled.
3. **Communication and clarification:** It is essential to communicate with the issuer of the practical completion certificate to clarify the implications of the practical completion certificate, especially when the certificate is issued with conditions.
4. **Contractual steps:** If clarification is not obtained from the issuer, it is important to take necessary actions as per the contract, such as issuing a notice of dispute or an extension of time claim, within the specified timeframes.

CONTACT US

For further information, please do not hesitate to contact **Kreisson** on **(02) 8239 6500**.

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