

Court of Appeal
Supreme Court
New South Wales

Case Name: Abergeldie Contractors Pty Ltd v Fairfield City Council

Medium Neutral Citation: [2017] NSWCA 113

Hearing Date(s): 5 May 2017

Decision Date: 26 May 2017

Before: Beazley ACJ at [1];
Basten JA at [2];
Meagher JA at [61]

Decision: (1) Allow the appeal and set aside the orders made by the trial judge on 6 March 2017.

(2) In place of those orders, order that –

(a) the summons filed in the Equity Division on 13 February 2017 by the plaintiff Council be dismissed;

(b) the plaintiff pay the first defendant's costs of the proceedings in the Equity Division.

(3) The respondent pay the costs of the appellant in this Court.

Catchwords: BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – progress payments scheme – requirement of valid reference date under contract – date of practical completion – whether payment claim valid

CONTRACTS – construction of contract – meaning of “date of practical completion” – whether practical completion dependent on building superintendent's opinion, or objective existence of state of facts – whether “date of practical completion” is the date of

certificate of completion

Legislation Cited:

Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 5, 7, 8, 13, 20, 21, 23, 25, 32, 34; Pt 3

Cases Cited:

Buck v Bavone (1976) 135 CLR 110
Charrington & Co v Wooder [1914] AC 71
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd [2017] HCA 12
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611; [1999] HCA 21
Parisenne Basket Shoes Pty Ltd v Whyte (1938) 59 CLR 369
R J Neller Building Pty Ltd v Ainsworth (2009) 1 Qd R 390; [2008] QCA 397
Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) [2016] NSWCA 379
Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd [2016] HCA 52; 91 ALJR 233
The King v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407
Transfield Shipping Inc v Mercator Shipping Inc [2009] 1 AC 61

Category:

Principal judgment

Parties:

Abergeldie Contractors Pty Ltd (Appellant)
Fairfield City Council (Respondent)

Representation:

Counsel:
Mr M Ashhurst SC (Appellant)
Mr B DeBuse (Respondent)

Solicitors:

HWL Ebsworth (Appellant)
Marsdens Law Group (Respondent)

File Number(s):

2017/80346

Decision under appeal:

Court or Tribunal: Supreme Court
Jurisdiction: Equity - Technology and Construction List
Citation: [2017] NSWSC 166
Date of Decision: 6 March 2017
Before: Ball J
File Number(s): 2017/46031

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

In 2015, Fairfield City Council sought to undertake major road works involving the upgrade of sections of Wetherill Street, Wetherill Park. The Council and Abergeldie Contractors Pty Ltd (“the contractor”) entered into a contract for this purpose on 18 August 2015. The terms of the contract allowed the contractor to make progress payment claims in accordance with the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”). It was accepted by both parties that the existence of a valid “reference date”, as defined in s 8(2) of the Act, was a precondition to the service of a valid payment claim.

The contract provided that after “practical completion” of the works, which was a defined term, there were two reference dates. The first of these was the 28th day of the month “immediately after practical completion”. On 16 September 2016, the project manager for the contractor wrote to the Council indicating that the contractor was of the view that practical completion had been achieved on that date. The letter requested that the Council’s superintendent issue a certificate of practical completion in accordance with the contract.

On 25 November 2016, the superintendent issued a certificate of practical completion which indicated that practical completion for the relevant work had been achieved on 16 September 2016. On the same day, 25 November, the contractor sent a payment claim to the superintendent. On 7 December 2016 the Council issued a payment schedule indicating that no amount would be paid, as there was no valid reference date which permitted a payment claim to be made in November.

The contractor obtained an adjudication that it was entitled to payment. The Council then sought relief in the Equity Division. Ball J declared that, there being no reference date in November 2016, the payment claim was invalid, and quashed the determination of the adjudicator. The contractor appealed to this Court.

The question on appeal was:

Did practical completion of the work occur, as the Council alleged, on 16 September 2016, with the result that the relevant payment reference date was 28 September 2016; or did practical completion occur, as the contractor submitted, on the date on which the certificate of practical completion was issued, namely 25 November 2016, with the result that the relevant reference date was 28 November 2016?

The Court (Beazley ACJ, Basten JA and Meagher JA) **allowed the appeal** and held:

1. This question may be addressed by applying the usual principles of contractual construction: [25].

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, applied.

2. There are a number of features of the contractual language which are consistent with the contractor's contention that it is the issue of the certificate which provides the date on which practical completion is achieved: [31]-[36].

3. It is necessary to identify whether the relevant contractual requirement is the existence of the underlying facts demonstrating practical completion, or the

existence of an opinion of the superintendent as to the underlying facts: [37]-[38].

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611; [1999] HCA 21, discussed.

4. The structure and language of the contract is consistent with the conclusive event being the issuing of a certificate of practical completion, which depends upon a contemporaneous opinion of the superintendent: [40], [67]. The contractor cannot know whether practical completion has been reached until it receives the certificate, which must be dated, and which will “evidence” the date of practical completion: [41]. The structure of the contract, which is part of the context which must be considered in construing the contract, supports that conclusion: [47].

5. The date of practical completion was the date of the certificate of practical completion, namely 25 November 2016. Pursuant to the contract, the relevant reference date was 28 November 2016. The payment claim was made prior to that date, and was therefore valid: [50], [69].

JUDGMENT

- 1 **BEAZLEY ACJ:** I have had the advantage of reading in draft the reasons of Basten JA with which I agree. I also agree with the additional observations of Meagher JA. I agree with the orders proposed by Basten JA.
- 2 **BASTEN JA:** On 25 November 2016 the appellant, Abergeldie Contractors Pty Ltd (“the contractor”), served a payment claim on the respondent, Fairfield City Council, pursuant to s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”). In proceedings commenced in the Supreme Court (Equity Division) the Council alleged that, practical completion having been achieved some two months earlier, there was no reference date under the contract, without which there could not be a valid payment claim.
- 3 The Council’s submissions were accepted by Ball J who declared that the payment claim was not a payment claim within the meaning of the Act and, as a result, there should be an order quashing the determination of the adjudicator

awarding an amount of approximately \$1.3 million to be paid by the Council to the contractor.¹

- 4 The appellant contractor accepted that it was a matter for the Court to determine whether a reference date had arisen under the contract at the time the payment claim was served. That conclusion followed from the decision of the High Court in *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd*.²
- 5 The appellant's argument encompassed three propositions, namely:
 - (a) practical completion under the contract only occurred when the superintendent certified that it had occurred;
 - (b) the certification could not have retrospective effect, and
 - (c) there was no evidence allowing the trial judge to conclude that practical completion had in fact occurred (disregarding the need for certification) on the date alleged by the Council, namely 16 September 2016.

For the reasons explained below, each of the appellant's submissions should be accepted. It follows that the appeal must be allowed and the orders made by the trial judge set aside.

Background material

(a) factual background

- 6 In 2015, Fairfield City Council sought to undertake major road works involving the upgrade of Wetherill Street, which runs between Polding and Victoria Streets, Wetherill Park, and certain intersections on the Cumberland Highway. A contract was entered into between the Council and the contractor on 18 August 2015. The contract sum was a little over \$6.3 million. The date for practical completion of the works was identified as 20 February 2016 or 34 weeks from the issue of a letter of acceptance of the tender.
- 7 The terms of the contract allowed for the superintendent, who was identified as the "Manager – Major Projects and Planning, Fairfield City Council" to direct that the work be divided into "separable portions" for which separate dates for

¹ *Fairfield City Council v Abergeldie Contractors Pty Ltd* [2017] NSWSC 166, delivered on 6 March 2017 ("Fairfield v Abergeldie").

² [2016] HCA 52; 91 ALJR 233 (Kiefel, Bell, Gageler, Keane and Gordon JJ).

practical completion could be specified. Although the relevant direction was not before the Court, it appears that the superintendent had in fact directed that the Wetherill Street works and the Cumberland Highway works be treated as separable portions.

- 8 On 16 September 2016, the project manager for the contractor wrote to the Council indicating that the contractor's view was that practical completion "has been achieved on 16 September 2016." The letter requested that the superintendent issue a certificate of practical completion. The letter from the contractor did not address separately the Cumberland Highway works and the Wetherill Street works. A response from the superintendent appears to have treated the letter as dealing with both portions of the works. He responded in the following terms:

"Please note that Wetherill Street works were completed with the final switch on 1 July 2016. It was agreed that Practical Completion under separable portion can be issued in October 2016 once the defects rectification and handover documentation are completed.

Similarly, the Cumberland Highway works at three intersections at John Street, St Johns Road and Hamilton Road were completed with the final switch on 16th September, 2016. It was agreed that Practical Completion under separable portion can be issued in October 2016 once the defects rectification and handover documentation are completed."

- 9 On 25 November 2016 the superintendent wrote again to the contractor, the letter being headed "Certificate of practical completion", providing, under the heading "Practical completion":

"In accordance with the provisions of Clause 34.6 of the General Conditions of Contract AS4000-1997 (**Contract**) and our letter dated 30 September, 2016 (Copy attached) the Superintendent hereby certifies that Practical Completion of the Works was reached as follows:

- 1 July 2016 for Wetherill Street works
- 16 September, 2016 for Cumberland Highway works at three intersections at John Street, St Johns Road and Hamilton Road."

The letter also contained a list of defects and noted that the Council was releasing 50% of the security held under the contract.

- 10 On the same day, 25 November 2016, the contractor sent payment claim No 16 to the superintendent. The claim sought an amount of approximately \$2.3 million plus GST. On 7 December 2016 the Council issued a payment

schedule indicating that no amount would be paid, there being no “reference date” permitting a payment claim to be made in November 2016.

- 11 On 15 December 2016, the contractor sought an adjudication with respect to the rejected claim. On 31 January 2017 the adjudicator determined that the contractor was entitled to be paid an amount of approximately \$1.3 million.

(b) the statutory scheme

- 12 Before turning to the terms of the contract, it is convenient to identify relevant statutory provisions which provide the context within which this aspect of the contractual relationship between the parties operated.
- 13 The broad scheme of the legislation has been addressed in a number of cases and in terms which need not be repeated here.³ While it must be accepted that the purpose of the legislation is to ensure that any person carrying out construction work falling within the scope of the Act⁴ is able to recover progress payments as the work is undertaken,⁵ the mechanism by which the purpose is effected requires attention to the terms of the specific provisions. Disputes are to be resolved on an interim basis by a speedy and tightly controlled regime for expert adjudication. The ultimate resolution of a dispute as to the contractual rights between the parties is not affected by the obligation to make progress payments.⁶
- 14 Because it is now accepted that the existence of a reference date is a precondition to the service of a valid payment claim, it is not necessary to explain the detail of the statutory scheme, as was necessary in *Southern Han*. Further, the present case does not turn directly upon the operation of the statutory scheme, but on the proper construction of the contract. Nevertheless, it is necessary to refer to a number of key features of the legislation.

³ See, eg, *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390; [2008] QCA 397 at [39]-[40] (Keane JA); *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 at [207]-[209] (McDougall J); *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 at [66]-[68]; and, most recently, *Southern Han* at [4]-[19].

⁴ Building Industry Payment Act, s 5 (definition of construction work) and s 7 (application of Act).

⁵ Building Industry Payment Act, s 3(1) and (2).

⁶ Building Industry Payment Act, s 32.

- 15 Part 2 of the Act sets out the scheme by which claims may be made; Pt 3 deals with the procedure for making a claim and for resolving disputes. Part 2 commences with the following provision:

8 Rights to progress payments

- (1) On and from each reference date under a construction contract, a person:
- (a) who has undertaken to carry out construction work under the contract, or
 - (b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

- (2) In this section, **reference date**, in relation to a construction contract, means:

- (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
- (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

- 16 Part 3 commences with the following provision:

13 Payment claims

- (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 claim 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**), ...

- (3) The claimed amount may include any amount:

- (a) that the respondent is liable to pay the claimant under section 27(2A), or
- (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

- (4) A payment claim may be served only within:

- (a) the period determined by or in accordance with the terms of the construction contract, or
- (b) the period of 12 months after the construction work to which the claim relates was last carried out ...,

whichever is the later.

(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.

- 17 The remaining provisions in Pt 3 may be dealt with briefly. Once a payment claim is served, the respondent to the claim must either pay the claim or serve a payment schedule within 10 business days explaining why the claim has not been met. Where the claim is not paid in full the claimant has a further 10 business days within which to make an adjudication application. That application will be referred to an adjudicator, the respondent having five business days to lodge an adjudication response. Significantly for present purposes, the response cannot include any reasons for withholding payment which have not been included in the payment schedule.⁷ Subject to agreement between the parties to extend time, the adjudicator is required to determine the application within 10 business days after notification of his or her acceptance of the application.⁸ Once an adjudication determination has been made requiring payment of an amount by the respondent, that amount must be paid within five days,⁹ failing which the claimant can bring proceedings in a court of competent jurisdiction, treating the adjudication certificate as a judgment debt.¹⁰
- 18 Bearing this legislative scheme in mind, it is necessary to turn to the provisions of the contract between the parties.

(c) contractual provisions

- 19 The contract used by the parties commenced with standard provisions contained within a form prepared by Standards Australia known as “General Conditions of Contract: AS 4950 – 2006”. There were, however, a number of documents (including the tender, specifications and drawings) which formed part of the agreement, together with a number of amendments to the standard provisions. (The amendments were also in a standard form.)
- 20 It was common ground that, for the purposes of s 8(2) of the Act (defining the term “reference date”), this was a contract which made express provision for

⁷ Building Industry Payment Act, s 20(2B).

⁸ Building Industry Payment Act, s 21(3).

⁹ Building Industry Payment Act, s 23.

¹⁰ Building Industry Payment Act, s 25(1).

the dates on which claims for progress payments were to be made, and accordingly fell within s 8(2)(a). Clause 37 was the principal provision in this regard and relevantly provided:

“37 Payment

37.1 Progress claims

The *Contractor* shall claim payment progressively in accordance with *Item 28*.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the *Superintendent* and shall include details of the value of *WUC* [work under the contract] done and may include details of other moneys then due to the *Contractor* pursuant to provisions of the *Contract*.

...

37.4 Final payment claim and certificate

Within 28 days after the expiry of the last *defects liability period*, the *Contractor* shall give the *Superintendent* a written *final payment claim* endorsed ‘Final Payment Claim’ being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract*.

Within 42 days after the expiry of the last *defects liability period*, the *Superintendent* shall issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.”

- 21 For the purposes of cl 37.1, item 28 in the reference schedule to the contract prescribed the times for progress claims as the 28th day of each month, for work done up to that day of the month. The operation of cl 37.1 was qualified by an additional cl 44.3 in the following terms:¹¹

“[4]4.3 Final Reference Date

[(a)] For the purposes of section 8(2) of SOP Act, there are only two reference dates after *practical completion* being:

- (i) the first date for a progress claim arising immediately after *practical, completion* (as determined by subclause 37.1); and
- (ii) the date provided in subclause 37.4 for the *Contractor* to give its *final payment claim*.

(b) For the purpose of section 11(1) of the *SOP Act*, the date for payment of the last payment claim under the *SOP Act* is the same as the date for payment of the *final certificate* provided in subclause 37.4.”

¹¹ This provision contained three typographical errors: although described as a “new clause 44”, this paragraph was numbered “14.3”; the first subparagraph had no letter, but the second did; and there is a comma after “practical” in (i).

22 There were, accordingly, two payment claims which could be made after practical completion. The second, referred to in cl 44.3(a)(ii) and (b) was that identified in cl 37.4. The “defects liability period” was identified as 12 months from “the date of practical completion”.¹²

23 The standard amendments also included the following definition:¹³

“1.8 The definition of **practical completion** is deleted and replaced with the following:

practical completion is that stage in the carrying out and completion of *WUC* when:

(a) the Works are complete except for minor defects:

(i) that do not prevent the Works from being reasonably capable of being used for their stated purpose;

(ii) that the *Superintendent* determines the *Contractor* has reasonable grounds for not promptly rectifying; and

(iii) the rectification of which will not prejudice the convenient use of the Works;

(b) those tests which are required by the *Contract* to be carried out and passed before the Works reach practical completion have been carried out and passed;

(c) the *Contractor* has provided the *Principal* with all documents and other information required under the *Contract* which, in the *Superintendent's* opinion, are essential for the use, operation and maintenance of the Works;

(d) the *Contractor* has removed all rubbish, *Contractor's* plant and surplus material from the *site*;

(e) Deleted

(f) the *Contractor* has provided the *Principal* with copies of all necessary approvals, certificates, design documents and operating and/or maintenance documentation relating to the Works including without limitation:

(i) approvals and consents obtained from a relevant authority concerning the Works;

(ii) warranties and certificates from consultants and subcontractors concerning the Works;

(iii) a final occupation certificate for all of the Works pursuant to the *Environmental Planning and Assessment Act [1979]*, Part 4A;

(iv) all compliance certificates pursuant to the development consent and the *Environmental Planning and Assessment Act 1979*; Part 4A; and

¹² Contract, cl 35 and item 27 in the reference schedule.

¹³ Where the word “deleted” appears against a letter, it is the provision in the standard form amendment which is deleted, and not the paragraph in the original definition.

(v) any other certificate or approval which must be issued or given by any authority having jurisdiction as a precondition to the use and occupation of each building comprising the Works;

(g) Deleted

(h) the *Contractor* has satisfied all legislative requirements concerning the Works.”

Date of practical completion

(a) the issues

24 The question in the present case concerned the payment referred to in cl 44.3(a)(i). By reference to cl 37.1, the reference date was the 28th day of the month “immediately after practical completion”. Thus, if practical completion occurred (as the Council submitted) on 16 September 2016, being a date prior to 28 September, that reference date was 28 September. If (as the contractor submitted) practical completion did not occur until it was issued with a certificate of practical completion by the superintendent, the reference date was the 28th day of the month in which the certificate was issued, namely 28 November 2016.

25 These questions may be addressed by applying the usual principles of contractual construction.¹⁴ It is far from clear that the provisions of the contract, given their natural and ordinary meaning, reveal any true ambiguity; but in any event the preferred construction accords with the intention which might be derived from the parties’ knowledge as to the surrounding circumstances and the commercial purpose of the contract. There is no need, as the Council submitted, to consider the arguably more restrained approach preferred by *Nettle J* in a dissenting judgment in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*.¹⁵

26 The Council’s case, accepted by the trial judge, involved the following propositions:

- (a) the existence of a reference date was a precondition to a valid payment claim;
- (b) the existence of a reference date was to be determined by the court in the event of a dispute, and

¹⁴ *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35] (French CJ, Hayne, Crennan and Kiefel JJ).

¹⁵ [2017] HCA 12 at [98]; 91 ALJ 486.

- (c) it was therefore for the trial judge to determine the date on which practical completion occurred.

27 The thrust of the contractor's case was that practical completion could not occur without its knowledge. Were that not so, it could be retrospectively deprived of the right to make a payment claim. Further, such an outcome would have other consequential effects which were inconsistent with the commercial context in which the contract operated and with the statutory scheme under which it operated and from which the parties could not derogate.¹⁶

28 The contractor contended that its reading of cl 44.3 reflected the implied addition of the words "as certified by the Superintendent in accordance with clause 34.6", after the words "practical completion". In response to the Council's submission that, if the contract had been intended to be so read, that language could easily have been adopted, the contractor replied, adopting the words of Lord Dunedin in *Charrington & Co Ltd v Wooder*¹⁷ that such a rhetorical question merely identified the nature of the dispute and the interpretation of the contract remained unresolved.

29 Counsel for the contractor also relied upon a passage in the opinion of Lord Hoffmann in *Transfield Shipping Inc v Mercator Shipping Inc*,¹⁸ to the effect that the implication of a term as a matter of construction requires reference to "the contract as a whole in its commercial context" and the Court "cannot decline this task on the ground that the parties could have spared it the trouble by using clearer language."

(b) construing the contract

30 These are standard retorts to a complaint that one party or the other is seeking to rewrite the contract. They have some force in the sense that the "why not say so" response owes more to rhetoric than to principles of construction. However, in the present case the contractor might have saved itself the trouble by not undertaking the task of implying further words in the provision. The purpose of cl 44.3 is not to say anything about *when* practical completion occurs, or *how* that date is to be determined; its sole purpose is to identify the

¹⁶ Building Industry Payment Act, s 34.

¹⁷ [1914] AC 71 at 82.

¹⁸ [2009] 1 AC 61 at [26].

existence of only two reference dates thereafter. Nor do the references to cl 37.1 and 37.4 demonstrate otherwise.

- 31 To understand the meaning of the term “practical completion” it is necessary to look to cl 34, dealing with “Time and Progress” and, in particular, cl 34.6 which provides:

“34.6 Practical completion

The *Contractor* shall give the *Superintendent* at least 14 days written notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached.

When the *Contractor* is of the opinion that *practical completion* has been reached, the *Contractor* shall in writing request the *Superintendent* to issue a *certificate of practical completion*. Within 14 days after receiving the request, the *Superintendent* shall give the *Contractor* and the *Principal* either a *certificate of practical completion* evidencing the *date of practical completion* or written reasons for not doing so.

If the *Superintendent* is of the opinion that *practical completion* has been reached, the *Superintendent* may issue a *certificate of practical completion* even though no request has been made.”

- 32 There are in effect four steps identified within this clause. The first is the anticipatory notice to be given by the contractor 14 days before it expects to reach practical completion. The second step involves a written “request” from the contractor to the superintendent to issue a certificate of practical completion. The third step is the response of the superintendent: the superintendent has two options, either to issue a certificate or to give written reasons for not doing so. One or other of those steps must be taken within 14 days after receiving the request. Although the Council submitted that the superintendent could decline to issue a certificate (with written reasons) even if of the opinion that the date of practical completion had been reached, no persuasive reason was given to support that construction and no reason is to be found within the terms of the contract.
- 33 The fourth step provides an alternative, allowing the superintendent to issue a certificate of practical completion even though the contractor has made no request for it.
- 34 There are a number of features of this language which are consistent with the contractor’s contention that it is the issue of the certificate which records practical completion, is the mechanism by which notice of practical completion

is given and therefore provides the date on which practical completion is achieved. First, the use of the present perfect tense, with respect to an event which “has been” completed, indicates that the event has occurred, but connotes that the actual time of completion is unimportant; it is likely to be something which has just happened.

- 35 Secondly, that understanding fits the structure of the provision. The first paragraph of cl 34.6 requires that an anticipatory notice will be given as to the date upon which practical completion “will be reached.” The second step requires the contractor to give notice of its opinion that practical completion “has been reached”; in that sense, the term “[w]hen” should be understood as indicating a point in time when the opinion is formed. The superintendent then has 14 days to consider whether or not he or she is of the same opinion and, if so, to issue a certificate. The same language (in the present perfect tense) is used in the third paragraph where the superintendent acts without a request.
- 36 Thirdly, the certificate is not said to state the date of practical completion, but rather is said to “evidence” that date. That too is consistent with the fact of practical completion occurring on the date of the certificate. That language is reflected in the definition of “date of practical completion”, the primary meaning of which is “the date *evidenced in* a certificate of practical completion as the date upon which practical completion was reached”.¹⁹ The definition provides for an alternative where there has been arbitration or litigation, but nothing turns on that for the purposes of construing cl 34.6.²⁰
- 37 Fourthly, there is the unresolved issue which underlay the Council’s case, which is whether, when asked to identify the date of practical completion, the court is to consider the underlying facts (eg, has the kerbing to the new roadway been completed) or is it to ask whether the superintendent has formed an opinion as to the underlying facts, and if so when he or she formed that opinion.
- 38 In administrative law terms, the distinction is well understood and has significant consequences. Thus, if the jurisdictional fact (or precondition to the

¹⁹ Contract, cl 1, date of practical completion (a) (emphasis added).

²⁰ Contract, cl 1, date of practical completion (b).

exercise of a power) is the existence or otherwise of the underlying fact, it is for the court itself to decide that fact, on the evidence before it, and the opinion of the original decision-maker will not be determinative, although it may be relevant. On the other hand, if it is the original decision-maker whose opinion is the precondition to the exercise of the power, the function of the court is limited to determining whether that opinion was in fact formed and, if so, when. The court may be invited to conclude that any opinion so formed was not an opinion of the kind required by law, because it was in some respect arbitrary, capricious or manifestly unreasonable or, on the other hand, did not address the issue which, according to the relevant legal principle, the decision-maker was required to address.²¹ In *Minister for Immigration and Multicultural Affairs v Eshetu*²² Gummow J described a provision which identified the state of satisfaction of the decision-maker as a precondition or criterion of the grant of a visa as a “jurisdictional fact”.²³ Gummow J continued:²⁴

“The ‘jurisdictional fact’, upon the presence of which jurisdiction is conditioned, need not be a ‘fact’ in the ordinary meaning of that term. The precondition or criterion may consist of various elements and whilst the phrase ‘jurisdictional fact’ is an awkward one in such circumstances it will, for convenience, be retained in what follows.”

39 An analogous exercise in contractual construction may be undertaken with respect to the question of practical completion. As counsel for the contractor noted, at least two elements of the definition of practical completion expressly involve opinions to be formed by the superintendent.²⁵ However, there is much to be said for the view that it is the opinion of the superintendent which is critical in respect of each of the requirements of the definition. First, par (a), dealing with “minor defects”, requires an evaluative judgment which must take into account, amongst other things, prejudice to the convenient use of the works. That would involve an evaluative judgment central to the function of the superintendent. Other things are entirely within the knowledge of the superintendent, such as par (b), the carrying out of tests, and par (f), the provision to the principal of copies of documents. No doubt questions relating

²¹ See, eg, *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J); *The King v Connell*; *Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 (Latham CJ).

²² (1999) 197 CLR 611; [1999] HCA 21.

²³ *Eshetu* at [128]-[130].

²⁴ *Eshetu* at [130].

²⁵ See amending cl 1.8, practical completion, (a)(ii) and (c).

to the removal of all rubbish, the contractor's plant and surplus materials from the site could be objectively determined for the purposes of par (d), as could the compliance with various legislative requirements, for par (h). Nevertheless, there can be no doubt that the superintendent will be the best placed person to assess these matters too.

- 40 Finally, cl 34.6 envisages that both the contractor and the superintendent will form an opinion as to whether practical completion has been reached. The superintendent cannot be understood to have a power to issue a certificate of practical completion unless of the opinion that it has been reached. Accordingly, regardless of the serious consequences of concluding that a court is the only body with the power conclusively to determine each of the multiple questions to be addressed in deciding whether practical completion has been reached, the structure and language of the contract is entirely consistent with the proposition that the conclusive event is the issuing of a certificate of practical completion, which must depend upon a contemporaneous opinion of the superintendent.
- 41 Once that point is reached it is apparent that the contractor cannot know whether practical completion has been reached until it receives the certificate of practical completion. That certificate must, by implication, be dated and the date of the certificate will evidence the date of practical completion.
- 42 This conclusion is consistent with the commercial context in which the issue arises. There are a number of provisions which depend upon the date of practical completion. One of them is the ability of the contractor to make a payment claim, pursuant to the provisions considered above. In addition, cl 14 imposes responsibility on the contractor for the care of the whole of the work under the contract up to 4pm on the date of practical completion, at which time responsibility passes to the principal. Acknowledging the possibility of dispute even as to a certificate of practical completion, any lack of certainty as to the precise date on which that event occurred would, potentially, be commercially disastrous. As a practical matter, it is self-evident that both parties must know the date of practical completion for this purpose, both contemporaneously and simultaneously. Clause 16, providing for insurance of

the works, is consequential upon the allocation of responsibility for their care in cl 14. To backdate practical completion might leave a period during which the contractor's insurance cover would not apply and the principal might not have obtained insurance cover.

- 43 A similar analysis may be made with respect to subsequent clauses in the contract. The contractor must remove temporary works and construction plant within 14 days after the date of practical completion, pursuant to cl 27. Backdating would potentially put it in breach of this obligation, or limit its opportunity to comply.
- 44 Reference has already been made to the definition of the "defects liability period" in cl 35. This period is said to commence on "the date of practical completion at 4:00 pm." Pursuant to item 27 in the reference schedule, it was a period of 12 months. One effect of the Council's claim that practical completion occurred two months before the certificate issued was effectively to reduce the defects liability period to 10 months.
- 45 Finally, pursuant to cl 34.7, if the work did not reach practical completion by the prescribed date for practical completion, the superintendent was required to certify an amount by way of liquidated damages "for every day after the *date for practical completion* to and including the earliest of the *date of practical completion* or termination of the *Contract ...*". There was also a balancing provision: cl 34.8 provided for the superintendent to certify a bonus payable where "the *date of practical completion* is earlier than the *date for practical completion*".
- 46 These last two provisions for calculation of liquidated damages or a bonus support the conclusion that it was the satisfaction of the superintendent as to the adequacy of the work done under the contract which was the precondition for a range of consequences. To adopt the language of Dixon J in *Parisienne Basket Shoes Pty Ltd v Whyte*,²⁶ whilst it was undoubtedly open to the parties to condition contractual obligations and consequences upon the actual existence of a state of facts, as opposed to the superintendent's opinion that the facts exist, to do so would greatly exacerbate the opportunity for disputation

²⁶ (1938) 59 CLR 369 at 391.

and the resultant uncertainty. The results would be so inconvenient that a court should not adopt such a conclusion in the absence of clear language to that effect.

- 47 There is a further factor which supports that conclusion, namely the statutory structure for progress payments. Accepting that a valid payment claim depends upon the existence of a reference date, it would be inconvenient in the extreme if a dispute as to the existence of a reference date turned not merely on the construction of the contract (a question of law) and a finding as to the date on which the superintendent held the necessary opinion to issue a certificate, but rather on the satisfaction of a judge following a trial as to the date on which he or she considered that practical completion had been achieved. Such a conclusion would drive a horse and cart (or perhaps a B-double) through the legislative scheme. In construing the contract, it must be assumed that the parties were aware of the scheme for progress payments under the Act (for which the contract expressly provided) and the fact that they could not contract out of the legislation. Knowledge of that legislative scheme is part of the context which must be considered in construing the contract.

(c) conclusions as to date of practical completion

- 48 The following propositions may be derived from the foregoing reasoning:

- (a) the achievement of practical completion depends upon the satisfaction of the superintendent as to the elements of the defined term;
- (b) that state of satisfaction is effective when communicated by the issue of a certificate of practical completion;
- (c) "issue" includes provision of the certificate to the contractor;
- (d) the date of practical completion evidenced by the certificate is the date of the certificate.

- 49 These conclusions are to be derived from the precise language of the contract. That analysis is supported by a consideration of the contractual provisions as a whole, an understanding of commercial reality and the background of the scheme for progress payments under the Act.

- 50 It follows that the date of practical completion in this case was the date of the letter which was headed "Certificate of practical completion". That date was

25 November 2016. By operation of cl 44.3, the relevant reference date was 28 November 2016. Pursuant to cl 37.1, payment claim no. 16, which was the subject of the adjudication challenged in the present case, was made on that date. It was therefore a valid payment claim.

(d) validity of certificate

51 It remains to note one further matter. The contractor submitted that practical completion had not yet been reached because the certificate of practical completion dated 25 November 2016 was invalid. It was invalid because it did not state the opinion of the superintendent that practical completion “has been reached”. Rather, it stated the opinion that practical completion “was reached” on two earlier dates, being 1 July 2016 for the Wetherill Street works and on 16 September 2016 for the Cumberland Highway works.

52 Secondly, it was noted that the certificate purported to be made in accordance with cl 34.6 “and our letter dated 30 September, 2016”. As the contractor pointed out, this letter was inconsistent with the conclusion as to the earlier dates. With respect to each separable portion of the works, the earlier letter had said that practical completion “can be issued in October 2016 once the defects rectification and handover documentation are completed.” This language was consistent with pars (a)(ii) and (c) in amendment cl 1.8 to the definition of “practical completion” not being satisfied as at 30 September 2016, in the opinion of the superintendent.

53 Thirdly, the superintendent’s letter referred to outstanding defects which were said to number in excess of 81. The contractor submitted that that statement was inconsistent with the superintendent having reached a conclusion as to the nature of the defects, as required by par (a) of the definition of practical completion.

54 The first two criticisms of the letter may be accepted; it may also be accepted that there is a degree of ambiguity created by the reference to numerous defects. The large number of defects is not, however, inconsistent with a conclusion that the superintendent was satisfied that they were all minor defects within par (a) of the definition. Otherwise the certificate is entirely consistent with an understanding that the superintendent had, at 25 November

2016, satisfied himself that practical completion “has been reached”. As the certificate expresses that conclusion with sufficient clarity, the specification of earlier dates may be treated as ineffective. Pursuant to the contract, practical completion occurred on 25 November 2016.

Practical completion – factual determination

- 55 Against the possibility that its submissions with respect to the proper construction of the contract were not accepted, the contractor also challenged the factual finding of the trial judge that practical completion had occurred on the dates specified in the letter of 25 November 2016 from the superintendent. The contractor submitted that there was “no evidence” upon which to make such a finding.
- 56 Because it is not critical to the outcome of the appeal, this ground may be disposed of briefly. The matter at trial was heard and disposed of with commendable expedition. However, it appears to have been only shortly prior to the hearing, which took place on 27 February 2017, that the Council realised that it might need to file evidence to support the conclusion that practical completion occurred in July and September 2016. Quite extensive affidavit evidence was filed and served on 23 February 2017, one clear working day before the commencement of the trial. Unsurprisingly, the bulk of that evidence was not read and was rejected. As a result, there was little evidence before the trial judge. With respect to the principal date of 16 September 2016, the trial judge found that, the contractor having asserted that practical completion had occurred by that date, and the superintendent ultimately having accepted that it occurred on that date, there was therefore “no dispute that practical completion occurred on 16 September 2016.”²⁷
- 57 In fact, there was no admission or concession by the contractor in that respect. It had submitted at trial that the superintendent’s letter of 30 September 2016 demonstrated that he was not satisfied as to the relevant criteria for practical completion at that time. Accordingly, if the contractual requirement were the existence of a particular opinion of the superintendent at the specified time, the contractor submitted that there was no evidence that such an opinion was held

²⁷ *Fairfield v Abergeldie* at [40].

and that the only evidence before the trial judge was to the contrary. On the other hand, if it were necessary for the trial judge to be satisfied as to the state of the works at that time, there was simply no material as to the actual circumstances at the construction site. In particular, there was no evidence in relation to the extent of the defects and whether or not they were minor defects.

58 It appears that the fact finding exercise failed, at least in part, because the judge was not squarely invited to determine as a matter of law whether practical completion depended on the opinion of the superintendent, or on the actual state of the construction works at a particular date. The resolution of that issue was critical to any ruling by the Court as to whether, and if so when, practical completion was achieved.

59 It follows that the contractor's complaint about the factual findings made by the trial judge had substance. However, that conclusion has no material consequence for the appeal, which is to be upheld on a different ground.

Conclusions

60 The orders sought by the appellant in its notice of appeal should be made, in the following terms:

- (1) Allow the appeal and set aside the orders made by the trial judge on 6 March 2017.
- (2) In place of those orders, order that –
 - (a) the summons filed in the Equity Division on 13 February 2017 by the plaintiff Council be dismissed;
 - (b) the plaintiff pay the first defendant's costs of the proceedings in the Equity Division.
- (3) The respondent pay the costs of the appellant in this Court.

61 **MEAGHER JA:** I agree for the reasons given by Basten JA that this appeal should be allowed. I add the following observations, which assume a familiarity with those reasons.

62 His Honour's conclusion ultimately turns on the construction of cll 34.6 and 44.3 of the building contract, as well as the definition of "date of practical completion".

- 63 The contract provided for progress payment claims to be made on the 28th day of each month for work done under the contract to that date. The date for the making of the builder's final payment claim was within 28 days after the expiry of the last "defects liability period". That period commenced on the "date of practical completion" and was of 12 months.
- 64 The readily apparent object of cl 44.3 is to limit to two the number of progress claims that may be made after "practical completion", the first of these to be made on or before the first date for the making of a progress claim "arising immediately after practical completion". This provision presupposes that practical completion will be a date known to the builder and be such that the builder can act to make a progress claim "immediately after" it has occurred. This would not be so if the time of practical completion could be a date earlier than that on which a certificate of practical completion is given to the builder.
- 65 The state of affairs answering the description "practical completion" as that term is defined, has many elements. The existence or satisfaction of each of them is necessary for that stage of the contract works to have been reached. Those elements include the making of a determination and the holding of an opinion by the Superintendent, as well as matters the existence or satisfaction of which requires some degree of judgment or evaluation: for example, whether a defect is "minor" or prevents the works from being "reasonably capable" of being used; whether required tests have been "carried out and passed"; whether copies of "necessary" approvals, certificates etc. have been provided; and whether all relevant "legislative requirements" have been satisfied. Most of these matters, at least to some extent, are capable of being contested. Finally, it is not within the power of the builder alone to satisfy all of these requirements, and not obvious that the builder will always have the information and knowledge necessary to make a confident judgment as to whether they are satisfied and that practical completion has been reached.
- 66 At the same time, under the terms of the contract the existence of rights and obligations of the parties with respect to subjects such as the reduction and release of security provided by one party to the other, the builder's ongoing responsibility for the care of the works, the commencement of the 12 months

defect liability period and the commencement of the period in which the builder is only permitted to make two further progress claims, are affected by the event of practical completion.

- 67 In this context the object of cl 34.6 considered with the definition of “date of practical completion” becomes clear. It is to produce a degree of certainty between the parties as to the occurrence of practical completion by providing that it is taken to occur when a certificate to that effect is issued by the Superintendent in accordance with cl 34.6. The definition of “practical completion” remains relevant because it describes the matters of which the Superintendent must be satisfied before that certificate may be issued.
- 68 The construction of cll 34.6 and 44.3 preferred by Basten JA provides certainty in relation to obligations and entitlements arising by reference to the occurrence of practical completion. It also means that cl 44.3 does no more than limit to two the number of progress claims that may be made after practical completion. In doing so that construction does not distort the ordinary meaning of the language used.
- 69 The day of issue of a certificate under cl 34.6 is the day on which practical completion is taken to have been reached (this is the effect of the use of the word “evidences” in the definition), except where another date is subsequently determined in an arbitration or litigation. The act of issuing the certificate includes its being given by the Superintendent to “the Contractor and the Principal”. Accordingly, in cl 44.3, the references to “practical completion” are to the date on which the certificate was issued. It follows, as Basten JA concludes, that for the purposes of cl 44.3 practical completion occurred on 25 November 2016 so that the first of the remaining two progress claims had to be made on or before 28 November 2016.
