

Article Information

Service: Projects & Construction

Sector: Infrastructure

Reference Date? What reference date?

In the recent decision of *Fairfield City Council v Abergeldie Contractors Pty Ltd* [2017] NSWSC 166, the New South Wales Supreme Court considered whether a reference date was available to a claimant under a Construction Contract, entitling it to make a claim and utilise the Building and Construction Industry Security of Payment Act 1999 (NSW) (Act). Andrew MacGillivray, Senior Associate discusses the case.

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Facts

The parties entered into an amended AS4000-1997 contract for the performance of upgrade works on the Cumberland Highway (**Contract**). The Contract provided at:

1. clause 37.1 that the claimant was entitled to make a progress claim on the 28th day of each month; and
2. clause 44 provided that (in accordance with the Act) only one progress claim could be made by the claimant after practical completion.

The following key events took place:

1. the claimant notified the Superintendent that practical completion had been achieved, and requested a certificate be issued;
2. a couple days later the claimant submitted payment claim 15;
3. a month later the Superintendent certified that practical completion had been achieved on the date it was requested by the claimant; and
4. before receiving the Superintendent's certification, the claimant submitted its payment claim 16.

In response to payment claim 16, the respondent scheduled \$NIL owing to the claimant, saying that the claimant was not entitled to payment because a reference date had not arisen under the Contract. The claimant proceeded to adjudication, where the adjudicator awarded it 65% of its claim.

The respondent filed a summons seeking a judicial review of the adjudicator's decision.

Review Decision

The respondent asked the Court to consider whether a valid reference date existed under the Contract, and whether the adjudicator had jurisdiction to determine payment claim 16.

Parties' arguments

The respondent argued that:

1. no reference date was available because the claimant's post practical completion claim arose after the date of practical completion;
2. the claimant had already lodged payment claim 15 in respect of the reference date arising after practical

completion; and

3. therefore, no further references were available to the claimant, and section 13(5) of the Act

Effectively, the respondent's position was that payment claim 15 was the claimant's post practical completion claim (not payment claim 16), as it was submitted after the date of practical completion.

In response, the claimant argued that:

1. its reference date in respect of its post practical completion claim arose when the Superintendent issues its certificate, not the date stated in the certificate; and
2. any other interpretation could result in the Superintendent imposing a retrospective date of practical completion, which would make any payments made after that date, which the claimant had believed to be valid, to be invalid.

Court's decision

The Court found in favour of the respondent (who reviewed the decision) providing that the claimant's position was contrary to the wording of the Contract. As it stood, the Contract did not allow for the claimant to make two claims post practical completion (unless it was its final claim, which payment claim 16 was not).

As such, the Court dismissed the claimant's second argument on the basis that once the works were substantially complete, the claimant should have known that only one more reference date would arise under the Contract (except for the final payment claim) under which it would be entitled to submit a progress claim.

Lessons learned

This case serves as a reminder to contractors, that once the works are nearing practical completion, each contractor should ensure that all works performed for that month (up to the date of the claim) are included in their payment claims.

If not, then contractor's may find themselves having no entitlement to claim for these works until their final payment claim (following the end of the DLP), which may be many months down the road.