



Beware, common law rights to damages could be barred under AS4902 contracts

Case Note: *Parkview Constructions Pty Ltd v Futuroscop Enterprises Pty Ltd* [2023] NSWSC 178

Introduction

AS4902-2000 ('AS4902') is a widely used form of contract for construction projects across Australia. Such contracts usually feature a defects liability period ('DLP') and final certification. Although standard contracts on the surface appear to simplify the contract formation process, caution must be exercised. Indeed, the NSW Supreme Court has recently held that the DLP and final certificate clause in an AS4902 is a code which may preclude entitlement to common law damages arising for the cost of rectifying obvious and apparent defects once the DLP has expired.

Facts

- Futuroscop Enterprises ('the Principal') engaged Parkview Constructions ('the Contractor'), through an **AS4902 contract**, to construct two buildings, a hotel ('Building A') and a carpark ('Building B'), at a site in Mascot owned by the Principal.
- Under AS4902 contracts, a Superintendent could issue a certificate of 'practical completion' where "the Works" are "complete except for minor defects". In the present case, the 'Works' referred to both Buildings A and B but did not distinguish between their respective completions.
- The Works commenced in March 2016 and in September 2017, and the Superintendent issued two Conditional Notices of Practical Completion for Building A and Building B, respectively. These retrospectively certified each building's practical completion date, contingent on the realisation of some additional items and rectifications.
- The Contractor commenced proceedings against the Principal to retrieve the security it provided and damages, claiming that the Works had reached practical completion as per the 'conditional' notices (certificates) of practical completion.
- The Principal denied that the Contractor was entitled to the return of either their first or second bank guarantee and filed a cross-claim seeking liquidated damages for the delayed and defective building works.

Key Issues

- 1) The first issue was whether practical completion was truly reached. This depended on whether the 'conditional' notices constituted effective certificates of practical completion in accordance with the contract.
- 2) If they were not, the question was whether the Court itself was able to determine the date of actual practical completion and then ascertain liquidated damages itself.
- 3) Lastly, the Court considered whether the DLP and final certificate mechanism in the AS4902 contract operated to oust the Principal's claim to common law damages for the defective building work.

NSW Supreme Court (Rees J)

In effect, Rees J held the Superintendent could not issue separate certificates of practical completion in respect of each building. Such a certificate should have only been issued where both buildings achieved 'practical completion' on a single date. Further, neither of the certificates expressed the satisfaction of the Superintendent as to the elements of practical completion.

'Conditional' certificates were not permitted under the contract and were therefore without effect. The Superintendent had failed to discharge its contractual function.

Consequently, the Court was allowed to determine the date of practical completion itself, as well as ascertain liquidated damages.

The true date of practical completion was found to be the later 25 September 2017, which in the present case meant that the DLP lasted until 25 September 2018. This modified the assessment of liquidated damages, requiring the payable amount to be based on a longer timeframe.

In relation to the DLP and final certificate mechanism, the Court held that it could potentially exclude damages for defective building work.

- In the present case, the Superintendent could direct the Contractor to rectify the defects in its work for 12 months following practical completion.
- If such notice was given and the Contractor failed to rectify the defects, the Superintendent could notify the Contractor that the Principal intended to have others rectify the relevant work. A lack of response from the Contractor would then entitle the Principal to proceed with the rectification, at the Contractor's cost.

- Within 42 days of the expiry of the DLP, a final certificate outlining the amounts owed between the Principal and the Contractor was to be issued which would act as "conclusive evidence of accord and satisfaction" and effectively discharge each party of their "obligations in connection with the contract". There were exceptions to this, such as in the case of defects or omissions in the works which were not apparent at the end of the DLP.
- Here, many of the defects notified by the Principal and served during the proceedings were in fact apparent (or patent) at the end of the DLP and did not fall within the exceptions.
- Because of the nature of the contract, the Principal could not claim damages in respect of such apparent defects on alternative grounds, including the common law.
- The clauses concerning the DLP and final certificate mechanism created a code, which ultimately operated as conclusive evidence regarding each party's liability and obligations as to rectifying defects.
- In effect, the code functioned to extinguish the Principal's right to common law damages for patent defective building work.
- Further, the contract did not contain detailed indemnities permitting the Principal recourse in the common law where the contract had not been complied with regarding notification and defect rectification.

Key Takeaways

- While the case concerned an AS4902 contract, the decision has implications for all forms of construction contracts containing a similar DLP and final certificate mechanism.
- Owners should consider:
 - explicitly preserving a common law right to damages for all defects when drafting contracts containing a DLP and final certificate mechanism,
 - carefully following the defect notification procedure prior to and during the DLP, and
 - conducting thorough inspections before the expiry of the DLP and issue of the final certificate.

More information

For further information contact the team at [Construction Legal](#).