



Builders - are you sure you have reached Practical Completion?

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

Facts

- On 20 October 2015, the plaintiff H & M Constructions (**Builder**) entered into a Design and Construct contract with the defendant Golden Rain Development Pty Ltd (**Developer**) to design and construct a 109-apartment building ('Sugarcube Apartments') on an industrial site in Erskineville for \$44 million.
- Both the Builder and Developer knew the site was contaminated and the DA conditions contained specific remediation conditions which were passed through to the Builder.
- In line with the contract, the Builder gave two bank guarantees totaling \$2.2 million as security.
- Remediation work was completed in mid-2017 and by July 2018, the Builder declared the project complete.
- In a letter to the Developer dated July 2018, the Council confirmed that the conditions surrounding remediation had not been met, preventing an occupation certificate being issued.
- In an attempt to protect the Developer from a delay costs claim from the Builder, the Superintendent issued a conditional certificate of Practical Completion (CPC). The CPC certified practical completion (PC) to be 7 September 2018. The CPC was subject to the Builder carrying out additional works and obtaining an occupation certificate.
- The Builder refused to perform the additional works on the basis that PC had been granted and proceeded to demand half the security back together with a bonus payment for completion. Notably, the Builder did not claim any extensions of time or delay costs after the CPC was issued.
- The Developer rejected the demand for the return of the security on the basis that PC was conditional, and the Builder triggered a formal dispute to obtain the payment.
- An interim occupation certificate was issued on 16 November 2020 in respect of the apartments (being part of the development), despite the additional works not being completed by the Builder.
- Ultimately, the dispute between the Builder and the Developer focused on the operation of the CPC and whether the date of PC should be applied to determine the parties' respective entitlements to liquidated damages and delay costs.

Legal issue

- The issue in this matter was whether the Developer had the right to call on the Builders security to apply against the liquidated damages of \$22 million that the Developer said it was owed.
- Put another way, the question was whether the Builder had a right to the return of its securities on the basis that PC was 7 September 2018 as set out in the CPC.

Decision

- Stevenson J found that the CPC did not comply with the Contract and had no contractual effect.
- In response to this finding, the Builder then argued that the Developer must be “estopped” from denying PC was reached on 7 September 2018, due to the representations that the Developer made that it was proceeding on the assumption that PC was achieved on 7 September 2018. The Court did not accept this argument, stating that: “My conclusion is that the position that the Builder now finds itself in is a result of its unilateral misunderstanding of the effect of the Conditional Certificate, and not because of any inducement by the Developer.”
- Stevenson J also found that the Builder remained responsible for obtaining the occupation certificate and performance of remediation obligations. The court held that the Builder unreasonably ignoring the conditions does not amount to detrimental reliance. Therefore, the builder could not prove detrimental reliance.
- The builder also attempted to rely on the prevention principle stating that the Developer by its conduct “took over” the Builder’s obligations and “prevented” the Builder from performing its remediation obligations. They also argued that the Developer “took out of the Builder’s hands” the ability to prepare a delay claim. The court ruled otherwise, finding that, following the issue of the CPC the Builder announced and repeatedly reiterated that it had no further obligations under the contract. It did so at its detriment.
- In conclusion, it was held that the Developer was entitled to the security and to deduct liquidated damages. The builder’s claim failed on all counts.

Key Takeaways

- Builders need to be mindful of their obligations to complete the works strictly in accordance with the contract, including any conditions of consent from Council and to continue to protect themselves by submitting extension of time claims until “Practical Completion”, as defined by the Contract, has been achieved.
- Do not rely on concepts (such as “Conditional Certificate”) that have been created by a principal or superintendent that are outside the terms of the Contract – they are not enforceable and have no contractual effect.
- The Court will strictly apply the terms of the contract and will not protect a builder from liquidated damages unless the builder can prove that it has taken all reasonable steps to protect itself by complying with its contract obligations.

More information

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