

# Two conditional certificates do not one final make

*The New South Wales Supreme Court in Parkview Constructions Pty Limited v Futuroscop Enterprises Pty Limited [2023] NSWSC 178 provides insight into the date of practical completion under an AS 4902-2000 contract.*



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## Background

Parkview Constructions Pty Limited (**Parkview**) as contractor was engaged by the principal, Futuroscop Enterprises Pty Limited (**Futuroscop**) to build a Travelodge hotel and a Wilson's carpark in Mascot, Sydney. The AS 4902-2000 form contract was entered into in September 2015 and work began on 1 March 2016. The date for practical completion was 4 September 2017. The 'works' did not distinguish between the completion of the two buildings.

The superintendent of works provided a retrospective certificate of practical completion for Building A (the Travelodge) on 12 September 2017, subject to Parkview rectifying certain items, and a separate certificate for Building B (the carpark) on 25 September 2017, on the same basis. The first certificate expressly stated that it excluded Building B. The 'works' under the contract were not



defined in a separable way and the superintendent could not issue a certificate for practical completion for only one building.<sup>1</sup>

*The Superintendent was conferred with an extensive role and powers under the Contract, including approving variations and extensions of time, giving directions to the Contractor, approving progress claims and – critically in this case – certifying practical completion and liquidated damages.*

In September 2017 the Council approved interim occupation of both buildings (which later became final) and Futuroscop took possession of the site and began taking rental from that time. This was strong evidence,

as it turned out, of practical completion, given the definition of practical completion:<sup>2</sup>

*Practical completion is that stage in the carrying out and completion of WUC [works under construction] when:*

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

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

...

*(d) the Contractor has done all things that it is required to do under the Contract to*

*enable the Principal to obtain a certificate of occupation from the applicable Authority;*

A dispute arose as to the release of security provided by Parkview and liquidated damages claimed by Futuroscop. Parkview commenced proceedings on 11 December 2018,<sup>3</sup> seeking to restrain Futuroscop from having recourse to the security. A crossclaim was issued in March 2019 by Futuroscop for liquidated damages and the costs of rectification of alleged defects. During the proceeding Futuroscop presented a lengthy defects list to Parkview, some 382 items,<sup>4</sup> which it said prevented practical completion from occurring.

Parkview claimed the 'works' had reached practical

1 *Parkview Constructions Pty Limited v Futuroscop Enterprises Pty Limited* [2023] NSWSC 178 at [23].

2 Above, at [186].

3 Above, at [173].

4 Above, at [269].

completion as per the conditional certificates. Futuroscop denied Parkview could have recourse to either its first or second bank guarantees due to the delayed and defective building works, and also withheld a GST payment.<sup>5</sup> During the proceeding the first bank guarantee was released “without prejudice” by Futuroscop.

### Judge’s findings

Justice Rees held that the “conditional” certificates had no contractual effect and could not be read in the composite. She was called upon to determine the date of practical completion herself and thus the defects liability period which ran for 12 months after practical completion. Further, her Honour was called to determine whether the contract was effectively a code and prevented common law damages for patent defects from being claimed by Futuroscop.

The terms of the contract were pivotal. Further, Justice Rees ruled that the superintendent had breached his duties to act reasonably and in good faith. The Court interprets commercial contracts objectively by *what a reasonable businessperson would have understood [the]*

*terms to mean:*<sup>6</sup> The actual subjective intentions of the parties are irrelevant.<sup>7</sup> The superintendent had not issued a certificate for practical completion in September 2017 or the ensuing five plus years. Parkview complained that the superintendent should administer the contract and not just pass on Futuroscop’s complaints. This resonated with the judge, who was sympathetic to Parkview’s evidence.

The Court found that unless a contract specifically provides for a certifier to issue a “conditional” certificate, the issue of such a certificate may be ineffective.<sup>8</sup> In this case the certificates had no contractual effect. This finding went Futuroscop’s way but the Court then moved to determine the practical completion date of its own accord. This favoured Parkview.

The Court ruled that the contract provided a code which established the rights, obligations and liabilities of the parties, and mechanisms by which completion of the ‘works’ was to be achieved to practical completion and during the defects liability period.

Justice Rees said that technical language is to be avoided in construing the contract:<sup>9</sup>

*In determining the*

*meaning of the language of commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. ...*

Where the superintendent had failed to determine the practical completion date, there was nothing in the contract to prevent the Court from stepping in (or an arbitrator) and determining that date. Indeed, the contract itself permitted this. The Court held that the date of practical completion was important (finding it was 25 September 2017) as the contractual terms provided:

- The superintendent could direct Parkview to remedy defects for the defects liability period of 12 months at Parkview’s cost; failing which Futuroscop would undertake the rectification at Parkview’s cost
- A further 12 months defects

5 Above, at [42].

6 Above, at [190]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656; [2014] HCA 7 at [35].

7 *Parkview Constructions Pty Limited v Futuroscop Enterprises Pty Limited* [2023] NSWSC 178 at [190]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116; [2015] HCA 37 at [50].

8 Above, n 1, at [205]; *Official Assignee of Hutson v The New Zealand Antimony Company (Ltd)* (1890) 10 NZLR 143.

9 Above, at [208]; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771.

- liability period for rectified work
- Within 42 days of the expiry of the last defects liability period a final certificate was to be issued as to the amounts owed between Parkview and Futuroscop, and this would equate to *conclusive evidence of an accord and satisfaction*
  - Patent defects, such as most of those focused on in the proceedings were exceptions to those discovered in the defects liability period and could not be claimed under common law damages; rather, they were covered solely under the

contract and the contractual time limits applied.

The superintendent had not specified a separate defects liability period.

Court orders were made for payment under the contract to Parkview and a modest amount for rectification of certain proved defects. Parkview was liable to pay some liquidated damages, but in an amount Justice Rees calculated, putting aside the superintendent's calculations. Costs were payable on an overwhelming basis to Parkview as the substantively successful

party following a six-day hearing.

### Conclusion

The contractual documentation and certification needs to be effectively drafted and implemented to avoid the Australian courts from having to step in to stipulate the date for practical completion. If a dispute of this nature were to happen in New Zealand, the Building Disputes Tribunal is well placed to provide a cost-effective remedy to avoid protracted and expensive court proceedings.

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