

**St Hilliers Construction Pty Ltd (In Administration) -v- Fitzpatrick Investments Pty Ltd [2012]
NSWSC 804**

FACTS

The Contractor and the Principal entered into a design and construct building contract for the construction of a commercial building Melbourne. The contract required provision by the Contractor of bank guarantees as security for performance, to be returned where, upon satisfaction of conditions precedent including the issue of the Certificate of Practical Completion and certification by the consultants of completion of the relevant works. Later, the Principal took possession of the works and subsequently, the Contractor went into voluntary administration and the Principal terminated the contract.

ISSUES

Is the Contractor entitled to rely on the Certificate of Practical Completion, to claim return of its security Alternatively has the Principal in taking possession of the works waived the right both to the relevant certification and the security?

FINDING

The Court held that the form of the certificates in the form given did not amount to performance of the condition precedent because the Certificate of Completion contained the qualification "work to the date of the statement" has been completed, which is less than the completion of all works.

The Contractor's alternative submission that the Principal had waived the entitlement to comply with certification was unsuccessful because taking possession of the works is not necessarily inconsistent with the Principal's entitlement to require production of the certificates. The contract also protected the Principal by a condition that any waiver of the conditions of the contract required the prior consent of the Principal in writing.

QUOTES

The Judge held at:

[26]: *"The Principal is entitled to receive, and the provision requires, an unqualified certification that the relevant work has been completed, not that work to a particular date has been."*

[27]: *"the form of the document used is undoubtedly the form which is intended to be used in relation to progress payments. The form envisages future payments for future work yet to be done."*

IMPACT

The case highlights the importance of promptly completing certification in the correct form, and to avoid a qualified certification which confuses later reliance. Contract Managers should insist on unqualified certificate at each stage of the works.

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