

Disputing a Final Certificate: Does the Contractor Still Need to Pay?

IN SHORT

The Situation: Most construction contracts, including AS4000 and AS2124, stipulate that a final certificate is issued following completion of the work, stating the final amount payable between the parties.

The Development: Two recent decisions by the Queensland Supreme Court held that contractors were not obliged to pay the amount certified in final certificates which were the subject of timely notices of dispute.

Looking Ahead: The Court's decision has led to some uncertainty, as a Victorian ruling concerning a modified AS2124 reached the opposite conclusion. Future cases will reveal whether the Queensland decision is followed by other courts.

The Background

Construction contracts usually provide for a final certificate to be issued following completion of the works, containing an assessment of the amounts finally payable between the parties to the contract. The functions of the final certificate always depend on the terms of the contract, but in most contracts (including AS4000 and AS2124), these include:

- Triggering an immediate obligation to pay any amount certified ("payment function"); and
- In any subsequent court or arbitral proceedings, evidencing the amounts finally due and payable between the parties ("evidentiary function").

The Issue

Usually, the contract will allow parties a limited period in which to give a notice disputing the final certificate (see, for example, AS2124 GC 42.8 and AS4000 GC 37.4). The effect of such a notice depends on the terms of the contract.

Under AS2124 and AS4000, it is clear that a timely notice of dispute will prevent the final certificate from fulfilling the "evidentiary" function (that is, the certificate will not be evidence of the amount payable, or that the works are complete). The statement that the final certificate "shall be [conclusive] evidence" is subject to an exception, namely where a party has issued a timely notice of dispute.

In contrast, in both forms, the requirement to pay amounts certified does not depend specifically upon whether the final certificate is disputed (although in AS2124, the requirement is "subject to the provisions of the Contract"). This raises an important issue: Does the payment obligation apply irrespective of any notice of dispute?

This question is especially important under AS2124 and AS4000 because it potentially determines whether the principal may have recourse to security. The principal may only have recourse where an amount has fallen due for payment and remains unpaid.



This decision creates some uncertainty, as a Victorian decision concerning a modified AS2124 contract, *Skilled Group Ltd v CSR Viridian Ltd*, reached the opposite conclusion.



The Outcome

In *Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers One Pty Ltd & Anor*, the owner sought to call on a bank guarantee under an AS4000 contract on the basis that amounts under a disputed final certificate were due and remained unpaid. The Court held that as the contractor had given a valid notice of dispute, the amount certified in the final certificate was not due and payable. The Court specifically rejected an argument that it was payable on an interim or provisional basis, subject to a final determination in court or arbitration.

Tomkins followed an earlier Queensland decision, *Martinek Holdings Pty Ltd v Reed Construction (Old) Pty Ltd*, concerning disputed final certificates under AS4000. The reasoning focused on the structure of the contract, in which a single clause (GC 37.4) deals with disputing a final certificate and the certificate's evidentiary and payment functions. According to these decisions, the different parts of that clause ought to be read as explaining and qualifying each other.

In [Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd](#) ("CMC"), the Court considered the same question in the context of an AS2124 contract, concluding that no debt arose from a disputed final certificate. The Court followed the line of cases mentioned above, seeing no relevant differences between AS4000 and AS2124.

This decision creates some uncertainty, as a Victorian decision concerning a modified AS2124 contract, [Skilled Group Ltd v CSR Viridian Ltd](#), reached the opposite conclusion. Arguably, CMC is inconsistent with a number of cases, including [Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd](#) and [Re Concrete Constructions Group Pty Ltd](#), holding that a payment certificate under GC 42.1 of AS2124 gives rise to a debt. It remains to be seen whether CMC is followed in other courts.

THREE KEY TAKEAWAYS

1. Many construction contracts, including AS4000 and AS2124, do not expressly say whether an amount certified in a disputed final certificate must be paid. Parties negotiating contracts should consider amendments to remove any uncertainty.
2. Under AS4000, principals are unlikely to succeed in enforcing payment of amounts only on the basis of the amount having been certified as owing in a disputed final certificate. A disputed final certificate is unlikely to provide sufficient basis for calling on security.
3. These decisions suggest that the Queensland courts will also apply these principles to a disputed final certificate under AS2124 contracts. The effect of a disputed final certificate under AS2124 is otherwise uncertain due to apparently conflicting court decisions. Until the position is clarified, parties should factor this uncertainty into their commercial strategy for contract closeout and seek specialist assistance where necessary.

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