

FACTS

The case of *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd [No 6] [2020] WASC 302* involved the development of Raine Hall, a shopping center in Perth, WA. Westgem, the developer, entered a multi option financing agreement (MOFA) with financiers to fund a contract with a construction company, Salta.

The financiers alleged a costs overrun in the course of construction, and withheld funding. A number of disputes arose from the matter, however Westgem in particular alleged that no costs overrun had *actually* occurred and that it was due to the financiers unjustified decision to withhold payment, that Salta decided after a certain delay to terminate the contract, which then caused further issues.

Whether a costs overrun had validly occurred came down to what amounts, which had already been paid, should be included in the contractual term ‘*cost to complete*’; which was broadly referred to in the MOFA as the “*amount... required to be expended to achieve Practical Completion*”. The Salta construction contract defined practical completion specifically, but the project was argued to include other costs than those required to achieve Salta’s practical completion.

ISSUE

Whether for the purposes of the MOFA, practical completion would defined as practical completion under the Salta Contract, or defined more broadly?

FINDING

His Honour, Tottle J, preferred the broader definition given the context and purpose of the MOFA, stating:

172 *“The Approved Project Budget was defined as ‘the detailed feasibility study and cash flow for the Project determined on a “whole of project basis” ...To construe Practical Completion of the Project as occurring simultaneously with practical completion under the Salta Building Contract would be inconsistent with the ‘whole of project’ approach to the Approved Project Budget.”*

176 *“I add that in arriving at the conclusion that the references to Practical Completion in the Cost to Complete definition were references to Practical Completion of the Project”*

Although ultimately a number of other disputes and issues were also raised, the court found for the financiers as to whether a cost overrun had actually occurred.

IMPACT

This decision shows the importance of parties understanding how practical completion will be defined and what third party obligations or actions may be necessary to achieve it.

Where financing or development contracts refer to the conduct of other contracts, this decision suggests it may be appropriate to do so a high level of specificity.