

CONSTRUCTION UPDATE
PRACTICAL COMPLETION

MAY 2019

- A CLEAR AND DETAILED DEFINITION OF PRACTICAL COMPLETION IS KEY
- CONSIDER WHAT PRACTICAL COMPLETION MEANS FOR DIFFERENT PARTS OF A BUILDING
- A MATERIAL FAILURE DOES NOT AUTOMATICALLY PRECLUDE PRACTICAL COMPLETION
- BE CLEAR ABOUT THE CONSEQUENCES OF AN ECONOMICALLY IRREMIEDIABLE BREACH
- A BESPOKE DEFECTS REMEDIATION REGIME IS RECOMMENDED



New guidance has been provided by the Court of Appeal about when a construction project completes. The guidance will be of particular relevance to those carrying out construction works in the hotel, student accommodation and care home sectors and where it is important that room sizes meet specified dimensions.

Practical completion is arguably the most important milestone in a building contract, and in the context of a commercial development project, the achievement (or non-achievement) of practical completion can often trigger some significant rights and obligations of the parties to related project documents.

In this update, we consider a relatively recent Court of Appeal case, *Mears Ltd v Costplan Services (South East) Limited & Ors* [2019] EWCA Civ 502, concerning the interpretation of practical completion under a building contract.

“NEW GUIDANCE HAS BEEN PROVIDED BY THE COURT OF APPEAL ABOUT WHEN A CONSTRUCTION PROJECT COMPLETES”

Facts

The appellant, Mears Limited (“Mears”) and the second respondent, Plymouth (Notte Street) Limited (“PNSL”) entered into an agreement for lease (“AFL”) under which Mears would take a long lease from PNSL of two blocks of student accommodation. Amongst other things, the AFL provided that:

1. PNSL, as the landlord shall not make any variations to the works which will materially affect the size (and a reduction of more than 3% of the size of any

- distinct area shall be deemed material), layout or appearance of the property;
and
2. if practical completion (pursuant to the building contract) did not occur by the long stop date of 11 September 2018, then Mears would be entitled to terminate the AFL, and effectively, walk away from the long lease.

Mear's case was that, pursuant to the AFL, the construction of any room outside the 3% tolerance would be a material breach, and as 56 rooms were found to be outside the 3% tolerance, this entitled Mears to discharge their obligations under the AFL, and in turn, also prevented the proper certification of practical completion under the building contract.

Court of Appeal's Decision

The Court disagreed with Mear's contention and stated that as a matter of construction, the deemed materiality only relates to the reduction in room size; in other words, the size reduction is deemed material and would be a breach if it is more than the 3% tolerance in any particular room, but there is nothing in the AFL to suggest that the consequent breach itself would be a material breach. In this regard, the Court pointed out that:

"... if the parties were to be taken to have agreed that any failure to meet the 3% tolerance no matter how trivial, amounted to a material breach of contract, it would lead to a very uncommercial result"; if, for example, there is a failure to meet the 3% tolerance in relation to the bin store, which on Mears' interpretation would allow Mears to walk away, this would be wrong both as a matter of the language, and as a matter of commercial reality.

The Court of Appeal further stated that the irremediable nature of a breach (being the fact that the departure from the 3% tolerance was economically irremediable) is irrelevant to the issue of practical completion.

In conclusion, the Court of Appeal provide the following summary on the law of practical completion under a building contract:

- Practical completion is easier to recognise than define and there are no hard and fast rules on this subject;
- The existence of latent defects cannot prevent practical completion;
- In relation to patent defects, there is no difference between an outstanding item of work and an item of defective work which requires remediation – both can and are usually identified in snagging lists without distinction;
- Practical completion generally means a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling;
- Whether or not an item is trifling is a matter of fact and degree, to be measured against "the purpose of allowing the employer to take possession of the works and to use them as intended". The fact that the works are in a state that allows the building owner to take possession, regardless of the

nature and extent of the items of work which remain to be completed/remedied, does not equate to practical completion; and

- The fact that the defect was irremediable does not necessarily mean that the works were not practically complete. If there is a patent defect which is properly regarded as trifling, then it cannot prevent the certification of practical completion, whether or not the defect is capable of economic remedy.

Other than the principles above, the Court also stated that, without any express contractual definition or control, practical completion is, at least in the first instance, a question for the certifier. However, parties to a construction contract can agree particular parameters to guide and control a certifier's exercise of such discretion.

Lessons Learnt

There are important lessons to be learnt from this case:

1. The conditions for achieving practical completion must be clearly specified in the building contract and any related contract(s);
2. Where achieving completion of certain parts of a building is more important than other parts, specify the standard to be achieved when defining the conditions for practical completion;
3. Set out clearly and unequivocally where a failure to meet a condition would preclude practical completion and/or constitute a ground for termination under the relevant contract(s);
4. Specify any factors considered material, and more importantly, what would constitute a material breach;
5. Agree upfront and stipulate in the relevant contract(s) the consequences of failing to achieve practical completion, especially where a failure to meet the requirements is economically irremediable;
6. Where works during the defects liability period would adversely impact on the development once operational, such as in the hotel, student accommodations or care homes sectors, make clear that the contractor is required to carry out any repairs with minimal disturbance to occupiers; and
7. As the courts may not be willing to delay practical completion where room sizes do not satisfy minimum levels, include tolerance LADs to compensate the employer. This will avoid the difficulties associated with proving losses where room sizes are out of tolerance from specified dimensions.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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