

Practical Completion: a contextual art?

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I was once asked by a trainee Architect: *'how do you know when practical completion has been achieved on a traditional contract?'* I was tempted to say, in the spirit of Potter-Stewart's US Supreme Court judgement in *Ohio v Jacobellis*; *'you know it when you see it'*. But I went for the safer and established: *'as long as there is generally only de minimis snagging outstanding?'*

Practical Completion and what that looks like is a subject the courts grapple with from time to time. It is a task which can leave certifiers in a difficult place: the contractor generally wants out, the employer is often desperate to get in; and, commercially, there is much riding on the coveted Certificate of Practical Completion (CoPC). The recent case of *Mears Ltd v Costplan Services (South East) Ltd and Others* provides another layer which contract administrators should be aware.

THE CASE

The case concerns two blocks of student residences in Plymouth. It was brought by Mears Ltd, who are involved in providing and managing student housing (the lessee) and was against: 1) Costplan Services (the Employer's Agent), 2) Plymouth Notte Street Ltd (the Employer/Proprietor), and; 3) J R Pickstock Ltd (the Contractor). The Claimant essentially sought declaratory relief from the Technology and Construction Court (TCC) on:

1. whether practical completion (PC) could be certified whilst there were known material or substantial defects;
2. and/or whether PC could be granted whilst there are material or substantial subsisting breaches of the [agreement] relating to the performance of the works;
3. whether the Employer's Agent could not validly certify Practical Completion whilst there were material and substantial breaches...and/or material or substantial defects in the works;
4. that a failure to construct the rooms within the 3% area margin described within the contract is material and substantial and constitutes a material and substantial defect;
5. that one or more of the rooms has been constructed to exceed the 3% margin contained within the agreement between the parties

Practical Completion (PC) in a traditional JCT building contract is an important milestone for many reasons: it is the point that the works contained within the contract are deemed to be complete, the insurance obligations for the building transfer to the Employer, fifty percent of the retention monies held back during the interim payment regime are released to the contractor and the defects liability period commences. In this matter, PC also signified the start of a process for a twenty-one year lease (Agreement for Lease or "AFL") between Mears Ltd and Plymouth Notte Street (PNS) Ltd. Where PC was not achieved by a longstop date, Mears Ltd had the contractual right to terminate their agreement for lease with PNS Ltd.

As with many projects, the Date of Completion came and went and in June 2018, Mears Ltd alleged a wide range of claims for work that was not complete and/or not in accordance with the contract namely; that a roof had not been installed in accordance with the contract (plywood as opposed to sedum), and; crucially, fifty-six rooms had been built smaller than shown on the Planning Drawings.

Costplan, the Employer's Agent and Certifier, believed there to be no impediment to them granting PC and were only stopped from doing so by a successful court injunction raised by Mears Ltd.

The judge in declaratory proceedings was able to dispose of all of the matters, with the exception the allegation related to the under-sized rooms. Contract clause 6.2.1 provided that: *'the Landlord shall not make any variations to the Landlord's Works of Building Documents which...materially affect the size (and a reduction of more than 3% of the size of any distinct area shown upon the Building Documents shall be deemed material)'*. Mears averred that PC could not be certified whilst there were material breaches of the contract. Two of the defendants, took the position that the reference to *'distinct area'* in the contract clause could not mean an individual room and that *'Building Documents'* meant the drawings appended to the AFL as opposed to the Planning Drawings, which Mears believed to be the baseline.

Justice Waksman found that even if any variation was considered material or substantial by the contract, it did not reflect the extent or the importance of the breach on the project as whole. The scale of the variation and the scale of any resultant breach *'are two quite different concepts...I do not see how **any** breach of Clause 6.2.1 effectively bars out practical completion so that Mears can walk away [emphasis added]..it would mean that one material deviation in respect of one room (for example a bin store) would have that effect. The result seems to me to be so commercially absurd that it cannot be right.'* However a breach or variation such as the bin store example, whilst not barring practical completion, could entitle Mears to damages.

Waksman J rejected Mears' assertion that Practical Completion could **only** be certified where there were *de minimis* items outstanding: *'for the avoidance of doubt, I do not consider that any breach of Clause 6.2.1, if more than 'de minimis', would then count as material or substantial. There is much ground in between. There could easily be a minor, though actionable, breach that is still not material or substantial'*.

The nub of this case and Waksman's obiter comments can probably be summarised best: *'the very concept of a material breach here begs the question - material to what?.. Materiality, once one assumes the correct context, must by its very nature be a question of fact and degree'*. The defendants tried to run the argument that the breaches were *de minimis* and whilst Waksman was minded to think that they were more than *de minimus*, he held that the breaches were not material or substantial, within the entire context of the project, preventing PC being granted. He did however open the window to possible claims for damages as a consequence of the breaches.

Waksman goes on to adopt the definition provided by Keating:

- *'The works can be practically complete notwithstanding that there are latent defects;*
- *A certificate or practical completion may not be issued if there are patent defects. The DLP is provided in order to enable defect not apparent at the date of Practical Completion to be remedied;*
- *Practical Completion means the completion of all the construction work that has to be done;*
- *However the architect is given discretion...to certify practical completion where there are very minor items of work left incomplete on de minimus principles.'*

but qualifies this somewhat by saying: *'put it another way, there will be practical completion if to all intents and purposes the building is complete. So the intent and the purpose of the building is key. When the building is intended to house people, that has led to an emphasis on it being fit for occupation by such people" and that what amounts to being sufficiently ready for occupation is highly-fact sensitive...context therefore is everything'*.

Waksman did not give a general definition of Practical Completion or a test that it must meet to be achieved - rather such a test needs to be determined based on the context of the particular project. Whether this is the end of the road for Mears and Costplan remains to be seen; in the meantime certifiers need to be mindful of context when certifying a construction project as practically complete.

Written while employed by Sense Studio

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