

TEARS FOR MEARS – THE PERILS OF DETERMINING PRACTICAL COMPLETION

- ▶ What is Practical Completion (PC)?
- ▶ In the absence of an express contractual provision, what guidance are parties given by the Courts to help them establish whether PC has occurred?
- ▶ Do patent defects or breaches of contract mean that PC is not established in law or in fact?

The recent case of *Mears Limited v Costplan Services (South East) Limited & 2 Oths [2019] EWCA Civ 502* provides useful guidance to help answer these questions and indicates how the Courts are currently interpreting the body of case law relating to practical completion.

What's it about?

This was an appeal by Mears against the TCC's decision that the failure of its counterparty to meet a contractual provision requiring that some new-build rooms in two student blocks should not be more than 3% smaller than originally designed was **not** "a material and substantial breach" of contract entitling Mears to refuse to enter into a Lease (that was dependent on PC being achieved) and to terminate the agreement; and (combined with the presence of alleged material and substantial defects) preventing the Employer's Agent from validly certifying PC.

Why does it matter?

The case law on the circumstances in which PC can be achieved or can/should be certified has fluctuated over the years between cases which have approved a more narrow or stricter approach, to ones that have applied a more flexible or practical approach. This is the first significant case on the approach to PC since *Walter Lilley & Co. Limited v Mackay & Another (No.2)* in 2012 and helpfully sets out the Court's current thinking and provides guidance on interpretation.

In the Court of Appeal, Coulson LJ agreed with Waksman J that the 3% tolerance requirement was not there in order to determine whether there was a material and substantial breach of the agreement, but rather that it set the bar for what constituted a variation which materially affected the size of the Property – such a variation being prohibited by the agreement. As such it was just a means by which a breach of contract could be "*indisputably identified*", giving rise to a right to claim for damages.

Mears' argument that a breach of this tolerance requirement was irremediable and so prevented PC was rejected as "*irrelevant*". The key issue is the nature of any outstanding defects, not whether they are remediable or not. If a patent defect is trifling, it "*cannot prevent the certification of practical completion, whether the defect is capable of economic remedy or not*".

Overall, Coulson LJ confirmed that a practical approach is favoured, which would allow PC to be certified where there are outstanding patent defects, if such defects can be "*ignored as trifling*". Whether an item is trifling is "*a matter of fact and degree to be measured against " the purpose of allowing the employers to take possession of the works and use them as intended"*" (as per Salmon, LJ. in the *Jarvis* case).

Now what?

The advice from the Court is clear:

- if you want particular parameters in a construction contract to determine what will constitute PC or in what circumstances PC can be certified, then that is possible, but you will need clear and precise wording in your contract; and
- in the absence of express wording, PC is a question for the certifier in the first instance and the Court's guidance is that a more flexible approach is currently preferred. Coulson LJ acknowledged that PC is easier to recognise than define and that there are no hard and fast rules. His summary of the law also included the following:

- ▶ latent defects cannot prevent PC;
- ▶ there is no difference between patent defects and items of work yet to be completed;
- ▶ "trifling" patent defects will not prevent PC from being certified. Whether an item is trifling is a matter of "fact and degree" to be measured against the purpose for which the party is taking possession of the property;
- ▶ the fact that possession can be taken and the works used for their intended purpose does not in itself mean that the works are practically complete irrespective of the position on defects; and
- ▶ the mere fact that a defect is irremediable does not mean that the works are not practically complete.

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