

Construction Law Update

Does a Material Breach of Contract Preclude Practical Completion?

In the recent TCC case of *Mears Limited v Costplan Services (South East) Limited & Others [2018]*, the court considered the meaning of 'practical completion' and whether a material variation and breach of a contract term will prevent achieving the same.

Background

In May 2016, J R Pickstock Limited ("**Pickstock**") was engaged by Plymouth (Notte Street) Limited ("**PNS**") under a JCT Design and Build Contract 2011 (the "**Contract**") to build two blocks of student accommodation (the "**Development**"). Costplan Services (South East) Limited ("**Costplan**") was engaged as Employer's Agent in relation to the Development and was responsible for certifying practical completion. Also in May 2016, Mears Limited ("**Mears**") entered into an agreement for lease ("**AFL**") with PNS to take a 21 year lease of the Development. The AFL stipulated that completion of the lease would take place within 5 working days of practical completion. However, if practical completion had not occurred by the longstop date of 11 September 2018, Mears could terminate the AFL and walk away.

By June 2018, the works were in delay and Mears was alleging a wide range of defects including that around 50 rooms had been built smaller than contractually permitted. The AFL provided:

"6.2 *The Landlord shall not make any variations to the Landlord's Works or Building Documents which...*

6.2.1 *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), layout or appearance of the Property."*

Costplan considered there was no impediment to practical completion and accordingly it intended to issue the practical completion certificate. In response, Mears applied for an injunction to restrain Costplan

from certifying practical completion. Mears sought declarations from the court that Costplan could not certify practical completion whilst there were known and subsisting "*material and substantial*" defects in the works and/or breaches of the AFL.

Decision

The court granted a declaration that a material variation had occurred as some rooms were more than 3% smaller than stipulated in the drawings. However, it concluded that a material variation did not by itself prevent practical completion as it did not necessarily follow that the resulting breach was a material or substantial breach of the AFL. It stated that Mears' interpretation of the clause "*would mean that one material deviation in respect of one room (for example a bin store) would [entitle Mears to terminate]. That result seems to me to be so commercially absurd that it cannot be right.*" The important point to consider is the seriousness of the breach in the context of the AFL and the Development as a whole.

Meaning of practical completion

The court considered the meaning of 'practical completion' which was not defined in the Contract or the AFL. It relied on the principle set out in Keating on Construction Contracts (9th Edition) that practical completion means the completion of all construction work that has to be done and can be certified notwithstanding latent defects, but not when there are patent defects. In addition, the court added the following observations:

1. practical completion is "*not merely about the extent of the work done but also... its quality*";
2. "*works need not be in every respect in complete conformity with the contract in order to merit practical completion, provided that any non-conformity is insignificant*"; and

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3. *“there will be practical completion if to all intents and purposes the building is complete”.*

The third point demonstrates that the intent and purpose of a building is key. If a building is intended to house people, the emphasis is on whether it is fit for occupation. The court pointed out that, *“what amounts to being sufficiently ready for occupation is highly fact-sensitive. So, for example, if a building was to be ready for occupation by a family, but one or more of the bedrooms had been constructed in such a way that a member of the family would find it uncomfortable or inconvenient to occupy it then this may mean that the building was not ready for occupation and so there could not be practical completion. Context, therefore, is everything.”*

It went on to emphasise that purpose and intent are not exhaustive. Defects such as an oddly shaped roof or wrong colour brickwork will not affect the ability of a building to house its occupants but could still prevent practical completion. Therefore, an irremediable breach can, but will not always, prevent practical completion. It will be fact dependent in each case.

Analysis

This decision makes a helpful distinction between the extent of a variation and the significance of the resultant defect to the overall contract. The fact that a variation is stated to be ‘material’ does not necessarily mean that it will prevent practical completion. However, this is not entirely consistent with the approach in other cases, such as *Hall & Anor v Van Der Heiden (No.2)*, in which practical completion could be achieved when defects remained, but only if they were minor (or ‘*de minimis*’).

As there is no definition of ‘practical completion’ in the commonly used standard forms of building contract such as JCT, whether practical completion has been achieved is a common point of contention. It is understood that Mears has lodged an appeal of this

decision. As such, perhaps further clarity will be provided by the Court of Appeal. In the meantime, parties may wish to protect themselves and add clarity to their contracts by ensuring practical completion is a defined term so that it is clear when it can be achieved and when it cannot be.

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