

# Legal Update

## A more than trifling matter: Court of Appeal considers the meaning of practical completion

Practical completion is easier to recognise than define. It is perhaps for this reason that there is no hard and fast legal definition, unless of course the parties choose to amend their contract to specifically define it. In the recent case of *Mears Ltd v Costplan Services (South East) Ltd and others*, the Court of Appeal considered the meaning of practical completion on appeal from the TCC's first instance decision in December 2018.

### THE FACTS

The tenant, Mears, entered into an agreement for lease (AFL) with the landlord, PNSL, and the developer and contractor, Pickstock, by which it agreed to take a 21 year lease of two blocks of student flats in Plymouth following completion. The annual rent was £1.6m. The building contract required Pickstock to design, carry out and complete the works in conformity with the AFL.

The AFL provided that:

- if a certificate of practical completion had not been issued by the longstop date of 11 September 2018, Mears or PNSL could terminate the AFL;
- the issue of a certificate of practical completion was to be in the "sole professional discretion" of the employer's agent; and
- the rooms were to be built to a specified size contained on the contract drawings and that if they were more than 3% smaller than the specified size, as built, this was 'material'.

The works were originally scheduled to be complete by August 2017. In the event, completion of the works was delayed by over one year. During the course of 2018, Mears alleged that some of the rooms in the flats were more than 3% smaller than specified. However, by that time, the rooms had been built and the long stop date was fast approaching. Notwithstanding Mears' complaints, the employer's agent, Costplan, indicated that it considered the works were practically complete and it therefore intended to issue a certificate of practical completion.

### AT FIRST INSTANCE

Mears sued Costplan, PNSL and Pickstock and obtained an interlocutory injunction restraining Costplan from issuing the certificate until after the trial. Mears then sought a declaration that the AFL, properly construed, meant that any reduction in room size exceeding 3% was a material breach of contract, which prevented certification of practical completion and that, consequently, it was allowed to terminate the AFL and "walk away".

PNSL disagreed and said that the effect of Mears' case was that it would leave PNSL with completed buildings, no tenant and lost rental income of more than £33m simply because of a very minor variance to the specification. PNSL said that this was an "absolutist" approach and could not be the correct analysis.

On the facts, the judge found that 56 of the rooms were more than 3% smaller than specified, which was a breach of the clear terms of the AFL. However, the judge said that it did not follow that practical completion could not be certified as a result. He agreed with PNSL that the effect of Mears' argument was "*commercially absurd*" for the reasons noted above.

## ON APPEAL

In the Court of Appeal, Coulson LJ gave the leading judgment (with whom Newey and Lewison LJJ agreed) and he upheld the first instance decision. He said that it would be "*commercially unworkable*" if every technical breach of contract drawings had to be regarded as sufficient to prevent certification of practical completion. This was so, even though the parties had expressly agreed that a variation in size over the 3% threshold was "*material*". Coulson LJ said that their agreement as to materiality related to what the parties had agreed to be material for the purposes of assessing whether there had been a breach of contract rather than deeming the breach itself to be material for the purposes of practical completion, which he said it was not. Coulson LJ said that whether a breach was sufficiently material as to prevent certification of practical completion was a matter of fact and degree in each case.

This was sufficient to dispense with the issues before the Court of Appeal but, helpfully, Coulson LJ took the opportunity to provide a review and summary of the leading authorities on the meaning of practical completion. In doing so, he noted the following key propositions which should be borne in mind when considering practical completion:

1. Practical completion is easier to recognise than define.
2. The existence of latent defects cannot prevent practical completion, because, by definition, nobody knows about them.
3. In relation to patent defects, there is no difference between an outstanding item of work which needs to be completed and an item of defective work which needs to be remedied.
4. The approach taken by Salmon LJ in *Jarvis & Sons Ltd v Westminster Corporation* [1970] 1 WLR 63 and the Hong Kong Court of Final Appeal in *Mariner International Hotels Ltd v Atlas Ltd* [2007] 10 HKCFAR 1 was the correct one. They defined practical completion, respectively, as:
  - a. "... completion for all practical purposes, that is to say, for the purpose of allowing the employers to take possession of the works and use them as intended"; and
  - b. when works have been completed "*free from patent defects, other than ones to be ignored as trifling*".
5. Whether or not a defect 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 to use them as intended*" (per Salmon LJ in *Jarvis*). However, this should not be elevated into the proposition that if a house can be inhabited the works must be practically complete, regardless of the nature and extent of the items of work that remain to be completed or remedied.
6. The fact that a defect is irremediable does not of itself preclude the achievement of practical completion. What matters is whether the defect is (or defects are) trifling.

## COMMENT

This decision demonstrates that the courts will take a practical approach to assessing whether and when the works are practically complete in the circumstances. The issue is highly fact sensitive and requires consideration of all of the circumstances. It will depend upon the nature of the items of outstanding works and/or defects and how serious those matters are. If the building can be occupied and the nature of the works which are outstanding or defective are only 'trifling' matters then they will not prevent certification of practical completion. The fact that any defect is irremediable does not, of itself, indicate that it is sufficiently serious to prevent practical completion.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

*James Morris*

Partner, London

E: [jmorris@mayerbrown.com](mailto:jmorris@mayerbrown.com)

T: +44 20 3130 3416

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