

When Do Defects Prevent Practical Completion?

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Authors: [Julian Bailey](#), [Emma Knight](#), [Helena Payne](#)

Practical completion represents the physical completion of works on construction projects. Despite its importance, it is not a legal term of art, and whether or not practical completion has been achieved requires determination on a case-by-case basis.

The recent judgment in *Mears Ltd v Costplan Services (S.E.) Ltd* [2019] EWCA Civ 502 provides an important analysis of the interplay between patent defects and practical completion. In this case, the Court of Appeal confirmed that a material defect does not necessarily prevent practical completion from being achieved.

Key facts

In *Mears v Costplan*, the Court of Appeal considered the meaning of 'practical completion' in the context of the construction of student accommodation and a related agreement for lease.

PNSL, the employer, contracted with Pickstock, the contractor, for the design and build of student accommodation. Separately, Mears, the tenant, entered into an agreement for lease ("AFL") with PNSL and Pickstock to take a long lease of the property following completion.

The AFL contained a longstop provision that permitted the tenant to terminate the AFL if the practical completion certificate had not been issued by the longstop date.

Further, the AFL prohibited variations to the works that materially affected the size of the accommodation rooms. It considered a reduction in size by more than 3% from the relevant drawings as material. In the event, of the intended 348 bedrooms plus kitchens and certain other rooms, 56 rooms were built more than 3% smaller than the relevant drawings. These breaches were irremediable: there was no prospect of the building being torn down and re-built.

The tenant alleged that any breach of the 3% tolerance was a material and substantial breach of the AFL, meaning that (i) it was entitled to terminate the AFL and (ii) practical completion could not be certified. At first instance, the judge ruled in favour of the employer / landlord, noting that it would be 'commercially absurd' if the breach of the 3% tolerance made practical completion impossible and allowed the tenant to terminate the AFL and walk away.

The tenant's appeal was dismissed by the Court of Appeal, which held that:

- The failure to meet the 3% tolerance was a breach of contract, but not automatically a *material* breach of contract allowing the tenant to terminate. The question of materiality related to room size and not to the resulting breach of contract. If the parties were to be taken to have agreed that any failure (no matter how

trivial) to meet the 3% tolerance amounted to a material breach of contract, it would lead to a very uncommercial result.

- Practical completion is a question for the certifier. Whether a derogation / breach is so material as to preclude practical completion is a matter of fact and degree in each case. Patent defects regarded as 'trifling' cannot prevent the certification of practical completion, whether the defect is capable of economic remedy or not. Whether the 3% tolerance breach was trifling was not a matter for the court here. The issue of economic remedy goes to the proper measure of loss, and not to the issue of practical completion.

The meaning of 'practical completion'

The Court of Appeal reviewed the current state of the law on practical completion, making the following observations:

- Practical completion is easier to recognise than define, and there are no hard and fast rules as to when practical completion is (or is not) achieved;
- The existence of latent (i.e. unknown) defects cannot prevent practical completion (as they are unknown to the certifier);
- In relation to patent (i.e. known) defects, there is no difference between uncompleted items of work and an item of defective work that requires to be remedied;
- Some authorities suggest the existence of patent defects prevents practical completion, however the preferred view (which has been adopted in almost all cases) is that the existence of 'trifling' patent defects does not preclude practical completion;
- Whether an item is 'trifling' is a matter of fact and degree to be measured against the intended purpose of the works; and
- The mere fact that a defect is irremediable does not mean that works are not practically complete.

Comment

The achievement of practical completion is primarily a question of fact and judgment, which is to be determined having regard to what the contractor promised to supply, the definition (if any) of "practical completion" in the relevant contract, and whether what the contractor has supplied substantially corresponds with what the contract required so as to constitute "practical completion". The intents and purposes of the project will be important to consider when addressing the question of whether practical completion has been achieved.

However, the Court of Appeal made clear that, in this particular case, the mere fact that the accommodation was habitable did not mean the works were practically complete. It is a question of whether any patent defects could accurately be described as trifling. If parties intend for practical completion to be dependent on certain aspects of the work being completed in accordance with the letter of the contract, they should draft carefully for this.

In contrast, a more precise approach to completion is often taken in contracts for mechanical plant or similar facilities, such as power stations. On these projects, 'completion' is only taken to occur if, amongst other things, certain testing and commissioning is completed satisfactorily, based on defined benchmarks. Liquidated damages may also be payable if the plant does not function according to a performance specification. Furthermore, completion may also be dependent upon the provision of "as built" documents, operation and maintenance manuals and other documents.

Exactly when practical completion will have occurred is dependent on the nature of the asset, its intended purpose and any relevant contractual provisions. Certainty on exactly when completion is achieved is important given its consequences: the commencement of the defects liability period, the potential end of liquidated damages, the possible impact on retention monies, and the movement of risk to the Employer, to name a few.

Mears v Costplan helpfully clarifies the approach that the English courts will take to determining controversies over the achievement of practical completion. But ultimately, if the contractual criteria for 'practical completion' are defined in only general terms, what this will mean is that disputes over the achievement of practical completion will continue to arise in practice.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

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