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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

The meaning of practical completion

Mears Ltd v Costplan Services (South East) Ltd & Ors
[2019] EWCA Civ 502

Here, the developer and contractor, Pickstock was engaged by PNSL to design and build two blocks of student accommodation. Under an Agreement for Lease ("AFL") Mears contracted with PNSL to take a long lease of the property following completion. Clause 6.2.1 of the AFL prohibited PNSL from making any variations to the building works which materially affected the size of the rooms. A reduction in size of more than 3% was deemed to be material. At the hearing at first instance, Waksman J found that some of the rooms were more than 3% smaller than the sizes shown on the relevant drawings. Mears said that any failure to meet the 3% tolerance was, without more, "a material and substantial breach" which automatically meant both that Mears was entitled to determine the AFL and that the Employer's Agent could not validly certify practical completion. Waksman J disagreed, and Mears appealed.

The AFL defined the Certificate of Practical Completion as: *"A certificate issued by the Employer's Agent to the effect that practical completion of the Landlord's Works has been achieved in accordance with the Building Contract."* The building contract incorporated, with amendments, the JCT Design and Build Contract Form, 2011. Clause 2.2.7 set out the provisions relating to practical completion. Paragraph 714 of the Preliminaries section of the Employer's Requirements contained detailed provisions about the information that had to be handed over before the grant of practical completion. This included a "PC Certificate with snagging/outstanding works list appended". The contract said that the "Third Party Agreements" included the AFL. Pursuant to clause 2.17B.2, Pickstock were to: "*design, carry out and complete the construction of the Works in conformity of the Employer's Obligations under the Third-Party Agreements including, without limitation, those relating to provision of information and the giving of notice and permitting inspections before the Practical Completion Statement ... may be issued.*"

On 4 May 2018, Mears served a defects notice alleging that 40 rooms were more than 3% smaller than required by the AFL. Mears said that pursuant to the AFL, a failure to meet the 3% tolerance was not a question of fact and degree, but instead fell the wrong side of a contractual red line. PNSL accepted that any failure to comply with the 3% tolerance was a breach of contract, but argued that clause 6.2.1 did not address the character or nature of that breach. What was deemed to be material was the reduction in the size of the room, not the resulting breach of contract. LJ Coulson agreed. As a matter of construction, the deemed materiality identified in clause 6.2.1 related to the reduction in room size, not the consequent breach of contract. The Judge said that:

"If the contract drawings required a room to be 7 square metres, and it was less, then there was a departure from the drawings. But was every such departure a breach of contract? There may be all manner of reasons why one room, on completion, is of a slightly different size to that shown on the contract drawings. Furthermore, the extent of any such departure might be very modest. It would be commercially unworkable if every departure from the contract drawings, regardless of the reason for, and the nature and extent of, the non-compliance, had to be regarded as a breach of contract."

LJ Coulson went on to review the meaning of Practical Completion. Having reviewed the authorities, he noted that:

"a) Practical completion is easier to recognise than define ... There are no hard and fast rules ...
b) The existence of latent defects cannot prevent practical completion (Jarvis). In many ways that is self-evident: if the defect is latent, nobody knows about it and it cannot therefore prevent the certifier from concluding that practical completion has been achieved.
c) In relation to patent defects, the cases show that there is no difference between an item of work that has yet to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.
d) ... the practical approach developed by Judge Newey in William Press and Emson has been adopted ... As noted in Mariner, that can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling.
e) Whether or not 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 to use them as intended' (see Salmon LJ in Jarvis). However, this should not be elevated into the proposition that if, say, a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied...
f) Other than Ruxley, there is no authority which addresses the interplay between the concept of completion and the irremediable nature of any outstanding item of work ... But on any view, Ruxley does not support the proposition that the mere fact that the defect was irremediable meant that the works were not practically complete."

The Judge continued that, in the absence of any express contractual definition or control, practical completion is, at least in the first instance, a question for the certifier. Here, the certifier considered that they would have certified practical completion notwithstanding the out of tolerance rooms. This was on the basis that the departures from the 3% tolerance could properly be described as trifling. Whether or not that view was correct was not a matter for this appeal.

That said, the Judge noted that the mere fact that the property is habitable as student accommodation does not, by itself, mean that the property is practically complete. If there is a patent defect which is properly regarded as trifling then

it cannot prevent the certification of practical completion, whether the defect is capable of economic remedy or not. If, on the other hand, the defect is properly considered to be more than trifling, then it will prevent practical completion, again regardless of whether or not it is capable of remedy. The issue as to whether or not it is capable of economic repair is a matter that goes to the proper measure of loss, not to practical completion.

Liquidated damages clauses

Triple Point Technology Inc v PTT Public Company Ltd

[2019] EWCA Civ 230

This was an appeal by the supplier of a software system against a TCC judgment dismissing its claim and ordering it to pay substantial damages on the counterclaim. The main issue of principle which arose was how to apply a clause imposing liquidated damages for delay in circumstances where the contractor or supplier never achieves completion.

In 2012, PTT decided to buy a new Commodity Trading & Risk Management (CTRM) system. There were two phases: Phase 1 would replace the existing system and Phase 2 would involve the development of the system to accommodate new types of trade. Triple Point completed the first two stages of Phase 1, 149 days late. Triple Point then submitted an invoice in respect of this work, which was paid. However, Triple Point went on, relying upon the calendar dates for payment stated in the order forms, and asked PTT to make further payment in respect of other work which was not yet completed. PTT refused saying that payment would be made by milestones. Triple Point had not achieved any of those milestones, apart from the completion of Phase 1. Triple Point suspended work and left the site. PTT terminated the contract.

Mrs Justice Jefford dismissed Triple Point's claim, awarding US$4.5million to PTT on the counterclaim. The Judge said that there was an inconsistency between Article 18 of the CTRM contract (which required payment by milestones) and the payment dates stated in the order forms. Article 18 prevailed which meant that Triple Point was not entitled to receive any further payments under the contract. Further, the delay and ultimate failure of the contract was caused by Triple Point's negligence. They were not entitled to suspend. PTT was entitled to recover (i) the costs of procuring an alternative system; (ii) wasted costs, but subject to a cap of US$1,038,000 pursuant to Article 12.3; and (iii) liquidated damages for delay pursuant to Article 5.3, totalling US$3,459,278.40, which were not subject to the cap.

Article 5.3 of the CTRM contract required Triple Point to pay damages for delay at the rate of 0.1% of undelivered work per day. The Judge held that, although Article 5.3 used the word "penalty", it was not in fact a penalty clause. The CA agreed. The sums generated by the contractual formula were modest, when compared with the financial consequences of delay in installing the software.

Triple Point said that Article 5.3 was not engaged. It only applied when work was delayed, but subsequently completed and then accepted; it did not apply in respect of work which the employer never accepted. This led to Sir Rupert Jackson in the CA reviewing the general principles concerning the operation of liquidated damages clauses in termination or abandonment cases. He noted that where the contractor fails to complete and a second contractor steps in, three different approaches had emerged:

(i) The clause does not apply.
(ii) The clause only applies up to termination of the first contract.
(iii) The clause continues to apply until the second contractor achieves completion.

He noted that whilst the textbooks tend to treat category (ii) as the orthodox analysis, he considered that this approach was not "free from difficulty". Ultimately, the question whether the liquidated damages clause ceases to apply or continues to apply up to termination, or even conceivably beyond that date, must depend upon the wording of the clause itself. There was no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss.

Sir Rupert Jackson was attracted by the 1912 case of British Glanzstoff Manufacturing Co Ltd v General Accident Fire and Life Assurance Corp Ltd. He thought that the clause here, like the clause in Glanzstoff, was focused specifically on delay between the contractual completion date and the date when Triple Point actually achieved completion. In the Judge's view Article 5.3 here had no application in a situation where the contractor never hands over completed work to the employer.

The consequence of this analysis was that PTT was entitled to recover liquidated damages of US$154,662 in respect of Triple Point's delay of 149 days in completing stages 1 and 2 of Phase 1. However, PTT was not entitled to recover liquidated damages for any of the other delays. This was because Triple Point did not complete any other sections of the work. The fact that PTT could not recover liquidated damages in respect of any other sections of the work did not mean that it was left without a remedy for non-completion. Such damages were at large, rather than fixed in advance, and PTT was entitled to recover damages for breach of other articles in the contract, assessed on ordinary principles.

This left the question as to whether PTT's entitlement to damages was subject to the Article 12.3 cap. The Judge said this:

(i) Article 5.3 provides a formula for quantifying damages for delay.
(ii) Sentence 3 of Article 12.3 deals with breaches of contract not involving delay. Hence it necessarily includes the words "Except for the specific remedies expressly identified as such in this contract". It was common ground that this phrase referred to liquidated damages under Article 5.3. Sentence 3 of Article 12.3 imposed a cap on the recoverable damages for each individual breach of contract.
(iii) Sentence 2 of Article 12.3 therefore imposed an overall cap on the contractor's total liability. That cap on total liability meant what it says. It encompassed damages for defects, damages for delay and damages for any other breaches.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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