



## LEGAL BRIEFING

### *Laing O'Rourke Construction Ltd (formerly Laing O'Rourke Northern Ltd) v Healthcare Support (Newcastle) Ltd Newcastle upon Tyne Hospitals NHS Foundation Trust [2014] EWHC 2595 (TCC), Mr Justice Edwards-Stuart*

#### *The Facts*

On 4 May 2005 the Newcastle upon Tyne Hospitals NHS Foundation Trust ("the Trust") entered into an agreement ("the Project Agreement") with Heath Support (Newcastle) Ltd ("HSN") for the design, construction and finance of hospital facilities in Newcastle. On the same date HSN engaged Laing O'Rourke Construction Ltd ("Laing") to design and build the facilities ("the Construction Contract").

Under a separate contract Faithful & Gould were appointed Independent Tester and required to carry out various inspection and certification functions under the Construction Contract and the Project Agreement.

The hospital facilities were divided into nine phases to be completed sequentially. Clause 22.5.1 of the Project Agreement (which was stepped down into the Construction Contract as clause 22.12) provided that:

*"Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when he is satisfied, subject to clause 22A.3.4 that completion of a Phase has occurred in accordance with the Completion Criteria, issue a Phase Certificate of Practical Completion to that effect ...".*

The Completion Criteria for Phase 8, which comprised office facilities for hospital staff, included fifteen particular requirements including the *"Clinical offices blocks 1 and 2 being available and ready for Trust use"* and *"Link bridges ...available and ready for use by the Trust"*. As part of the completion process clause 22.5 of the Construction Contract required Laing to give the Independent Tester three months' notice of the date on which it considered the phase would be complete *"in accordance with the Trust's Construction Requirements, the Completion Criteria and this Contract"*.

During mid 2012 Laing contended that Phase 8 was complete but Faithful and Gould identified five grounds preventing the issue of the completion certificate as follows: toilet areas too small, daylight levels not meeting relevant British Standards, inadequate window restrictors, incorrect link bridge steelwork and potentially inadequate cooling systems.

Laing disagreed contending that these issues were not expressly included within the Completion Criteria. The Trust responded that under clause 22.5 of the Construction Contract completion required compliance not only with the Completion Criteria but also with the Trust's Construction Requirements and all other terms of the Construction Contract. The Trust therefore maintained that in assessing whether practical completion had been achieved wider failures to meet the specifications should be taken into consideration, not just compliance with the tests expressly set out in the Completion Criteria.

Laing contended that:

(i) the wording of the Project Agreement was absolutely clear so that when certifying completion the Independent Tester had to consider whether the Completion Criteria had been met and nothing else;

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(ii) that there was no provision in the Project Agreement that required the Independent Tester to be satisfied that all work had been carried out strictly in accordance with the contract before completion could be certified; and

(iii) that in any event, expressions such as “available” and “ready for Trust use” should be construed as meaning that a breach of specification which did not have any materially detrimental effect on the amenity and functional use of the building should not prevent the issue of the completion certificate.

### ***The Issue***

The issue at the heart of this case was whether any breach of contract relating to quality or conformity of works was a grounds for preventing the issue of the completion certificate by the Independent Tester, or whether, all that was required was compliance with the Completion Criteria set out in Part 2 of Schedule 12 to the Project Agreement.

### ***The Decision***

As a matter of interpretation the Judge concluded that practical completion should be assessed by reference to the requirements under clause 22.5.1 of the Project Agreement i.e. satisfaction of the Completion Criteria only. There was no justification for importing a requirement that any breach of the specification, however technical or minor, could prevent completion from being certified.

As regards Laing’s third point the Judge held that expressions such as “available and ready for use by the Trust” were not precise but must relate to the anticipated use of the Phase 8 offices. The Independent Tester was required to ignore the parties’ disagreements and decide for himself/herself whether or not any alleged non-conformity was likely to have a materially adverse effect on the use of the building by the Trust in the manner contemplated by the agreements. If not, the Independent Tester could issue the completion certificate and leave the Trust to its remedy in damages for any such non-conformities.

### ***Commentary***

Unless the wording of a particular contract points to a contrary conclusion, then the general rule is that practical completion can be achieved notwithstanding minor non-compliances. The certifier must exercise professional judgement in assessing whether any non-compliances can be considered material to the intended use of the building.

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