Cripps

What does “practical completion” mean?

In most standard form building contracts, “practical completion” is not defined or not defined precisely. It is left to the contract administrator to certify it, using their professional judgment in the relevant circumstances.

However, there is much case law on its meaning and the Court of Appeal discussed the subject again in *Mears Limited v Costplan Services (South East) Limited and others* [2019] EWCA Civ 502.

Mears had entered into an agreement to take a lease of two blocks of student accommodation (the Agreement). If practical completion did not occur by 11 September 2018, then Mears could terminate the Agreement.

The Agreement said that the developer could not make variations to its works which materially affected the size, layout or appearance of them. Clause 6.2.1 specifically stated that a reduction of more than 3% of the size of any distinct area shown on the agreed documents would be “deemed” material.

56 of the rooms were found to be more than 3% too small. Mears asked the High Court to declare that there was therefore a material and substantial breach of the Agreement (which would mean that Mears could terminate the Agreement) and also to declare that practical completion could not be certified because of known material or substantial defects or breaches. The High Court refused to give the declarations.

The Court of Appeal agreed. Clause 6.2.1 made clear that if rooms were more than 3% smaller than they should be, that would be a “material variation” and indeed a breach of contract **but** it would not necessarily be a **material** breach of the Agreement. Only a material breach would entitle Mears to terminate the Agreement.

So: if draftsmen want to be sure that the breach of, for example, size parameters will rank as a material breach of contract, entitling the injured party to terminate, they should say so explicitly in their contracts.

Would the defects or breaches prevent practical completion and therefore entitle Mears to terminate the Agreement because practical completion did not occur by 11 September 2018?

The Court of Appeal said:

a. Practical completion is easier to recognise than define.
b. Latent defects (those not apparent at the date of certification of practical completion) cannot, of course, prevent certification – because no-one knows of them.
c. Patent defects (those which are apparent on inspection of the works) include not just defective work but outstanding work.
d. Whilst acknowledging there is conflicting case law, the Court of Appeal concluded that "trifling" patent defects should not prevent issue of a certificate of practical completion.
e. Whether a defect or outstanding work is "trifling" is a matter to be measured against "the purpose of allowing the employers to take possession of the works and to use them as intended". That does not, however, mean that practical completion has occurred merely because the building is usable.
f. Just because a patent defect cannot be remedied (such as building a room too small) that does not mean that practical completion cannot be certified. The defect might be trifling.

Mears may yet be able to prove that the variation in room sizes in this case was more than "trifling" and should therefore prevent certification of practical completion. Likewise, it may be able to show that the room size variations were severe enough to amount to a **material** breach of the Agreement, entitling Mears to terminate it. Even if it turns out that Mears cannot terminate, they could still have a right to damages for any losses they suffer because of the reduction in room sizes.

How we can help

From developers, investors and contractors to high net worth individuals, our construction lawyers provide a wealth of expertise and ensure construction contracts are well drafted and watertight. We can also assist with construction disputes. To find out more, please contact our construction team.