The achievement or certification of practical completion has significant consequences under a building contract; which will usually include a release of part of the retention monies, the employer taking possession of the works and the start of the defects liability period.

However, whilst there is an overarching principle of practical completion (PC), there is no precise legal definition; parties are free to define what practical completion will mean in their contract.

We review three Technology and Construction Court (TCC) decisions this year and highlight the key points you need to know.

**Swansea Stadium Management Company Limited v City & County of Swansea, Interserve Construction Limited [2018]**

**Background**

1. Swansea Stadium Management Co Ltd (SSM) is the leasehold owner of the stadium for Swansea City Football Club. The City & County of Swansea (CCS) owns the freehold.
2. In 2004, Interserve was appointed by CCS to design and construct the stadium under a JCT Standard Form of Building Contract with Contractor's Design 1998 incorporating amendments 1 to 4; plus bespoke amendments by the parties (the Contract). The
works commenced in 2003 and practical completion was certified on 31 March 2005.
3. In 2005, the parties entered into a collateral warranty (the CW) for the benefit of SSM.
4. In 2017, SSM commenced proceedings seeking damages of around £1.3m under the CW for defective work under the Contract.

**Limitation Defence**

Interserve's primary position was that any claim by SSM under the CW was time barred for limitation purposes as the claim was commenced more than 12 years after the date of PC which was 31 March 2005.

This decision of the TCC related to Interserve's application to have certain claims by SSM struck out as being barred due to limitation.

Part of SSM's defence to this application was that PC was not achieved by 31 March 2005 as the works were incomplete and defective at that date.

In terms of the certification of PC, clause 16.1 of the Contract provided:

"When in the reasonable opinion of the Employer the Works have reached Practical Completion and the Contractor has complied with clause 6A.5.1 or has complied sufficiently with clause 6A.5.2, whichever clause is applicable, the Employer shall give the Contractor a written statement to that effect, which statement shall not be unreasonably delayed or withheld, and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such statement."

**TCC Decision**

Due to the deeming provisions in Clause 16.1 set out above, the TCC held that: "the existence of any defects or outstanding works........ would not prevent the operation of clause 16. Clause 16.1 is clear that where, as in this case, the employer issues a notice that practical completion has been achieved, practical completion is deemed to have been achieved."

It was therefore correct that any breach of the CW in respect of claims relating to defects present at PC must have occurred by 31 March 2005, i.e., the date of PC, on which date the 12 years limitation period started to run. The proceedings were issued on 4 April 2017 by which time those claims were statute barred; they were struck out.
**University of Warwick v Balfour Beatty Group Ltd [2018]**

**Background**

1. University of Warwick (UW) appointed Balfour Beatty Group Ltd (BB) to design and build the National Automotive Innovation Centre on the UW campus. It was to be a state-of-the-art "international class automotive academic and commercial R&D research facility".
2. The building contract was based on the JCT 2011 Design and Build form of contract with amendments agreed by the parties (the Contract).
3. A dispute arose in relation to sectional completion, delay and the liquidated damages provisions of the Contract.
4. In March 2018, BB commenced an adjudication seeking a declaration that under the Contract, it was not possible to achieve completion of one of the defined Sections of the Works prior to completion of the whole of the Works (PC) - and, that as a result; the liquidated damages provisions of the Contract were inoperable.

**Definitions**

In the Contract:

- "Practical Completion" was defined as follows:
  "a stage of completeness of the Works or a Section which allows the Property to be occupied or used and........". Emphasis added
- "Property" was defined as "the property comprised of the completed Works." Again, emphasis added.

**Adjudication Decision**

Focusing in particular on the definitions of PC and Property, the Adjudicator found in favour of BB’s construction of the Contract.

In his decision, he emphasised that the "completed National Automotive Innovation Centre could [only] be occupied and used when all Sections have achieved Practical Completion....". He applied what he described as a "literal interpretation" of the Contract in relation to PC and observed that "[t]his definition may seem illogical however the words
used by the parties are clear and unambiguous”.

**TCC Decision**

The TCC did not agree with the Adjudicator's interpretation, stating that it "does not accord with the ordinary meaning of the words used". The court's view was that the adjudication decision placed too much emphasis on the definition of "Property" "at the expense of what the parties plainly meant by using all the words and without regard to the wider context of the other provisions of the Contract and the background known to both parties at the date that they entered into the Contract".

The TCC emphasised that this was not a case of "giving effect to an apparent intention notwithstanding rather than because of the actual words used". The Court's interpretation reflected the ordinary meaning of the words used and reflected the parties' clear intention to provide for sectional completion. BB's interpretation would mean that all provisions relating to sectional completion were "otiose".

The TCC did not consider there to be any ambiguity in the wording and additionally stated that "business common sense" supported UW's construction.

**Mears Ltd v (1) Costplan Services (South East) Ltd (2) Plymouth (Notte Street) Ltd and (3) J.R. Pickstock Ltd [2018]**

This claim concerned M's application for declaratory relief in relation to the interpretation of an agreement for lease.

**Background**

1. This case relates to two blocks of student flats in Plymouth (the Property) constructed by JR Pickstock Ltd (JRP) for the employer Plymouth (Notte Street) Ltd (PNS). Costplan Services (South East) Ltd (Costplan) were the Employer's Agent in relation to the building works, with responsibility for certifying PC etc under the PNS/JRP building contract (the BC). The BC was based on the JCT Design and Build 2011 standard form with amendments.

2. In May 2016, Mears Ltd (Mears) agreed to take a 21 year lease of the Property from
PNS, with completion of the lease to take place within five working days after PC under the BC. The Agreement for Lease (AFL) provided for a longstop date of 11 September 2018 - if PC had not occurred by that date, Mears could terminate its AFL.

3. In 2016, JRP and Costplan provided collateral warranties to Mears.

4. Delays in the building works occurred and the original completion date in August 2017 was missed. A dispute arose with Mears making various allegations of defective/incomplete work.

5. In the summer of 2018, Costplan stated that PC could be certified imminently. Mears applied for and was granted an interim injunction restraining certification of PC pending the resolution of certain areas of dispute.

6. The parties agreed meanwhile to treat the AFL long stop date as 18 September 2018 (rather than 11 September).

7. On 18 September 2018, Costplan indicated that, but for the injunction, PC would have been certified. Mears undertook not to terminate the AFL until after the trial.

The Dispute

For the purposes of the hearing in November 2018, Mears' remaining substantive allegation in relation to the works themselves was that certain rooms within the Property were too small, in breach of a term in the AFL.

In the TCC, Mears sought five declarations relating to the construction of the AFL. In this alert, we focus on issues relating to the interpretation of practical completion.

Under the AFL, although Mears would still have the benefit of the warranties from Costplan and JRP, no discrete breach of contract claims could be brought after PC. For this reason, the date of certification of PC was pivotal to obligations under the AFL.

Mears sought declaratory relief from the Court in relation to the construction of the AFL in relation to Costplan's obligation to certify PC including that:

1. Costplan could not validly certify PC whilst there are "known material or substantial defects";

2. Costplan could not validly certify PC whilst there are "known material or substantial subsisting breaches of the AFL relating to the performance of the Works";

3. Under the AFL and under Costplan's warranty to Mears, Costplan could not validly certify PC whilst there are material and substantial breaches of the AFL and/or material and substantial defects in the work.
Mears was seeking to establish that some of the rooms were too small, in breach of contract, and that that breach was "material and substantial" such that Mears would be entitled to terminate the AFL.

**TCC Decision**

In summary, whilst Mears succeeded in obtaining one declaration out of five, it was unsuccessful overall in establishing a clear right to terminate the AFL.

Although the Court's view on issues directly relating to PC under these contracts was obiter, Mr Justice Waksman's approach is instructive, particularly here in relation to the crossover between the BC and the AFL.

Key points:

- None of the parties sought to argue that there was a difference between PC under the BC and PC under the AFL;
- Practical completion was not defined in the BC;
- In the AFL, there was a schedule of conditions to be fulfilled before the certification of PC; despite this, the Judge doubted that this imposed a higher standard than would otherwise apply;

The Judge referred to the statement of principle in Keating on Construction Contracts 9th Edition paragraph 20-120 on PC (summarising):

a. Works can be practically complete notwithstanding there are latent defects;

b. PC may not be certified if there are patent defects;

c. PC means the completion of all the construction work;

d. The certifier is however given discretion - regarding very minor works left incomplete on "de minimis" principles.

In addition, Mr J Waksman observed that PC is "not merely about the extent of the work done, but also… its quality" and went on to add:

"…the works need not be in every respect in complete conformity with the contract … provided that any non-conformity is insignificant, a matter which will usually be left to the professional judgment of the certifying entity………..the fact that the breach alleged here is not capable of remedy on any sensible basis does not mean that it cannot prevent practical completion. But on the other hand nor does it mean that it will
always prevent practical completion”.

Practical Completion: the contract is king

No surprises then in these decisions, but the judgments serve as reminders that the contract will be definitive as to the meaning and effect of PC on a particular project. The courts' approach therefore to the interpretation of building and other related contracts is not merely academic - it serves as direct guidance to be kept in mind when negotiating and administrating contracts.

When considering when PC will be achieved (or indeed whether or not it has been achieved):

1. Start with the contract(s) - is there a definition of PC? Does the building contract provide for sectional completion? What is the ordinary meaning of the contract, reflecting the intent of the parties? Is there a deeming provision in relation to PC?
2. Bearing this in mind, what does PC mean on your project in terms of the Works as defined?
3. At the point of certification of PC, can it be said that any outstanding works are minor? - remember that the certifier does have discretion here.

If you have any queries on PC or other construction issues, please contact Ashley Pigott.

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