

How practical can completion be?

How much do we think about Practical Completion (PC)? We often find ourselves judging the significance of defects or outstanding work when the contractor offers a building as complete or when the programmed date for completion arrives.


Under pressure of time (schools tend to need to be occupied by September!) many accept PC with significant work remaining, albeit that a careful record is made of that outstanding work. But should there be any outstanding work? A friend of mine in my local branch of the RIBA boasts that he never grants PC until all work is completed correctly. He maintains that is correct in law - is it?

The JCT Standard Building Contract 2005 follows its predecessors and says, "*When in the opinion of the Architect practical completion of the Works or a Section is achieved and the Contractor has complied sufficiently with clauses 2.4 3.25.3, then:... shall forthwith issue a certificate to that effect... and practical completion of the Works or the Section shall be deemed for all the purposes of this Contract to have taken place on the date stated in that certificate*". What does it say in Section 1, Definitions and Interpretation? "*Completion Date*" is "...as stated in the Contract Particulars or such other date as fixed either under clause 2.28 or by a Pre-agreed adjustment". Date for Completion is also in the Contract Particulars. For Practical Completion, "see clause 2.30". This all means PC is not defined by the JCT. That is common with the other standard forms. My friend, naturally, concludes that 'completion' must simply mean 'completion' - the building is either complete or not. It can't be qualified. He believes that has been held by the courts - lawyers are always referring to words having to be construed to have their natural meaning. Unfortunately, the courts aren't so clear on this one! My friend's interpretation is at odds with Hudsons Building and Engineering Contracts which says, "...it seems clear that (PC) means a sufficient degree of completion to permit occupation and use of the works by the owner and departure of the contractor from the site, but not a complete and perfect discharge of every last

contractual liability... with regard to quality and finish of work; usually, it will mean bona fide completion free of known or patent defects so as to enable the owner to enter into occupation. The words 'practical' or 'substantial' (in civil engineering contracts) probably do no more than indicate that trivial defects not affecting beneficial occupancy will not prevent completion...".

I reckon we all think we can recognise PC but find it hard to define. Keating on Building Contracts says, "*Practical Completion is perhaps easier to recognise than to define... It is submitted that the following is the correct analysis: a) the works can be practically complete notwithstanding that there are latent defects; b) a Certificate of Practical Completion may not be issued where there are patent defects; c) Practical Completion means the completion of all the construction work that has to be done; d) however, the Architect is given a discretion... to certify Practical Completion where there are very minor items of work left incomplete*".

The courts have addressed the matter on few occasions and then only obliquely. You may wish (????) to read the following cases: *Jarvis & Sons-v-Westminster Corp [1968] 118 New LJ 590 (at first instance), [1969] 1 WLR1448, CA,[1970] 1 WLR 637; P&M Kaye-v-Hosier & Dickinson [1972] 1 WLR 146; H W Neville (Sunblest Ltd)-v-William Press & Son Ltd [1981]20 BLR 83; Emson Eastern Ltd-v-EME Developments Ltd [1991 55 BLR 83; Impresa Castelli SpA-v-Cola Holdings Ltd [2002] CILL 1904; Skanska Construction (Regions) Ltd-v-Anglo-Amsterdam Corporation Ltd [2002]. However, to save you doing so I offer some quotes.*

In *Jarvis & Sons-v-Westminster Corp* in the Court of Appeal, Salmon LJ (*obiter dictum*, ie an observation) 



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Rob, author of the SCALA and LGTF 'Guide to Standard Forms of Construction Contracts', has offered to share his experience and expertise with you and looks forward to hearing from readers.

“The contractor has no right to an extension of time if a nominated sub-contractor has finished his work on site...”

by a judge on a legal question suggested by a case before him, but not arising in such a manner as to require decision - therefore, not binding as precedent) said, “*I take these words to mean completion for all practical purposes, that is to say for the purposes of allowing the employers to take possession of the works and use them as intended. If completion in Clause 21 (ie completion on or before the date for completion) meant completion down to the last detail, however trivial and unimportant, then Clause 22 (liquidated damages) would be a penalty clause and as such unenforceable*”. Even as obiter dictum this is pretty convincing and is much quoted as why PC should be granted for strictly incomplete works. However, it is still not law. As an aside, the case concerned the issue of patent and latent defects. A piling nominated sub-contractor had been granted PC for his piling works and subsequently a defect in a pile gave rise to a delay for which the contractor sought an extension of time arising from delay by a nominated sub-contractor. Because the defective pile was not discovered until after PC (a latent defect) and PC had been achieved without delay the sub-contractor had not caused a delay. The contractor has no right to an extension of time if a nominated sub-contractor has finished his work on site, the main contractor has proceeded with the main contract works, the sub-contract works are subsequently found to be defective, and rectification of those defects results in the main contract works being completed late.

P&M Kaye-v-Hosier & Dickinson concerned the effect of a final certificate, but more *obiter dictum* regarding PC is the source for the Keating characteristic (b) referred to above (re patent defects). On its own, that seems to suggest my friend is right in not accepting a building until it is perfect. However, in *H W Neville (Sunblest Ltd)-v-William Press & Son Ltd* Judge Newey QC (sitting on Official Referees business) said, “*I think that the word ‘practically’ in Clause 15(1) [JCT ‘63] gave the architect a discretion to certify that William Press had fulfilled its obligation under Clause 21(1), where minor or de minimis work had not been carried out, but that if there were any patent defects in what William Press had done the architect could not have given a certificate of practical completion*”. So, all the work doesn’t have to be completed perfectly! Still *obiter dictum* and not law, though! In *Emson Eastern Ltd-v-EME Developments Ltd*

Judge Newey said, “*...building construction is not like the manufacture of goods in a factory... It must be a rare new building in which every screw and every brush of paint is absolutely correct... If... completion is something which occurs after all defects, shrinkages and other faults have been remedied... it would make the liquidated damages provision... unworkable... The construction industry recognises a difference between the carrying out of new works and ‘snagging’, that is to say dealing with minor defects in them...*”. Whilst this seems to clarify matters further, Judge Newey’s use of “probably” and “I think” in his judgement make his observations indecisive as well as obiter.

The *Impressa* and *Skanska* cases, listed above, raised the issue of possession as a factor in PC. If an employer occupies the building is he accepting PC? Is possession a determining factor in assessing PC? In *Impressa* possession didn’t prove PC had been achieved. In *Skanska* it did, but only because it was held that partial possession had been granted for the whole building - a rather unusual situation.

So, pick the bones out of that lot! A lot of dictum and a lot of common sense - but no definition of PC in law. No definition, that is, other than going to the contract and giving words their natural meaning - when you must be strict and insist on the building being perfectly complete. Practically, however, that’s not what happens in the industry and that has been recognised by the judiciary. Such matters seem, perhaps, academic but I was recently asked to adjudicate a dispute over whether PC should have been granted. I wasn’t asked to decide on any payments, but seven figures of LAD’s hung on my decision! Arguments about whether the building should be absolutely complete or minor defects are acceptable then become very important. After all the legal argument around the cases outlined above, the parties agreed that PC could be granted with minor, de minimis or trivial defects. I think that’s got to be the case - ie PC means complete with the exception of minor, de minimis or trivial defects or incomplete work. Of course, then comes the issue of what constitutes minor, de minimis or trivial...! In my case there was also the issue of whether a major defect was ‘patent’ or ‘latent’ - but that’s another story!