PRACTICAL COMPLETION AND OTHER PROBLEMS:

CERTIFICATION AND INSPECTION BY CONSTRUCTION PROFESSIONALS

TIM CHELMICK AND LUCY COLTER

SEPTEMBER 2020

OVERVIEW

1. Certificates are of extreme importance in the life of any construction project, given their link to the contractor's entitlement to payment and to the identification of defective works, to the transition between stages of the works, and ultimately to practical completion and final completion of the project. We explore below two vital certification stages, in particular interim/progress certificates and practical completion, and the potential problems and challenges presented by them for construction professionals. We also consider the associated topic of inspection of works (which may or may not be harnessed on any given project to the certification process).

ARCHITECT'S CERTIFICATES / DUTIES TO INSPECT

- **Progress/interim certificates**

2. These are payment certificates issued during the course of the work (before practical completion), certifying that in the architect's opinion, work has been carried out to a certain value, and certifying sums for payment to the contractor. Given that the contractor is only entitled to be paid for work properly carried out, the architect or engineer certifying the works has a duty to see that the work has been executed in compliance with the contract before issuing a payment certificate.

3. The key (although now rather old) case remains that of *Sutcliffe v Chippendale and Edmondson* (1982) 18 BLR 149 in which HHJ Stabb QC emphasised that:

    a. Any prolonged or detailed inspection or measurement at the interim stage is impracticable and not to be expected, but more than a glance around is expected.

    b. So long as the contractual basis of an interim certificate is the valuation of work properly executed the architect must satisfy himself as to the quality of the work.

    c. Where a QS is also engaged, the architect should keep him properly and continually informed of any defective or improperly executed work so that it can be excluded.

- **Inspection of the works**

4. The potential trap for the architect is that if the works are later discovered and alleged to be defective, the architect will be blamed for not having identified that when inspecting the works. This will be *inter alia* on the basis that the employer has as a result overpaid during the course of the works, which can be disastrous for example in the event of the contractor's insolvency, but also on the basis that the architect ought to have intervened, the defective work would have come to the employer's notice, and the project may have taken a different course.

5. The duty to carry out periodic inspections are not always harnessed to the certification and valuation process, and as per *McGlinn v Waltham Contractors Ltd* [2007] EWHC 149 (TCC) paragraph 215 there can also be a blurring of responsibility as between architect and QS in respect of the responsibility for interim valuations / certificates. In general terms, the QS role is to assess the quantities of work, and the architect/engineer remains responsible for checking that the work valued has been properly carried out.

6. There is a perceived lack of clarity in the case law as to what exactly is expected and required of an architect in inspecting works, but the following principles do emerge and were summarised in paras. 216-218 of *McGlinn* (which remains the leading case in this area):

    a. The duty is to make periodic inspection, which does not guarantee that all defective work will be revealed or prevented: *McGlinn* para. [216] citing *Consarc Design Ltd v Hutch Investments Ltd* [2002] 2 WLUK 445.

    b. The frequency and duration of inspection has to be tailored to the nature of the works. It is not enough for the architect to have inspected only at the time of monthly site meetings because such times were not necessarily suitable and were telegraphed to the contractor in advance.

    c. Depending on the importance of the particular element or stage of the works, the inspecting professional can instruct the contractor not to cover up the elements of the works (although this is covered by the tailored nature of inspections).

    d. The fact defective work is carried out and covered up between inspections will not automatically amount to a defence to an alleged failure to carry out proper inspections.

    e. If an element of work is particularly important because it is going to be repeated throughout a building or apart of a building, the architect should see it at an early stage.

f. Reasonably examination does not require the inspector to go into every matter in detail.

g. It is misconceived always to accompany a claim for bad workmanship against an employer with an automatic claim against the inspecting officer. Again, the architect does not guarantee that his inspection will reveal or prevent all defective work.

7. See also the summary in Jackson & Powell (8th edn.) paras. 9-175 - 9-188 which (at least in earlier iterations) has been approved in various of the cases including *McGlinn*.

- **Considerations**

8. A few points to bear in mind when bringing or facing claims against an architect for negligent inspection in the course of certifying works:

a. Awareness (including, vitally, a visual awareness) of precisely what was happening on the ground at or around date of inspection, through scrutiny/disclosure of photographs (including on phones), WhatsApp messages, diaries and so forth. This can be extremely useful in identifying what would have been immediately visible to the architect and what may already have been covered up.

b. Length of time the architect has spent on site for an inspection (can often be pinpointed by reference to other attendances, commitments, appointments, and can be embarrassing for the architect if extremely short).

c. Quality of records of inspection findings.

d. Any evidence of concealing / deliberate covering up. This is a fraught defence for an inspecting architect: see e.g. *George Fischer Holdings Ltd v Multi Design Consultants Ltd* [1998] 61 Con LR 85.

e. There is also dicta in *McGlinn* that if an inspecting professional identifies a defect and draws it to the attention of the contractor, he is obliged to monitor

the progress of the rectification work until it is complete or a deduction is made. The identification of the defect is itself not enough.

f. Another interesting line of enquiry is the relationship between the architect and the contractor / subcontractors, i.e. whether it can be alleged that relationship is such that the architect has given the contractor a deliberately easy ride, and what the consequences of that might be.

PRACTICAL COMPLETION

Introduction

9. Practical completion ("PC") is a critical concept in almost all standard form construction contracts. It is a key milestone for important events such as the handover of possession, the transfer of insurance liability and the release of payments including the retention and is usually a major milestone in respect of the overall transfer of risk from contractor to owner. Despite this, the term is not defined in either of the two main forms in this jurisdiction, published by the JCT and the NEC. The definition can only be found by reference to the case law.

10. Again, perhaps surprisingly, the cases that discuss the issue are relatively few in number which probably suggests that the disputes reaching the court were whether PC was achieved as a matter of fact, not about the legal definition of PC.

Existing position – narrow or broad construction

11. There was considerable disagreement regarding the test for practical completion both amongst lawyers and in practice.

12. The following points were uncontroversial:

    a. the Works can be practically complete notwithstanding that there are latent defects (unsurprisingly, as such defects are by their very nature not identified during the construction phase);

    b. a Certificate of Practical Completion may not be issued if there are patent defects.

13. The difficulty was the extent to which "minor" defects amounted to patent defects which would prevent PC being achieved.

14. The leading English authority was (and, in fact, remains) *Jarvis & Sons v Westminster Corporation & Another* [1970] 1 WLR 637 where Viscount Dilhorne said:

The contract does not define what is meant by "practically completed". One would normally say that a task was practically completed when it was almost but not entirely finished but "practical completion" suggests that that is not the intended meaning and that what is meant is the completion of all the construction work that is to be done".

15. This suggests that any patent defect, however minor, would prevent certification of PC. This approach is also supported by *Kaye v Hosier v Dickinson* [1972] 1 WLR 146 where Lord Diplock refers to the absence of any patent defects (at 164A-B).

16. In two separate decisions, HHJ Newey QC interpreted the cases of Javis and Kaye and created an exemption for defects which could be described as "*de minimis*" – see *H.W. Nevill (Sunblest) Limited v William Press & Sons Limited* (1981) 20 BLR 78. This approach was also adopted in the more recent case of *Walter Lilly v Mackay* [2012] EWHC 1773 where it was common ground between the parties that: "*de minimis snagging should not be a bar to Practical Completion unless there is so much of it that the building in question cannot be used for its intended purposes*" – see para 372 of the Judgment.

17. Other cases also adopted the de minimis exception. See, for example, *GB Building Solutions Ltd v SFS Fire Services Ltd* [2017] EWHC 1289 (TCC)[1] where the Judge cited *Jarvis*, *H W Nevill* and *Walter Lilly* when setting out the relevant law (about which there was no dispute).

18. *GB Building Solutions Ltd* is an interesting example of the problems that can arise with practical completion. The decision followed the trial of a preliminary issue in a claim brought by a main contractor against a sub-contractor in respect of allegedly negligent sprinkler installation works undertaken in construction of an office building in Manchester, under a JCT D&B sub-contract (2005 ed.). The building flooded, causing damage which was alleged to be the fault of the sub-contractor. An issue arose as to whether the flood event took place before or after the "terminal date", i.e. in this case practical completion of the sub-contract. This was important as the main contractor

[1] Lucy represented the claimant main contractor.

was obliged to hold a joint names insurance policy until practical completion, which if in place at the date of the flood event would provide the sub-contractor with a defence to the claim. The main contractor therefore contended that practical completion had been achieved for the purposes of the sub-contractor prior to the flood event. The court agreed.

19. The difficulties that arose included the following:

    c. Confusion arose from the use of the defined term "Practical Completion" alongside the use of "practical completion."

    d. The sub-contract provided for practical completion to be deemed to have been achieved by notice if not challenged in writing within 14 days, but an issue arose over whether effect notice had been given. The court found that it had.

    e. In these circumstances, whether practical completion had actually been achieved was irrelevant. However, HHJ Davies did consider whether practical completion had been achieved, and found that it had. The sub-contractors' position was thoroughly undermined by the evidence of its own factual witnesses (who were very keen to explain to the court how well they had done in minimising the outstanding defects and "finishing the job"!)

20. Despite the "*de minimis*" exception being relatively limited by the case law set out above, other cases took a significantly more liberal approach to the certification of PC. The rule of thumb for construction professionals was not whether the defects were "*de minimis*" but whether the building was "*capable of beneficial occupation*"[2]. One authority which supports such a construction of Practical Completion is *Bovis Lend Lease v Saillard Fuller & Partners* (2001) 77 Con LR 134 where HHJ Thornton stated that "*what is meant by practical completion is that the works as a whole are substantially complete and are in a state that allows the building owner to take possession*".

[2] As noted by Coulson LJ in *Mears v Costplan*, this view was expressed in some of the construction texts such as Bailey on Construction law. It was not the view of the authors of either *Keating* or *Hudson*.

21. This also accords with common practice in construction projects where extensive snagging lists of patent defects are prepared in advance of PV to identify the defects that will be rectified after PC has been certified. There are no contractual provision for snagging lists in either the NEC or JCT standard forms. There appears therefore to be a disconnect between the usual practice of certifying professionals in construction projects and the case law.

Mears v Costplan

22. A dispute that turned on the definition of practical completion was considered by the Court of Appeal in 2019 (*Mears v Costplan* [2019] EWHC Civ 502). The facts were unusual as Mears was neither the employer nor the contractor but the prospective tenant of the building once constructed (the purpose of the building was to provide student accommodation). The obligation on Mears to enter into a lease with the employer took effect 5 days after the certification of practical completion. Mears did not wish to execute the lease and so applied for an injunction preventing the Contract Administrator from certifying PC. The basis of the application was that it was impossible for PC to be certified as the size of some of the rooms had decreased by more than 3% (which was deemed to be a material reduction in clause 6.2.1 of the Contract). It was not in dispute that some of room sizes had decreased by more than 3%. However, whether, on the facts, this could prevent certification of PC was not before the Court (at least at this stage). Mears contended:

    f. that any breach of clause 6.2.1 was a material breach which relieved Mears from any further liability under the contract, including the liability to enter into the lease; alternatively

    g. a breach of clause 6.2.1 prevented the Employer's Agent from ever certifying PC (which would mean that the obligation to enter into the Lease never arose).

23. Unusually, the case did not therefore consider whether the defects did, as a matter of fact, prevent PC being certified but merely whether the mere existence of defects prevented the certification of PC at all. This allowed the Court to consider the question for practical completion at a conceptual level.

24. The Court rejected the suggestion that the existence of any defect prevented practical question. It adopted a new formulation of the test which derives from a Hong Kong case (*Mariner International Hotels Limited & Another v Atlas Limited & Another* [2007] 10 HKCFAR 1) as follows (at paragraph 74(d)):

> *"a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling."*

25. Coulson LJ went onto say (at paragraph 74(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. Mariner is a good example of why such an approach is wrong. In consequence, I do not consider that paragraph [187] of the judgment in Bovis Lend Lease, with its emphasis on the employer's ability to take possession, should be regarded (without more) as an accurate statement of the law on practical completion.*

26. Coulson LJ went on to consider whether the mere fact that 56 of the rooms did not conform to the contractual specification meant that practical completion could not be certified:

    h. First, he stated (as a matter of fact) that the EA has certified PC notwithstanding the defects with 56 rooms and that whether this was a correct decision on the facts was not before the Court;

    i. Second, he noted that the mere fact that the building was capable of use as student accommodation was not determinative when considering the issue of PC;

j. Finally, he stated that the fact that the defects were not capable of rectification (as it would involve the demolition and reconstruction of the building) was, again, not relevant. The test was whether the defect was trifling. If the defect was trifling but not capable of rectification, this would be relevant to the assessment of loss (as was the case in the well-known case of *Ruxley Electronics & Construction Limited v Forsyth* [1996] 1 AC 344, where it was never suggested that the defect with the swimming pool prevented practical completion).

Practical consequences of the decision

27. The obvious question is where does this leave professionals responsible for certifying practical completion? On one level, the decision provides welcome clarity but yet scope for debate and disagreement remains.

28. The obvious issue is that what amounts to "trifling" is hard to apply, especially as there is no guidance in *Mears* from the Court of Appeal as the facts of whether the defects regarding the room sizes were, in fact, trifling was not before the Court. However, on any view, it is a low threshold before a patent defect becomes more than trifling and so prevents PC being achieved. This has three immediate consequences:

    k. First, the decision in *Mears* means that certifying professions may be less likely to certify PC, the courts having now clarified that only trifling details can exist before PC can be certified. The effect of such late certifications can be draconian for the contractor, both from a cash flow perspective but also due to the potential liquidated damages liability that may arise. This may increase both claims between employer and contractor but also against the certifying professional, caught in the middle.

    l. Second, certifying professionals would be well advised to exercise caution before certifying PC. If there are "trifling" defects which are going to be resolved after PC by way of snagging, any such agreement needs to be documented.

m. Third, parties may need to consider expressly amending the standard form to include a contractual definition of PC if there are specific items which need to be completed before PC can be certified in order to avoid any debate as to whether the defect is trifling.

Tim Chelmick and Lucy Colter

September 2020