PRACTICAL COMPLETION – A TALE AS OLD AS TIME

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As an experienced Contract Administrator and Expert Witness, the subject of practical completion is a somewhat regular process and occurrence for me although rarely are the circumstances the same. More recently I've found myself being called upon to provide an independent expert opinion on the specific date on which practical completion of a project could be said to have been achieved, due to a dispute between the parties on the extent to which liquidated damages may or may not apply, including administration of the process by the Employer's Agent.

Hudson on Building and Engineering Contracts[i] ("Hudson") considers it desirable to be clear on the meaning of completion as a time obligation, albeit recognising that there is little English authority on the subject:

> ***"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 the English standard forms probably do no more than indicate that trivial defects not affecting beneficial occupation will not prevent completion (the more so, of course, if the contract provides for maintenance or defects liability period)"***

Maintaining the principle of completion as a time obligation, Hudson further advocates that:

> ***"In the last resort, the degree of required completion needed to discharge the contractor's obligation to complete to time will be a matter of interpretation but can be expected to differ from other aspects of the contractor's obligation to complete."***

Here, Hudson draws distinction between (i) the contractor's obligations to "*complete to time*" and (ii) the contractor's obligation to "complete" period, which Hudson elsewhere describes as "*indispensably necessary*" and "*contingently necessary*" work which in the absence of express provision means work deemed to be included in the contractor's price under the

i Hudson Building & Civil Engineering contracts; 11th Edition

"inclusive price principle". In other words, whether the Contractor has completed all of the works deemed to be included within its contract price is not a matter of interpretation but a matter of fact. However, the time by which this obligation is met is a matter of interpretation.

ALL CLEAR SO FAR?

On a more practical level, the Royal Institution of Chartered Surveyors (RICS) provides its own guidance on "*Defining completion of construction works*"[ii] where in response to the proposition "*When is a construction and engineering project complete?*" it explains as follows:

> ***"Subject to any express provisions in the contract, construction and engineering projects are not complete until all of the services required by the contract have been provided to a standard consistent with the requirements of the contract. Such services may include the provision of manuals, demonstrations and training, which, unless the contract states otherwise, will be required to be provided before the works can be said to be complete. The criteria relating to whether or not the service or workmanship has been provided to the required standard will include; any relevant provisions of the contract; any relevant provision of the specification; the purpose for which the works are intended, and any statements made by the contractor prior to his or her appointment, such as specific skills or experience."***

In relation to the term "beneficial occupation", the RICS explains that although often used to describe the standard of completion required for the meaning "practical completion", under the JCT suite of contracts there is no legal basis that supports "beneficial occupation" as a reliable test for practical completion, on the basis that although the Client may be physically able to occupy the building for the purpose and use intended (this being the suggested meaning of "beneficial occupation") there is no obligation to do so if the works are not complete in the full sense of the word, unless of course provided otherwise in the contract. The test for practical completion advocated by RICS is a limited test of reasonableness based upon the *de minimis* principle suggesting that practical completion cannot be denied due to the existence of very minor defects.

Pausing for a moment to digest the authoritative principles of Hudson and the more practical approach advocated by RICS, we find that on the one hand, Hudson" advocates that the meaning of completion is a matter of interpretation taking into account the owner's ability to occupy the building notwithstanding the existence of "*trivial defects*" and the contractors obligations regarding "*necessary work*" under the "*inclusive price principle*". The RICS viewpoint makes clear that all services required under the contract must be complete with all

ii RICS; Defining completion of construction works; 1st edition Guidance Note

contractual requirements satisfied, and under JCT forms of contract "beneficial occupation" is considered an unreliable test of practical completion, the favoured approach being a test of reasonableness based on the *de minimis* principle.

There is obvious commonality in principles between the aforementioned authorities which is both helpful and reassuring. Both are agreed that there is an element of subjectivity, and the contractors complete contractual obligations must be satisfied, aside of "trivial (trifling) defects". As to the meaning of "*beneficial occupation*" as expressed by both "Hudson" and RICS I would draw the following conclusion.

In a contextual setting, Hudson explains that "t*rivial defects not affecting beneficial occupation will not prevent completion*". In other words, "trivial defects" that do not affect the Client from occupying the building for the purpose and use intended cannot prevent completion from occurring. RICS in their guidance under the JCT suite of contracts contest that "beneficial occupation" is a reliable test for practical completion on the grounds that there is a lack of legal basis to support this approach and, the Client has no obligation to occupy if the works are not complete. My interpretation of this is that RICS are rightly steering contract administrators away from the misconception that the ability of a client (employer) to occupy a building for the purpose and use intended signifies practical completion. There is also the important matter of the contractor fulfilling all of its other contractual requirements, a matter on which both Hudson and RICS are fully aligned.

Fortunately Lord Justice Coulson in his well-known and inimitable fashion has also now given the industry clearer guidance and meaning on practical completion courtesy of the 2019 Court of Appeal Decision in the case of *Mears Limited v Costplan Services (South East) Limited, Plymouth (Notte Street) Limited, J.R. Pickstock Limited* (2019):

- *Practical completion is easier to recognise than to define. There are no hard and fast rules.*
- *The practical approach to practical completion can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as 'trifling'.*
- *Whether or not a matter is trifling is a matter of fact and degree to be measured against the purpose of allowing the employer to take possession of the works and to use them as intended, albeit it is noted that possession in itself does not necessarily constitute practical completion.*
- *There is no difference between an outstanding item yet to be completed and a defective item that needs to be remedied*
- *The existence of latent defects cannot prevent practical completion.*

With the baseline principles surrounding practical completion seemingly aligned both in law

and through institutional guidance, how is this best addressed in a practical environment. As RICS points out, common scenarios and experiences are:

1. Employers seeking to impose liquidated damages where the building can legitimately be occupied but there remains a small amount of relatively insignificant work.

2. Contract Administrators exercising wider discretion in interpreting the meaning of practical completion.

3. The unique nature of construction and engineering projects in relation to the integration of separate processes, products, teams and individuals.

From my own experience as an Expert but certainly not as a practitioner, I have encountered first hand disputes arising from scenario's 1 and 2 described above.

On one particular occasion I was engaged on behalf of a Contractor to advise on a certificate of practical completion that had been issued, but then "set aside" with the suggestion it was "conditional". Coincidentally a matter of a few days after Practical Completion had been granted the Employer and prospective Tenant requested "changes" to an external drainage system on the basis it was not compliant with the Employers Requirements and, therefore, defective. Subsequent defects also arose in an extensive gabion wall which the Contractor acknowledged and corrected. A second "Practical Completion" was issued some 21 months after the first, by which time the Tenant had terminated the Agreement for Lease on the grounds that there was a failure to achieve Practical Completion in time, resulting in the Employer making a claim against the Contractor of circa £5 million.

There was much "smoke and mirrors" created by the Employers legal team including a position that the Employers Agent was not in a position to grant Practical Completion when it did due to the identification of "defective work" a few days after the certificate had been issued. Alternatively, the Employer also argued the principle that "defects" constituted a "breach of contract" giving rise to an entitlement to damages. The Contractor's Legal Counsel and I

were aligned that the provisions and mechanisms within the building contract had been duly followed and that for all purposes under the contract, Practical Completion shall be (and was) deemed to have taken place on the date stated in the statement.

The above is a clear example of a Contract Administrator bowing to pressure from the Client to manipulate the meaning of "practical completion" to preserve the Clients best interest which on this occasion was apparently to satisfy the requirements of the prospective Tenant in order to give effect to the Agreement for Lease. Although the Tenant ultimately terminated its agreement with the Employer, citing late completion of the works, it was also alleged that the prospective Tenant had its own other reasons for extracting itself from the agreement.

In similar vein, I also have experience of an Employer carrying out "snagging inspections" for over 12 months before finally granting practical completion. Although on first glance the prevalence of reported "snags" appeared high volume, on detailed review and examination, the majority recorded such concerns as "*pin hole in grout*"; "*make good mark holes and remove pencil marks*" ; "*tighten loose taps*" "*provide caulking to window boards*"; "*screw and grommet missing*". These are the more extreme descriptions given but again highlight how Contract Administers seek to widen the interpretation of "practical completion" for the benefit of the Client. On this occasion there was no incoming Tenant[s] on the horizon.

Putting aside legal context and interpretation for a moment, as this is ultimately a solution to practical completion rather than a function of it, initial consideration must be given to the prevailing terms and conditions of the contract.

The standard JCT Design & Build Contract (2016) addresses practical completion at clause 2.27 stating:

"When practical completion of the Works or a Section is achieved and the Contractor has complied sufficiently with clauses 2.37 and 3.16 in respect of the supply of documents and information, then:

1. ***in the case of the Works, the Employer shall forthwith issue a statement to that effect ('the Practical Completion Statement');***

2. ***in the case of a Section, he shall forthwith issue a statement of practical completion of that Section (a 'Section Completion Statement'); 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 statement."

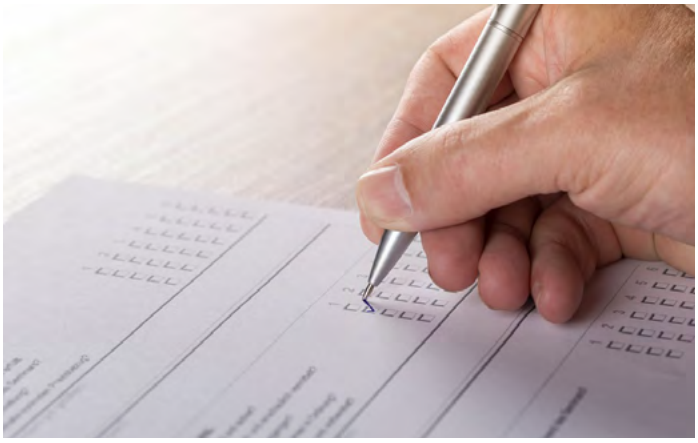
The accompanying JCT guidance notes for the 2016 Design and Build Contract offers the following for amplification:

"Practical Completion, Lateness and Liquidated Damages (clauses 2.27 to 2.29)

> ***The sub-section requires the Employer to issue a Practical Completion Statement or Section Completion Statement as soon as the Works or Section achieve practical completion and the Contractor has fulfilled his obligations both as to as-built drawings and health and safety file matters (clause 2.27)."***

In consideration of the contractual requirements under the JCT 2016 Design & Build contract for determination of practical completion, it can be seen that the Employer must be satisfied as follows;

1. Practical Completion of the Works or a section has been achieved.
2. The contractor has complied sufficiently with Clause 2.27 (as-built drawings) and;
3. The Contractor has complied sufficiently with Clause 3.16 (Health & Safety file matters)



In keeping with the holistic concept of practical completion the contract maintains a combination of subjectivity on the part of the Employer alongside compliance by the Contractor with tangible obligations.

On the matter of subjectivity, Keating on Construction Contracts] ("Keating") discusses the nature of "Employers Approval" as follows [iii];

> ***"Normally the employer's approval must not be unreasonably, or dishonestly, or***

iii Keating; 11th Edition; sub-section 5-003

> ***capriciously withheld. What is reasonable is a question of fact. The right to withhold approval may by the terms of the contract be limited to certain parts or qualities of the work. If approval is subject to the completion of certain tests which the employer through its own default fails to carry out, it cannot withhold its approval because the work has not satisfied other tests not agreed upon in the contract."***

From the Contractors perspective its requirements under clause 2.27 of the 2016 JCT Design and Build contract are what can be known as a "double obligation" which Keating further explains as below[iv];

> ***"A contractor must frequently complete work according to a specification or to a certain standard and to the satisfaction of the architect. It is a question of construction in each case whether this imposes a double obligation on the contractor. There is no rule of law or principle of construction applicable to construction contracts that, where the contract contains a term that a structure is to be erected in a prescribed manner and to the satisfaction of the employer's architect or engineer, the contractor fulfils that obligation if the architect or engineer is in fact satisfied even though the structure has not been erected in the prescribed manner. The general principles of construction apply, and the meaning of any clause must be ascertained from within the particular contract by construing the contract as a whole and giving effect so far as possible to every part of it. In that case, the engineer had issued an unqualified certificate of satisfaction, but the obligation to satisfy the engineer was held to be cumulative upon other obligations. The balance of English authority was said to favour a cumulative approach, but there was in fact held to be no particular applicable rule of law."***

So, how can we rationalise, understand and approach the process of practical completion to the extent that the actions of the Employer, or Agent on its behalf, can withstand third party scrutiny?

- Practical completion is a matter of interpretation based upon fact.
    - Have the works, other than patent "trifling defects" been completed in accordance with the contract? and;
    - Have all of the services required of the contractor under the contract been completed to the standard required under the contract?
- "Trifling defects" are a matter of fact and degree to be measured against the purpose of allowing the employer to take possession of the works and to use them as intended.

iv Keating; 11th Edition; sub-section 5-046

- The Employers approval cannot be unreasonably, dishonestly or capriciously withheld.
- The Employer cannot "prevent" the Contractor from achieving practical completion.
- Under JCT contracts the Employers ability to take "beneficial occupation" is legally unsupported as a reliable test for practical completion.

Rarely are unamended standard forms of building contract adopted. The nature and extent of bespoke amendments vary. As one of the main causes of construction dispute is the parties' ability to properly understand and administer the contract, taking the time to identify and/or avoid inappropriate risk from outset can prove invaluable. Mutual agreement on the precise meaning of "practical completion" should not be discounted; and is indeed advocated by RICS as a way of providing greater certainty in the agreement, increasing trust between the parties and reducing the likelihood of costly dispute resolution.

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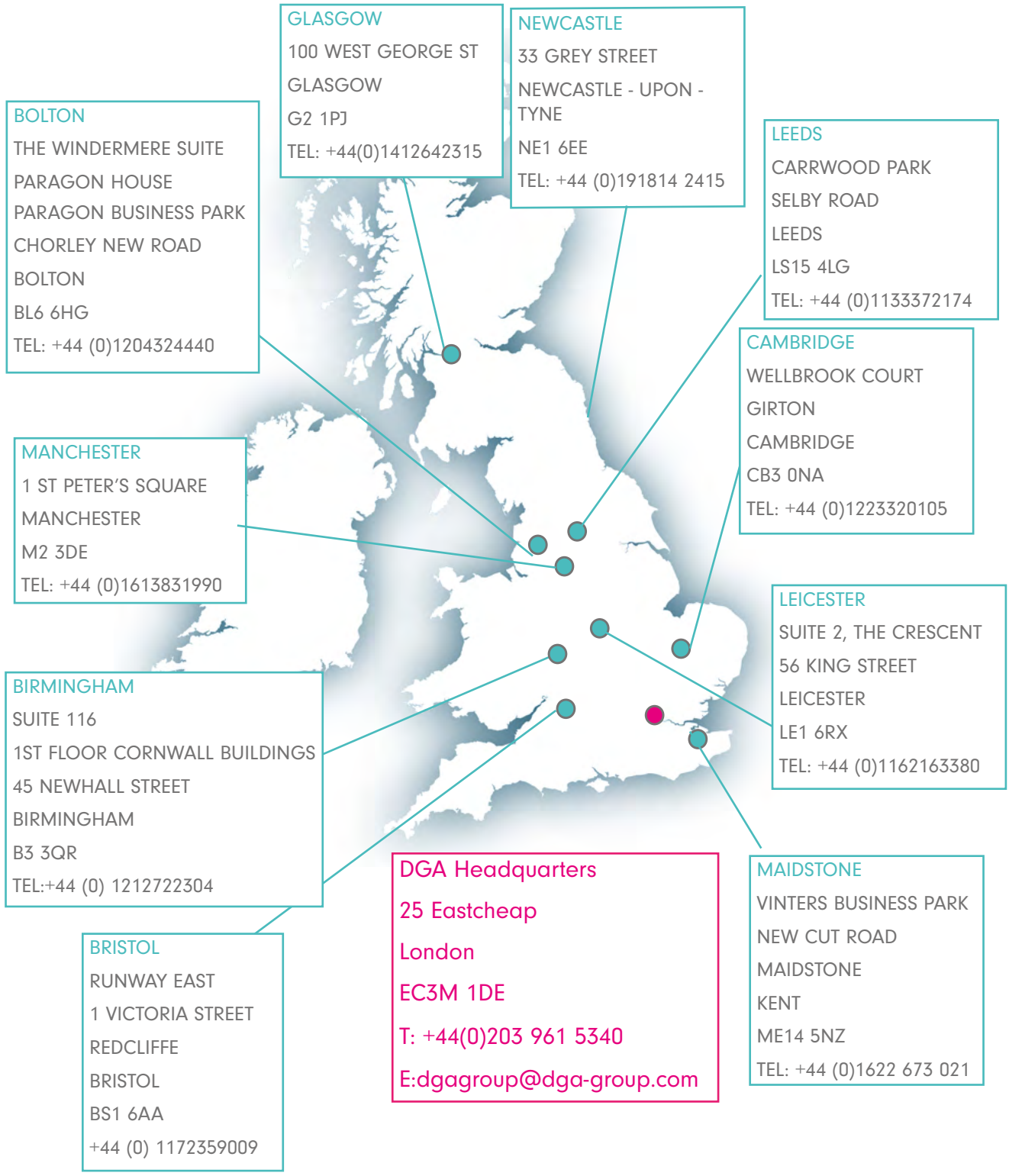

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