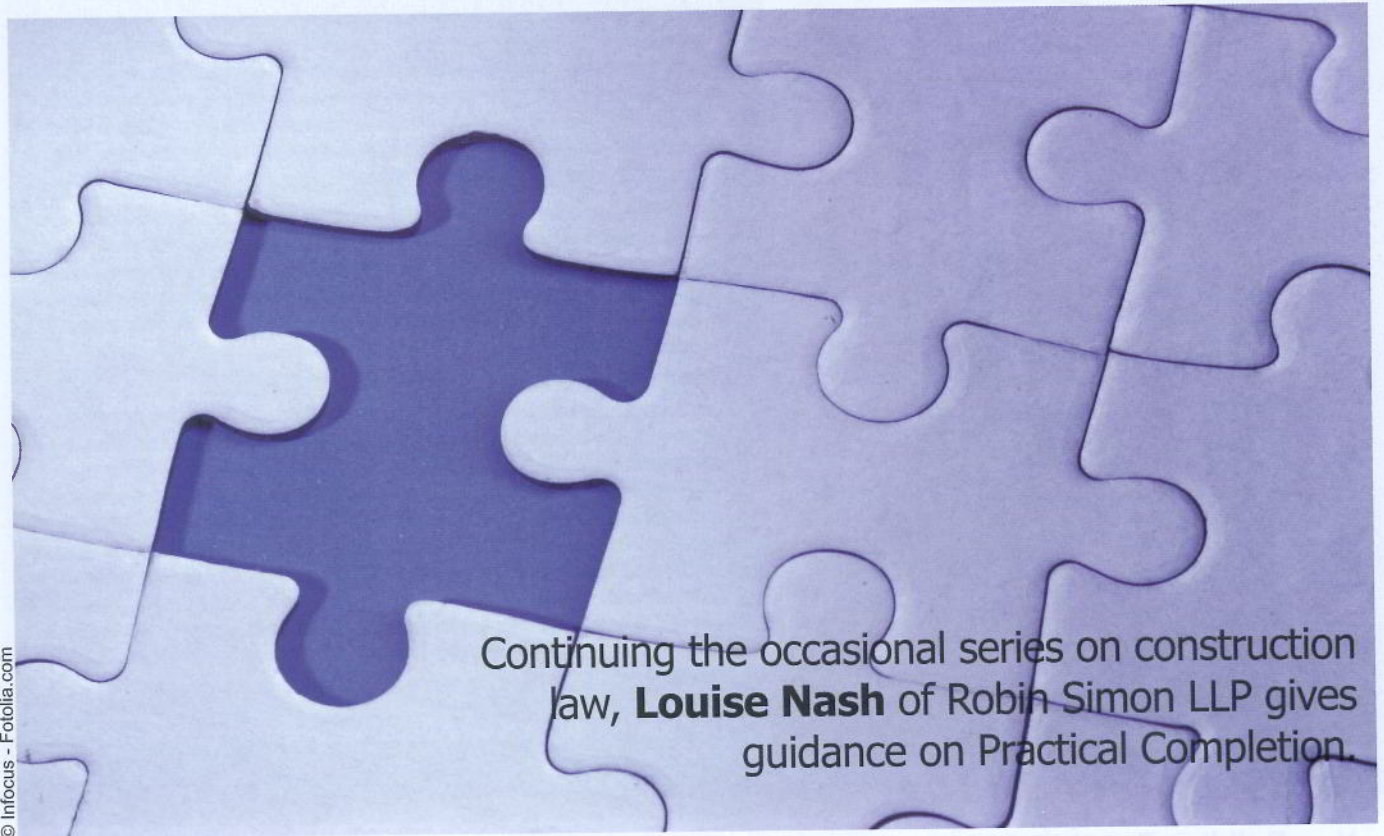


Contract killers 4



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Continuing the occasional series on construction law, **Louise Nash** of Robin Simon LLP gives guidance on Practical Completion.

Despite being a key milestone in construction projects, there is no standard definition of 'Practical Completion'. The purpose of this article is to consider the meaning of Practical Completion, what triggers this event and what impact it has when it is achieved.

I will also be discussing the important distinction between Certificates of Practical Completion and Professional Consultants' Certificates.

What is Practical Completion?

Generally, Practical Completion is considered to be the point at which a building project is complete, except for very minor defects which can be put right without undue interference or disturbance to an occupier. It is sometimes described as the point at which the building project is capable of beneficial occupation and use.

Before considering how Practical Completion has been interpreted by the courts, it is necessary to consider the obligations a contract administrator is under in terms of certifying Practical Completion.

There are a large number of standard form contracts used in construction projects, but for the purpose of this article, I will be focusing upon the terms set out in the JCT Minor Works Building Contract 2005 Edition ('the Contract').

Clause 2.9 of the Contract requires the contract administrator to '...certify the date when in his opinion the Works have reached practical completion and the contractor has complied sufficiently with clause 3.9.3' (Clause 3.9.3 requires the Contractor to comply with CDM Regulations and to provide information to the planning supervisor for the preparation of the health and safety file).

The following checklist is a helpful reminder of what must be achieved for the works to be considered 'practically complete':

- All of the construction work that has to be undertaken must be complete.
- A Certificate of Practical Completion can still be issued where there are very minor items of work left incomplete, on *de minimis* principles.

- A certificate of Practical Completion can be issued even though there may be latent defects. The Defects Liability Period enables previously undiscovered defects to be remedied.

- A certificate of Practical Completion may not be issued if there are patent defects.

With the above points in mind, the following case law provides a summary of how the courts have defined Practical Completion in previous cases.

One of the leading cases on Practical Completion is the House of Lords decision in *City of Westminster v J Jarvis and Sons Ltd* [1970] 7 BLR 64.

The question for the court to decide was whether the contractor was entitled to an extension of time due to the delay caused by a sub-contractor. The answer to this question involved consideration as to when Practical Completion had occurred.

Viscount Dilhorne in his Judgment held that 'One would normally say that a task was practically completed when it was almost but not entirely finished; but Practical Completion suggests that

it is not the intended meaning and what is meant is the completion of all the construction work that has to be done'.

In *H W Neville v William Press and Sons* [1981] 20 B.L.R., Judge Newey QC sitting as official referee took a more relaxed view. His view was that '...the word practically...gave the architect a discretion to certify that the contractor had fulfilled its obligation...where very minor *de minimis* work had not been carried out, but that if there were any patent defects in what the contractor had done the architect could not have given a Certificate of Practical Completion'

Although the above decision suggests that Practical Completion can still be achieved where very minor *de-minimis* work has not been carried out, caution must be exercised by contract administrators in this regard. It will always be a question of fact and degree as to whether 'snagging' items fall within the definition of *de-minimis* work. However, where there is a long list of 'snagging' items to be rectified, careful thought should be given by contract administrators as to whether Practical Completion should be certified at all.

Taking possession of the site

Parties to construction contracts should be aware that where an employer takes possession of the site, Practical Completion will be triggered notwithstanding that Practical Completion may not have been formally certified.

This issue was considered by Lord Diplock in *P&M Kaye v Hosier & Dickinson* [1972] 1 WLR 146. It was held that where an employer takes possession of a site before the works are practically complete, the defects liability period begins to run, which in turn, gives rise to Practical Completion.

What happens when Practical Completion is achieved?

Practical Completion gives rise to a number of other events within a construction contract. Parties to the contract should be aware of these events, which can be summarised as follows:

- Possession of the site transfers to the employer as does the risk of damage to the works and third party liability.
- Liquidated damages for delay claims will crystallise.
- Defects liability period commences;
- Payment of one half of the retention fund falls due to the contractor;

- No further instructions may be issued for variation works or rectification of works besides those appearing during the defects liability period;
- Generally, the Certificate stands as the latest date when the limitation period for claims will start to run.

When a Certificate of Practical Completion is issued, it may bring an end to the sub-contractor's protection under the main contract all-risks insurance policy. It may also conclude any obligations in respect of guarantees or performance bonds.

Practical Completion and Liquidated Damages

Where the contractor fails to complete the works by the completion date, this may give rise to a claim for liquidated damages. In these circumstances, the contract administrator must issue a Certificate of Non-Completion as well as ensuring that he has addressed any requests from the contractor for an extension of time under clause 2.7.

In the event the employer wishes to deduct liquidated damages from any sums due to the contractor, he must give notice to the contractor of his intention to do so, no later than the date of issue of the Final Certificate.

Certificates of Practical Completion and Professional Consultant's Certificates.

In conveyancing transactions involving the sale of new residential properties, the difference between a Certificate of Practical Completion and a Professional Consultant's Certificate, such as a Council of Mortgage Lender's ('CML') certificate is often misunderstood.

A CML certificate is a certificate in a prescribed form, which is signed by a professional affiliated to one of a number of professional bodies, including CIAT, RIBA and RICS. To enable a professional consultant's certificate to be issued, the consultant is required to visit the site at appropriate stages during the construction works with a view to verifying that the property has been constructed to a satisfactory standard and is generally in compliance with the approved drawings which form part of the contract and for which planning permission and Building Regulations approval has been obtained.

CML certificates contain clear statements to the effect that they can be relied upon by the original purchaser and their lender for a period of six

years from the date of the certificate. Where the property is sold within six years, the benefit of the certificate for the remainder of the period of six years passes to the subsequent owner. If defects are subsequently discovered in a property, a CML certificate may entitle the purchaser/lender to bring a claim in negligence against the professional who issued the certificate for losses arising out of those defects.

A Certificate of Practical Completion does not (and is not intended to) offer purchasers (including subsequent purchasers) or their lenders any direct reassurance that the works have been carried out to a satisfactory standard. As such, a contract administrator who issues a certificate of Practical Completion does not do so intending that purchasers and their lenders should rely upon it. The Certificate of Practical Completion is part of the contractual machinery under the building contract which regulates the rights and obligations as between the Employer and the contractor. It is issued to identify that the works are practically complete and to trigger a further chain of events, such as those described in detail above.

Summary

Practical Completion is an important event in a construction contract, which gives rise to a number of further rights and responsibilities for the employer and the contractor.

It is therefore important to ensure that contract administrators have a clear understanding of when to certify Practical Completion and the rights and responsibilities this gives rise to. Achieving this will inevitably reduce the risk of contractual disputes and claims being made by disgruntled contractors and/or employers.

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