# CASE IN BRIEF 2

## *Mears Ltd v Costplan Services (South East) Ltd & Ors* [2019] EWCA Civ 502

By Jeremy Glover

Here, the developer and contractor, Pickstock was engaged by PNSL to design and build two blocks of student accommodation. Under an Agreement for Lease ("AFL") Mears contracted with PNSL to take a long lease of the property following completion. Clause 6.2.1 of the AFL prohibited PNSL from making any variations to the building works which materially affected the size of the rooms. A reduction in size of more than 3% was deemed to be material.

At the hearing at first instance, Waksman J found that some of the rooms were more than 3% smaller than the sizes shown on the relevant drawings. Mears said that any failure to meet the 3% tolerance was, without more, "a material and substantial breach" which automatically meant both that Mears was entitled to determine the AFL and that the Employer's Agent could not validly certify practical completion. Waksman J disagreed, and Mears appealed.

The AFL defined the Certificate of Practical Completion as: "A certificate issued by the Employer's Agent to the effect that practical completion of the Landlord's Works has been achieved in accordance with the Building Contract." The building contract incorporated, with amendments, the JCT Design and Build Contract Form, 2011. Clause 2.2.7 set out the provisions relating to practical completion. Paragraph 714 of the Preliminaries section of the Employer's Requirements contained detailed provisions about the information that had to be handed over before the grant of practical completion. This included a "PC Certificate with snagging/outstanding works list appended". The contract said that the "Third Party Agreements" included the AFL. Pursuant to clause 2.17B.2, Pickstock were to: "design, carry out and complete the construction of the Works in conformity of the Employer's Obligations under the Third-Party Agreements including, without limitation, those relating to provision of information and the giving of notice and permitting inspections before the Practical Completion Statement … may be issued."

On 4 May 2018, Mears served a defects notice alleging that 40 rooms were more than 3% smaller than required by the AFL.

Mears said that pursuant to the AFL, a failure to meet the 3% tolerance was not a question of fact and degree, but instead fell the wrong side of a contractual red line. PNSL accepted that any failure to comply with the 3% tolerance was a breach of contract, but argued that clause 6.2.1 did not address the character or nature of that breach. What was deemed to be material was the reduction in the size of the room, not the resulting breach of contract. LJ Coulson agreed. As a matter of construction, the deemed materiality identified in clause 6.2.1 related to the reduction in room size, not the consequent breach of contract. The Judge said that:

"If the contract drawings required a room to be 7 square metres, and it was less, then there was a departure from the drawings. But was every such departure a breach of contract? There may be all manner of reasons why one room, on completion, is of a slightly different size to that shown on the contract drawings. Furthermore, the extent of any such departure might be very modest. It would be commercially unworkable if every departure from the contract drawings, regardless of the reason for, and the nature and extent of, the non-compliance, had to be regarded as a breach of contract."

LJ Coulson went on to review the meaning of Practical Completion. Having reviewed the authorities, he noted that:

"a) Practical completion is easier to recognise than define … There are no hard and fast rules …

b) The existence of latent defects cannot prevent practical completion (Jarvis). In many ways that is self-evident: if the defect is latent, nobody knows about it and it cannot therefore prevent the certifier from concluding that practical completion has been achieved.

c) In relation to patent defects, the cases show that there is no difference between an item of work that has yet to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.

d) … the practical approach developed by Judge Newey in William Press and Emson has been adopted … As noted in Mariner, that 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.

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…

f) Other than Ruxley, there is no authority which addresses the interplay between the concept of completion and the irremediable nature of any outstanding item of work … But on any view, Ruxley does not support the proposition that the mere fact that the defect was irremediable meant that the works were not practically complete."

The Judge continued that, in the absence of any express contractual definition or control, practical completion is, at least in the first instance, a question for the certifier. Here, the certifier considered that they would have certified practical completion notwithstanding the out of tolerance rooms. This was on the basis that the departures from the 3% tolerance could properly be described as trifling. Whether or not that view was correct was not a matter for this appeal.

That said, the Judge noted that the mere fact that the property is habitable as student accommodation does not, by itself, mean that the property is practically complete. If there is a patent defect which is properly regarded as trifling then it cannot prevent the certification of practical completion, whether the defect is capable of economic remedy or not. If, on the other hand, the defect is properly considered to be more than trifling, then it will prevent practical completion, again regardless of whether or not it is capable of remedy. The issue as to whether or not it is capable of economic repair is a matter that goes to the proper measure of loss, not to practical completion.

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