Delay and completion

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Introduction
This guide on delay and completion will consider:
what is practical completion
the consequences of practical completion either happening or not
the options if practical completion is delayed
obligations arising during, and at the end of, the Rectification Period?

Practical completion
While the phrase “practical completion” and other similar phrases, such as “substantial completion” are often used in construction contracts, many do not in fact define what it is.

In order for the development to be practically complete, there must be no patent defects. However, the contract administrator does have a discretion to certify practical completion if there are very minor items of work left to complete and the development as a whole is capable of being fully used by the employer.

Some standard forms of contract however have defined practical completion as taking place when the development is complete for all practical purposes and, in particular:
- the relevant statutory requirements have been complied with by the contractor and any necessary consents or approvals obtained;
- none of the minor outstanding works affect the use of the building;
- any stipulations identified by the employer in the building contract as being essential for practical completion to take place have been satisfied; and
- the health and safety file and all “as built” information and operating and maintenance information have been provided to the employer.

Equally important, on practical completion, the insurance obligations under the building contract cease. The employer must have insurance for the building as from that date.

The date of practical completion also normally signifies the start of the limitation period for any contractual claims against the contractor under the building contract.

Liquidated damages
If the works are not practically complete by the completion date, as extended by any extension of time to which the contractor is properly entitled, the employer is entitled, subject to the requisite contractual notices being served, to deduct liquidated damages from any sums otherwise due to the contractor. Such liquidated damages are calculated at the rate set out in the building contract from the completion date, as extended, until such time as the contractor achieves practical completion. The relevant contractual notices which act as a pre-condition to liquidated damages can include:
- a certificate of non-completion being issued by the contract administrator;
- the employer notifying the contractor that it may exercise its right to levy liquidated damages; and
- the employer issuing a valid pay less notice.

Liquidated damages normally provides an exclusive remedy in respect of the contractor’s delay.

The impact of practical completion
The date of practical completion acts as a trigger for a number of different and important events. It signifies the commencement of the Rectification Period. This is the period during which the contractor has an obligation to remedy any (originally latent) defects which may emerge. Generally speaking, it is a 12 month period, which allows the employer to operate the building through all the seasons and gives time for defects to emerge.

The date of practical completion also fixes the date for the release of the first half of the retention. It also starts the timetable for agreeing the final account.

Sectional completion
If the building contract provides for sectional completion, that can have advantages for both the contractor and the employer.

From the contractor’s point of view, if it is able to hand over each part of the development as it is completed, it reduces the amount of its exposure to damages for liquidated damages.

From the employer’s perspective, it will be able to use at least part of its building earlier than it would otherwise. Depending on the type of development, this may enable the employer to sell or lease those completed parts.
Rectification period

At practical completion, there are not meant to be any patent defects. The Rectification Period is about remedying defects which “appear” during that period. However, if a schedule of minor defects (a snagging list) is in fact attached to the certificate of practical completion, those minor defects should be remedied at the start of the Rectification Period and within a reasonable time.

Very shortly before the expiry of the Rectification Period, the contract administrator should inspect the works and draw up a schedule setting out, in some detail, any defects which are apparent.

Defects appearing after the certificate of making good has been issued

Strictly speaking, the contract administrator cannot issue the contractor with an instruction to make good any defects which appear after issue of the certificate of making good. However, if the final certificate has not yet been issued, an adjustment as to the amount payable to the contractor can be made.

The employer should check the terms of the building contract to ascertain the contractual effect of the final certificate and in particular whether it is conclusive and if so, as to what.

As a last resort (and assuming that the final certificate does not act as a total bar), the employer may have no alternative but to issue proceedings in relation to the losses which it will suffer, as a result of the defects. The issuing of proceedings is outside the scope of this guide.

Conclusion

While practical completion and the Rectification Period are the final hurdles in any development, it is important that care is taken to ensure that the project does not stumble at this late stage when the finishing post is in sight. Remember the tight rope walker.

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