

Practical Completion and the Rectification Period



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What is the Rectification Period and what obligations arise?



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.

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 although it can be as short as 3 months or as long as 24.

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.

Equally important, on practical completion the insurance obligations under the building contract cease. The employer must have arranged for 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 provide an exclusive remedy in respect of the contractor’s delay. However, depending on the wording of the liquidated damages clause, it is possible that the liquidated damages provisions may not survive termination of the contract. You should seek advice on this before terminating the contract.

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 delay.



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 start of the employer's income stream from those completed parts.

However, there are some disadvantages – for example, it is not always possible to sequence the works to enable the development to be completed in sections, or it may be more difficult and costly to do so. In addition, the sections are likely to have different rectification periods and the insurance arrangements will be more complex.

Even if the building contract does not contain a provision for sectional completion, the employer can, if it wishes and the contractor consents, still take partial possession of that part of the building which is (almost) partially complete.

However, taking "ad hoc" possession of part, before the whole development is complete, does have disadvantages. These include that, notwithstanding there may still be some patent defects, practical completion of the part of which early possession is taken will be deemed to have occurred and all the consequences of practical completion will follow in respect of that part. This will lead, for example, to there being two rectification periods (one for the part of the development for which early possession is taken and the other for the remainder of the development). Equally, the employer will have to arrange for insurance of that part of the development in respect of which possession is taken. In addition, the amount of liquidated damages to which the employer is entitled in respect of the non-completed part and in respect of which possession is not taken, will be reduced accordingly.

However, with the agreement of the contractor, it may be possible to overcome some of the problems arising from the employer taking partial possession. If agreement is possible, a supplemental agreement is recommended, varying the terms of the original building contract.

Rectification period

There should be no patent defects at practical completion. 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.

The contract administrator can issue instructions *during* the rectification period to remedy any such defects appearing, again at no further cost.

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. Check the contract for the date by which such schedule must be provided.

What options are there as to any defects identified?

The contract administrator can instruct the contractor to make good the defects within a reasonable time, at no cost to the employer. This is in line with the duty to mitigate.

Alternatively, the contractor can be instructed not to remedy the defects. The employer can then make an appropriate deduction equivalent to the costs that the contractor would have itself incurred, had it been asked to remedy the defects.

Once the defects have been made good

Once the rectification period has expired and the defects have been made good, and assuming that the contractor was actually instructed to make good the defects, the contract administrator must issue a notice to that effect, for example, the certificate of making good.

Consequences of issuing the certificate of making good

The issuing of the certificate of making good will result in the release of the second and final part of the retention.

The final certificate cannot be issued prior to the issuing of the certificate of making good.

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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