





Understanding Practical Completion

Jane McMonagle & Rachael Brown
Brodies LLP


Introduction – what we will cover today 

- ▶ Interpretation in JCT and other standard forms of construction contracts
- ▶ Why is Practical Completion ("PC") important (practical/legal consequences)?
- ▶ Documentation required
- ▶ Managing defects rectification and occupation issues in relation to completion
- ▶ Liquidated damages ("LADs") and delay costs in relation to completion
- ▶ A review of the existing related court decisions

Defining / Interpreting PC (1) 

Standard Forms

- ▶ No precise legal definition and most standard forms do not define PC.
- ▶ *Hudson* refers to: 'When the work reaches a state of readiness for use or occupation by the owner and is free from any known omissions or defects which are not merely trivial.'
- ▶ JCT/SBCC – does not define
 - ▶ Schedule of Contract Amendments.



Defining / Interpreting PC (2)



Standard Forms

- ▶ NEC Engineering and Construction Contract (ECC)
 - ▶ **"Completion"** is defined as occurring when the Contractor has done all the work which the Works Information (NEC3 term) / Scope (NEC4 term) states is to be done by the Completion Date, and corrected notified Defects which would have prevented the Employer (NEC3 term) / Client (NEC4 term) from using the works and Others from doing their work

Defining / Interpreting PC (3)



Standard Forms

- ▶ FIDIC
 - ▶ Requires (1) the Works to have been completed in accordance with the Contract and (2) Tests on Completion to be passed
 - ▶ Taking-Over Certificate issued by the "Engineer"

Defining / Interpreting PC (4)



Schedule of Contract Amendments - PC Checklist (examples):

- ▶ Works complete in accordance with Contract Documents.
- ▶ No incomplete Works to prevent beneficial occupation.
- ▶ Site left in clean and tidy condition.
- ▶ Contractor has carried out satisfactory demonstration for Employer of controls of all M&E equipment.
- ▶ All test certificates issued.

Defining / Interpreting PC (5)



Schedule of Contract Amendments - PC Checklist (examples) continued:

- ▶ Conditions in "Third Party Agreements" fulfilled.
- ▶ Works certified/inspected by Employer's insurance advisor.
- ▶ Performance Bond, Parent Company Guarantee and Collateral Warranties all delivered.
- ▶ Health & Safety file, O&M Manuals and As Builts all delivered.
- ▶ Anything project specific (e.g. NHBC guarantee on residential developments).
- ▶ Are all of these requirements practical?

Why is PC important?



- ▶ Works **handed over** to the client.
- ▶ The **risk of loss or damage** to, and responsibility for, the works transfers from the contractor to the client. In addition, if the contractor has insured the works, the **insurance risk** passes to the client.
- ▶ The **defects liability period** commences.
- ▶ Release of **retention monies**.
- ▶ Practical completion ends any right to **LADs** in respect of a delay to the works.
- ▶ **Performance Bond** may expire.
- ▶ Practical completion may trigger **other consequences** under the building contract.
 - ▶ For example, under JCT/SBCC PC triggers the final account process, PC may also trigger the client entering into a lease.



Documentation required



- ▶ **PC Certificate**
 - ▶ Issued by the Employer's Agent / Contract Administrator.
 - ▶ Independence/impartiality is key.
 - ▶ Joint inspections and third party representations – are these provided for contractually?
- ▶ **Snagging lists**
 - ▶ What exactly should these include?
 - ▶ Is it possible to deliver a snag-free building?
- ▶ **See earlier example PC checklist**
 - ▶ **Collateral warranties**
 - ▶ Managing the sub-contractor warranty process (tracking, monies withheld for non-delivery).
 - ▶ Don't leave until the last minute!

Managing defects rectification and occupation issues re completion



Standard Forms

- ▶ JCT/SBCC (clause 2.35 D&B; clause 2.38 Q/XQ)
- ▶ NEC (core clause 43)
- ▶ Bespoke requirements:
 - ▶ Immediate, Urgent, Routine
 - ▶ Employer's ability to get third party/ies to remedy and recover costs from the Contractor

Occupation

- ▶ Access
 - ▶ Agreements for lease, development agreements etc. should provide a mechanism
- ▶ Tenant requirement under AFL for snag free building within [10] days of PC

LADs and delay costs in relation to completion



LADs – contractual steps to follow to deduct monies from Contractor

- ▶ JCT/SBCC
 - ▶ Issue a Non-Completion Notice
 - ▶ Notify the Contractor that the Employer may require the payment of and/or may withhold or deduct LADs and will be recovering these LADs as debt and/or deducting them from monies due to the Contractor
 - ▶ Serve a Pay Less Notice
 - ▶ Check contractual timescales / amendments made to the standard form



- ▶ NEC
 - ▶ Secondary Option X7: Delay Damages

LADs and delay costs in relation to completion (1)



LADs

- ▶ "EX per week or pro rata per part thereof"
- ▶ Genuine pre-estimate of loss
- ▶ DON'T state "nil" or "zero"
- ▶ LADs cap, Ramped LADs, LADs holiday, LADs per Section
- ▶ Example heads of loss to consider:
 - ▶ Interest & finance charges, delay damages payable by the Employer under other contracts, insurance costs, storage costs, management costs of dealing with the delay, additional cost of consultants (e.g. PM, QS, property agents), loss of rent, depreciation on assets not being used.
- ▶ When are LADs not enforceable? Penalty Rule (*Cavendish and ParkingEye cases*).

LADs and delay costs in relation to completion (2)



LADs

- ▶ What if the Employer's **actual losses are greater than LADs**? Tough - where stipulated they are a complete remedy for breach of time-related obligations (*Surrey Heath Borough Council v Lovell Construction Ltd and Another*)
- ▶ What about a failure to **proceed regularly and diligently**? Can an Employer claim damages for that? Not during the works, no. Unless you have sectional or key dates with damages triggered at that point, the right to apply LADs arises at the date of planned completion, not before. Remedy prior to that might be to serve a notice threatening termination/termination and/or instruct acceleration. (*Leander Construction Limited v Mulalley and Company Ltd*)

Alternative - Common Law Damages for Delays

Cases / common themes (1)



LADs


- ▶ **Bramall & Ogden v Sheffield City Council**
 - ▶ Local Authority housing contract
 - ▶ LADs included in the contract – “£20 per week for each completed dwelling”
 - ▶ Sectional completion not provided for
 - ▶ Employer took partial possession
 - ▶ LADs rendered unenforceable
- ▶ **VAT**
 - ▶ Sum certified + VAT, THEN deduct LADs

Cases / common themes (2)




Defects

- ▶ Do we need to **notify the Contractor** and/or give them the opportunity to make good defects?
 - ▶ During DLP, essentially yes, thereafter up to the Employer, but this will be a factor in the measure of damages if the Employer has not mitigated its losses by asking the Contractor to return to rectify – plenty of cases but *Oksana Mul v Hutton Construction Ltd* reasonably good on this point.
 - ▶ NEC3/4 expressly write the common law position in anyway by stipulating that the measure of cost that can be recovered is dependent on whether defect notified by Supervisor or not.

Cases / common themes (3) 

- ▶ Often confusion between:
 - ▶ Early use by the Employer
 - ▶ Sectional Completion
 - ▶ Partial Possession

<http://www.brodies.com/binformed/legal-updates/partial-possessionsectional-completionearly-use-by-the-employer>

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Questions..?



BRODIES LLP

Jane McMonagle, Consultant
(0141 245 6757 / jane.mcmonagle@brodies.com)

Rachael Brown, Senior Solicitor
(0131 656 0228 / rachael.brown@brodies.com)

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