Neutral Citation Number: [2019] EWCA Civ 502

Case No: A1/2018/3112

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT
Mr Justice Waksman
HT-2018-000250

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE COULSON

- -

Between :

Mears Limited	**Appellant**
- and -	
Costplan Services (South East) Limited	**1st Respondent**
Plymouth (Notte Street) Limited	**2nd Respondent**
J.R. Pickstock Limited	**3rd Respondent**

- -

Mr Stephen Dennison QC & Ms Camille Slow (instructed by **Mischon de Reya LLP**) for the **Appellant**
Mr Andrew Rigney QC & Mr Dermot Woolgar (instructed by **Silver Shemmings Ash LLP**) for the **2nd Respondent**
Written Submissions were received from the 1st Respondent
The 3rd Respondent did not appear and was not represented

Hearing date: Wednesday 13th March 2019

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Approved Judgment

Lord Justice Coulson :

1. Introduction

1. The third respondent ("Pickstock") is both a developer and a building contractor. By a building contract dated 27 May 2016, Pickstock was engaged by the second respondent ("PNSL") to design and build two blocks of student accommodation at Notte Street, in Plymouth ("the property"). Pursuant to an Agreement for Lease ("AFL") dated 20 May 2016, the appellant ("Mears"), a company in the business of providing managed student accommodation, contracted with PNSL to take a long lease of the property following completion.

2. Amongst other things, the AFL prohibited PNSL from making any variations to the building works which materially affected the size of the rooms (clause 6.2.1). The clause stipulated that a reduction in size of more than 3% was deemed to be material. In the event, Waksman J found that some of the rooms were more than 3% smaller than the sizes shown on the relevant drawings. That finding of fact was the subject of Declaration 5. There is no appeal against that conclusion. The appeal was presented on the basis that there were 56 such rooms.

3. It is Mears' case that, pursuant to the AFL, *any* failure to meet the 3% tolerance was, without more, "a material and substantial breach" of the AFL, the existence of which automatically meant that: a) Mears was entitled to determine the AFL; and b) the Employer's Agent could not validly certify practical completion. In a judgment dated 7 December 2018 ([2018] EWHC 3363 (TCC)), Waksman J rejected Mears' claims for declarations to that effect (Declarations 1-4). Mears now appeal against the refusal to make Declarations 1-4.

4. Before turning to the AFL, and the two issues which arise, it is necessary to make two introductory observations.

5. First, Declarations 1-4 were drafted in very wide terms. They were said to arise either as a matter of construction of the AFL or as a matter of law. They were not related to the particular facts of the case. Although at a very late stage of the trial, Mears sought to argue that there had been a material and substantial breach of clause 6.2.1 on the facts (ie because 56 rooms were beyond the 3% tolerance), for the reasons explained at [44] – [50] of the judgment, no amendments to that effect were ever formulated and Waksman J declined to deal with the claimed declarations by reference to the facts. As we shall see, that poses certain difficulties for Mears, particularly in relation to Issue 2 (concerned with practical completion), which is conventionally regarded as a matter of fact and degree.

6. Secondly, the arguments on appeal about the construction of the AFL, and whether practical completion can ever occur if the outstanding matters cannot be economically remedied, might be thought to be some way removed from the real dispute between the parties, which is whether, on the facts, Mears are entitled to refuse to execute the Lease because of PNSL's breaches of contract. The court was told that PNSL's separate claim for specific performance was issued on 20 December 2018 and that the claim is defended by Mears.

7. Thus, this court is keenly aware that, because the declarations sought are unconnected to the facts (and therefore theoretical), and because the arguments as to construction

and as to practical completion are not determinative of the claim for specific performance (and the defence to it), the matters addressed below may be of limited utility to the parties.

2. The Contracts and the Relevant Events

2.1. The AFL

8. The overall scheme of the AFL was that PNSL, as the Landlord, would carry out the Landlord's Works. Those were set out in the Building Documents, which were defined as being the documents listed in Annex A to the AFL. These included the Employer's Requirements, (which were also a key component of the building contract, separately entered into between PNSL and Pickstock). Pursuant to clauses 3 and 22.1, 5 days after the certification of practical completion, PSNL would grant Mears, and Mears would execute, a Lease in the terms set out at Annex B to the AFL.

9. PNSL's principal obligation was to carry out the Landlord's Works. That obligation was set out in clause 5 of the AFL as follows:

> "**5. Carrying out the Landlord's Works**
>
> 5.1. The Landlord must commence the Landlord's Works as soon as reasonably practicable after the necessary Approvals have been obtained, and must diligently carry them out and complete them in a good and workmanlike manner and with sound materials of their respective kinds, in accordance with the terms of any Approvals, in accordance with the Building Contract, and otherwise in accordance with the provisions of this agreement."

10. As the prospective tenant, but not a party to the building contract, Mears required protection against unauthorised or substantial changes to the Landlord's Works as the works progressed. One element of that protection was set out in clause 6 as follows:

> "**6 Variation and substitution of materials**
>
> 6.1. Subject to clause 6.2, if the Landlord is unable, despite having used reasonable endeavours, to obtain any of the materials referred to in the Building Documents within a reasonable and proper time or at a reasonable and proper cost, he may, subject to promptly notifying the Surveyors of his intention to do so, substitute for them alternative materials of equivalent (or better) quality.
>
> 6.2. The Landlord shall not make any variations to the Landlord's Works or Building Documents which:
>
> 6.2.1. materially affect the size (and a reduction of more than 3% of the size of any distinct area shown upon the Building Documents shall be deemed material), layout or appearance of the Property; or

> 6.2.2. result in materially increased maintenance costs or increase the frequency of component replacement cycles; or
>
> 6.2.3. are substantial or material.
>
> 6.3. Subject to clause 6.2, the Landlord may make variations to the Landlord's Works without the Tenant's consent if:
>
> 6.3.1. the variations are insubstantial or immaterial and of routine nature; or
>
> 6.3.2. the variations are required by the terms of any Approval.
>
> Subject to clause 6.2, any other variation to the Landlord's Works can be made by the Landlord with the consent of the Tenant (such consent not to be unreasonably withheld or delayed)…"

11. Additional protection for Mears was provided by clauses 8 and 9, which allowed Mears' surveyors access to the property and the opportunity to attend meetings and inspect documents. If their surveyors had concerns, Mears could issue defect notices pursuant to clause 9. As noted below, that is what happened, although many of those notices were issued only after the Employer's Agent had first indicated, in August 2018, that they were likely to certify that practical completion had been achieved.

12. Clause 13 was concerned with liquidated damages and termination. At clause 13.7.2 the AFL provided that "if the Certificate of Practical Completion has not been issued by 11 September 2018 then Mears or PNSL may at any time thereafter (but before the Date of Practical Completion) give notice to the other parties terminating this agreement". It was common ground that this was extended by agreement to 18 September 2018. Accordingly, if the works were not the subject of a valid certificate of practical completion by this long stop date of 18 September 2018, either side was entitled to determine the AFL.

13. The specific provisions in relation to practical completion were set out at clause 14. The relevant parts were as follows:

> "**14 Practical Completion**
>
> 14.1. The Landlord shall use reasonable endeavours to procure that the Employer's Agent does not issue a Certificate of Practical Completion without previously giving to the Surveyors not less than 5 working days' notice that he proposes to carry out an inspection on a date specified in the notice with a view to issuing the Certificate of Practical Completion.
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> …
>
> 14.4. The Surveyors may attend every inspection, and the Landlord shall use reasonable endeavours to procure that the Employer's Agent has due regard to any written representations

> made by them within 3 working days after the notice referred to in clause 14.3. The issue or non-issue of the Certificate of Practical Completion is to be in the sole professional discretion of the Employer's Agent but no Certificate of Practical Completion shall be issued until the Landlord has complied with the obligations to supply information and documentation and achieve the qualitative requirements listed in Part A of the list annexed to this agreement as Annex D."

14. 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."

15. Accordingly, on the face of it, the AFL and the building contract envisaged just one certificate of practical completion (as opposed to separate certificates under each contract). The parties operated throughout on the basis that only one such certificate was required.

16. The Employer's Agent named in the AFL was Edmonds Shipway LLP. The same firm was named as Employer's Agent in Article 3 of the building contract. At a date in 2016, they were replaced by the first respondent ("Costplan").

17. Clause 15 was concerned with defects liability. The relevant parts of clause 15 were as follows:

> "**15 Defects Liability**
>
> 15.1. As soon as practicable after the Date of the Practical Completion the Landlord must carry out and complete, in accordance with the provisions of this agreement, any Landlord's Works that the Employer's Agent on issuing the Certificate of Practical Completion specifies in writing as being still outstanding.
>
> …
>
> 15.7. Except as provided in this clause 15 (and in the Lease), with effect from the Date of Practical Completion, the Landlord is not to be liable to the Tenant under this agreement for any failure by the Landlord for any reason to comply with his obligations under clauses 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 15."

2.2 The Building Contract

18. The building contract was dated 27 May 2016. PNSL were the employer and Pickstock were the contractor. The contract incorporated, with amendments, the JCT Design and Build Contract Form, 2011.

19. Clause 2.2.7 set out the provisions relating to practical completion. They were in common form. Paragraph 714 of the Preliminaries section of the Employer's

Requirements contained detailed provisions as to the necessary information that had to be handed over before the grant of practical completion. One such item was identified as "PC Certificate with snagging/outstanding works list appended".

20. One of the amendments to the JCT form was a series of provisions relating to "Third Party Agreements". The definition section made clear that these included the AFL. Pursuant to clause 2.17B.2, Pickstock:

> "…shall 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."

2.3 The Relevant Events

21. Building work started in the middle of 2016. Although the AFL provided that the estimated completion date was 11 August 2017, on 24 July 2017 PNSL served a notice of late completion. In fact, such were the delays that the works were being progressed well into 2018.

22. On 4 May 2018, Mears served a defects notice under the AFL which alleged that 40 rooms had been constructed more than 3% smaller than required by the AFL. On 16 August 2018, Costplan served notice that they intended to attend site to conduct a pre-completion inspection, with a view to issuing the certificate of practical completion. This led to two further defects notices from Mears' surveyors on 17 and 20 August 2018.

23. On 20 August 2018, Mears sought an injunction restraining the certification of practical completion. An interlocutory injunction was granted on an *ex parte* on notice basis on 22 August. Pickstock then applied to discharge the injunction. On 6 September, Stuart-Smith J upheld the injunction and revised the trial timetable to ensure that Mears' underlying claims for Declarations 1-5 were heard as soon as practicable. At the same time further defects notices were served by Mears' surveyors, again in relation to room sizes.

24. On 17 September 2018, Costplan issued a draft certificate of practical completion subject to the outcome of the declaratory proceedings.

25. The trial took place on 8, 12-14, and 19 November 2018. On 7 December, Waksman J handed down his reserved judgment. He granted Declaration 5, to the effect that one or more rooms in the property had been constructed in breach of the AFL. He declined to grant Declarations 1-4.

26. On 12 December 2018, in consequence of this result, Costplan ratified their draft certificate of practical completion.

3. Issue 1: Declaration 4/The Proper Construction of Clause 6.2.1.

3.1. The Declaration

27. Declaration 4 was sought in these terms:

> "That, on a true construction of the AFL, any failure to construct one or more of the rooms of the Property such that they are not more than 3% smaller than the sizes specified in the Jefferson Sheard drawings contained in the Building Documents (unless amended by one of the Elements drawings contained in the Building Documents) or (contrary to Mears' primary case) such alternative room sizes otherwise agreed to by Mears is a material and substantial breach of Clause 6.2. of the AFL [and/or] constitutes a material and substantial defect in the works."

28. In effect, it was Mears' case that, pursuant to the AFL, the construction of any room outside the 3% tolerance (regardless of the nature and extent of the non-compliance) amounted to a material and substantial breach of contract.

3.2. The Judgment

29. Waksman J rejected that case. As he explained at [32] and [33], Mears were advancing this contention in order to demonstrate that any breach of Clause 6.2.1 was, as a matter of construction, of sufficient importance that it "would entitle the innocent party [ie Mears] to treat themselves as discharged without more".

30. The judge rejected that case as a matter of construction of Clause 6.2. The relevant paragraphs of his judgment were as follows:

> "30. The deeming provision in Clause 6.2.1 is not surprising. It avoids, in one important area of the works, a dispute as to what deviation should be regarded as "material". And it ties the areas down to those shown in the Building Documents. Materiality, therefore, whether deemed by Clause 6.2.1 or otherwise, goes to the extent of the variation which has occurred. Unless material "or substantial" any such variation does not amount to a breach. But if it does, the fact that there has been a material variation says nothing about the extent or importance of that breach to the Property or works as a whole.
>
> 31. Accordingly, the fact that there is a material variation for the purposes of Clause 6.2.1 does not mean without more that the resulting breach is itself material or substantial. In contending that it does, it seems to me that Mears is eliding these two quite different concepts: (a) the scale of the variation and (b) the scale of any resultant breach.
>
> …
>
> 34. I further recognise that Clause 6.2 trumps, as it were, Clause 6.3 which allows for certain variations either without Mears, consent or as to which it should reasonably consent. But I cannot see how one has to interpret this term as meaning that

any breach is itself so important that it has the consequence (through the particular mechanism provided for in the AFL) that one way or the other Mears is entitled to terminate. It would mean that one material deviation in respect of one room (for example a bin store) would have that effect. That result seems to me to be so commercially absurd that it cannot be right. That, of course, does not mean that the existence of such a breach will not entitle Mears to a remedy in damages and I deal with that below. Nor can the outcome proposed by Mears be made more palatable by the introduction of a limiting factor such as "*de minimis*", so that any breach must at least surpass that modest threshold. That is because if the provision was really a condition of the AFL it is hard to see why such a threshold would work here. Nor may it always be easy, in fact, to say what is "*de minimis*" or not. Even with that threshold, I still do not see how without more Clause 6.2 can be regarded as a condition of the AFL.

35. For the avoidance of doubt, I do not consider that any breach of Clause 6.2.1, if more than "*de minimis*", would then count as material or substantial. There is much ground in between. There could easily be a minor, though actionable, breach that is still not material or substantial.

36. Moreover, the very concept of a material breach here begs the question - material to what? To the entire Property or to its purpose or usefulness? Or in terms of (here) the number of rooms affected or the scale of the actual as opposed to possible breaches? Materiality, once one assumes the correct context, must by its very nature be a question of fact and degree. It is usually indicative of a threshold degree of relevance, as with, for example, materiality in the International Standards on Accounting, or for the purpose of disclosure to a prudent underwriter or indeed to a court making a "without notice" order. The use of the concept of materiality in Clause 6.2 itself is thus explicable - but less so when it comes to describing a breach of contract. To say that a breach is material is not of any real assistance in saying what the legal result of that breach should be. A material breach does not necessarily amount to a repudiatory breach. So one returns to the fact that in reality, Mears' contention is that as a matter of construction, Clause 6.2.1 is such that any breach thereof prevents practical completion. But for the reasons already given, I do not accept that.

37. Another argument put forward by Mears is that if the breach of Clause 6.2.1 is irremediable, then it must follow that the only outcome is to prevent practical completion. That, in my view, simply does not follow. There may in theory be a breach of Clause 6.2 which, while not "*de minimis*" can be put

> right. A room which is too small might be capable of being put right in some cases and in any event Clause 6.2 concerns material variations other than simply with regard to room size. For a start, Clause 6.2.1 itself deals with variations to layout and appearance. And Clause 6.2.2 and 6.2.3 deal with variations that are not or not only, concerned with size, layout or appearance."

31. In support of their argument, Mears had also suggested that, if their interpretation was incorrect, then the contract-breaker would escape the consequences of the breach. Waksman J rejected that argument too:

> "40. I do not agree. First, the fact that practical completion might be certified despite a breach of Clause 6.2.1 does not mean that Mears would have no remedy. For the reasons set out below I consider that there would be various other remedies open to Mears.
>
> 41. Second, all one is dealing with here is Mears' argument that any breach of Clause 6.2.1 (because it is without more material and substantial) prevents practical completion. That must be distinguished from a separate argument, which Mears sought to introduce as an alternative, which is that on any view these breaches were material and substantial on the facts. But for the reasons given below, I do not think it open to Mears to advance that contention as part of this trial.
>
> 42. So it does not follow that a breach or breaches of Clause 6.2.1 can never have an impact on practical completion. It all depends on the circumstances. Nor do I see how a proper construction of Clause 6.2.1 entails the results sought by Mears. The words to give effect to it are simply not there."

3.3 The Parties' Contentions on Appeal

32. On behalf of Mears, Mr Dennison QC based his submissions entirely on clause 6.2. He said that, at clause 6.2.1, the parties had agreed that a variation would not reduce the size of the rooms by more than 3% and that, critically, they had deemed any such departure from that obligation to be "material". So, he said, as a matter of language, 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, which failure permitted Mears to treat themselves as discharged from their obligations under the AFL and/or prevented the proper certification of practical completion. This, he said, also provided an answer to the judge's "bin store" point at [34]. If the prohibition at clause 6.2.1 meant what it said, then the nature, scope and extent of any failure to comply with the 3% tolerance would not matter.

33. In addition, Mr Dennison also made a wider submission to the effect that, if he was wrong in his interpretation of clause 6.2.1, it would mean that PNSL were benefitting from their own wrong (in this case, the failure to build the rooms to tolerance) in

breach of the well-known principle set out in *Alghussein v Eton College* [1988] 1 WLR 587. That, he said, indicated that his construction of the AFL was the right one.

34. In response, on behalf of PNSL, Mr Rigney QC argued that Mears' case was based on a misinterpretation of clause 6.2.1. He accepted that any failure to comply with the 3% tolerance was a breach of contract. But he argued that clause 6.2.1 did not address the character or nature of that breach. He said that what was deemed to be material was the reduction in the size of the room, not the resulting breach of contract.

35. In addition, Mr Rigney argued that support for this interpretation could be found in other parts of the AFL. He said that the inclusion of clause 6.2.3 as an alternative (he stressed the use of the word "or" between the various sub-clauses of clause 6.2) meant that the clause recognised that a material reduction in size under clause 6.2.1 may not be a material or substantial breach of contract: hence the need for the separate category in clause 6.2.3. In addition, he maintained that the wording of clause 15.7 meant that the AFL itself assumed that there might be a breach which would not prohibit practical completion; clause 15.7 (and indeed clause 15.1) assumed that there would or might be practical completion even if there were outstanding works.

36. Finally, in response to the *Alghussein* point, Mr Rigney maintained that PNSL were not relying on the breaches of contract for any purpose. They were not, for example, seeking to rely on their own breaches in order to justify termination. In consequence, he maintained that this argument simply did not arise.

3.4 Analysis

37. In my view, the parties to contracts of this sort are entitled to agree, in advance, that a breach of a particular clause amounted to a material or substantial breach of contract. The issue is whether or not that is what these parties did at clause 6.2.1. For the reasons set out below, I have concluded that they did not.

38. I consider that Mr Rigney was right to say that, 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. 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.

39. The parties recognised this problem and, at clause 6.2.1, they addressed it directly. They identified the circumstances in which a departure from the room size specified on the contract drawings would amount to a breach of contract. They agreed that the benchmark would be if the size of the room was "materially affected" by the departure; that it would be a breach of contract if the effect on the room size was "material". That would rule out immaterial deviations.

40. And the parties went a stage further, because they also agreed what was to be deemed to be "material" for this purpose, namely a reduction of more than 3% in any

particular room. In this way, where rooms have been built over 3% smaller than shown on the contract drawings, PNSL cannot – and do not now – suggest that such a departure was anything other than a breach of contract.

41. But the parties were not saying that the resulting breach of contract was itself "material". The words of clause 6.2.1 do not say that. Materiality is introduced only in relation to room size ("materially affect the size"), and not in relation to the resulting breach. There is nothing in clause 6.2.1 which addresses the character or quality of the breach. The clause simply provides a mechanism by which a breach of contract can be indisputably identified.

42. Moreover, if the parties were to be taken to have agreed that any failure to meet the 3% tolerance no matter how trivial, amounted to a *material* breach of contract, it would lead to a very uncommercial result. It would mean that every room would be the subject of minute measurement and remeasurement, and that one trivial failure to meet the 3% tolerance, allowed Mears to determine the AFL. This was properly characterised by Mr Rigney as "an absolutist argument". In my view, clear words would be necessary for such a draconian result and there are no such words in clause 6.2.1.

43. This ties in with the "bin store" point. Mears' reading of clause 6.2.1 would treat any failure to meet the 3% tolerance, no matter where or how it arose, in the same way. So a failure to meet the 3% tolerance in relation to the bin store on the ground floor, even if that failure was trivial, would be said to be a material breach of contract which, in Mr Rigney's phrase, "would allow Mears to walk away". For the reasons given by Waksman J, I consider that interpretation to be wrong both as a matter of the language, and as a matter of commercial reality.

44. On that basis, it is probably unnecessary to consider the other clauses of the AFL on which Mr Rigney relied. Speaking for myself, I am not sure that they added very much. I think that Mr Dennison was probably right to say that, notwithstanding the use of the word "or", clause 6.2.3 was in the nature of a general sweep-up, rather than a separate and discrete category of prohibited variation. As to the argument in relation to clause 15.7, I consider that Mr Dennison was probably right to say that this was intended to deal with latent defects, because patent defects would have been dealt with under clause 15.1. But neither of those arguments go to the root of the dispute on Declaration 4.

45. It will be noted that the discussion set out above has dealt only with a "material" breach. Declaration 4 also included the word "substantial". That does not arise out of clause 6.2.1 or any other part of the AFL: it is not a word that appears there. It was not separately addressed in submissions. For the avoidance of doubt, I can see no basis for saying that, as a matter of construction, a breach of clause 6.2.1 was automatically "substantial". In my view, that element of the claim for Declaration 4 could never have succeeded.

46. Finally, I agree with Mr Rigney that this is not an *Alghussein* case. There were breaches of clause 6.2. It will be a matter of factual assessment as to whether or not those breaches were material or substantial, and whether they justify determination and/or should properly have led Costplan to refuse to certify practical completion. But in no sense could it be said that PNSL were seeking to rely on those breaches of

contract in order to seek any advantage or gain: the only issue is the nature and extent of any relief available to Mears in consequence.

3.5 Conclusion on Issue 1

47. For the reasons that I have given, I would reject the appeal against Waksman J's refusal to grant Declaration 4. In my view, as a matter of construction, Clause 6.2.1 cannot be read as deeming any breach of contract to be material such as to allow Mears to treat themselves as discharged from their obligations under the AFL.

48. The 56 separate failures to achieve the 3% tolerance amounted to 56 separate breaches of contract. Whether or not those breaches, either singularly or taken together, were material or substantial such as to justify recission, is a matter of fact and degree, not a matter of the construction of the AFL.

49. On one view, as Waksman J pointed out at [70], that is the end of the case, because Declarations 1-3 were dependent on Declaration 4. However, he went on to deal with the practical completion issues and we heard submissions on the same dispute. It is therefore appropriate to deal with it, notwithstanding Mears' failure on Declaration 4. In addition, there was one particular argument, relating to the irremediable nature of these breaches, which, on Mr Dennison's case, might survive Mears' failure on Declaration 4 in any event.

4. Issue 2: Declarations 1 – 3/Practical Completion

4.1 Declarations 1-3

50. Declarations 1-3 were set out at [11] of the judgment in the following terms:

> "(1) That, on a true construction of the AFL, or by virtue of a term implied therein, the Employer's Agent cannot validly certify Practical Completion whilst there are known material or substantial defects ("Declaration 1")
>
> (2) That, on a true construction of the AFL, or by virtue of a term implied therein, the Employer's Agent cannot validly certify Practical Completion whilst there are material and substantial subsisting breaches of the AFL relating to the performance of the Works ("Declaration 2")
>
> (3) Further or alternatively, the Employer's Agent, properly exercising his discretion under the AFL and its duties under the Costplan Warranty, could not validly certify Practical Completion whilst there are material and substantial breaches of the AFL and/or material and substantial defects in the works ("Declaration 3")."

51. Although Mr Rigney argued that these declarations were in any event inaccurately worded, because they concentrated on the obligations of the Employer's Agent, I consider that criticism to be unfair. Declarations 1-3 were drafted at a time when there was a real concern on the part of Mears that practical completion might be certified without any input on their part. Furthermore, it might be said that these declarations

are, of themselves, relatively uncontroversial: the question is whether they are apposite in circumstances where there has been no investigation of the facts, and where it is said that they arise as a matter of Mears' contractual entitlement under the AFL.

4.2 The Judgment

52. Waksman J noted at [71] that there was no suggestion that practical completion for the purposes of the building contract meant anything different to practical completion for the purposes of the AFL. And at [72] he also noted that there was no indication that practical completion should not mean in this case what it usually means.

53. Then, having set out some of the applicable principles relating to practical completion, he said:

> "77. Beyond those statements of principle, however, I would add some further observations. First, the notion of practical completion might be thought to connote no more than the apparent finishing of all the work that has to be done. Thus the failure yet to construct a part the building, as required by the contract would prevent practical completion. In a very trivial case, practical completion might still be certified with an additional requirement to provide the missing element for example a gate at the side of a newly built house or, even more minor, the requisite lock for the gate. However it is plain that practical completion is not merely about the extent of the work done but also, at least in some respects, its quality. Work that has either not been done at all when it should have been, or which has been done but done badly, could both equally be described as "defective". Thus to supply and purportedly finish the construction of a central heating system but which in a real sense fails to work could prevent the issue of practical completion see, for example, the decision of the Court of Appeal in *Bolton v Mahdeva* [1971] 2 WLR 1009, referred to at paragraph 4-019 of *Keating*. If it were otherwise, it would make no sense to say that if there are patent defects, this could prevent practical completion.
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> 78. There is a gloss on this, however, which is that the works need not be in every respect in complete conformity with the contract in order to merit practical completion, provided that any non-conformity is insignificant, a matter which will usually be left to the professional judgment of the certifying entity.(This is made clear in the AFL because Costplan can provide in the certificate for the completion of outstanding works and rectification of snagging as indeed it has done in the draft certificate).
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> 79. Put another way, there will be practical completion if to all intents and purposes the building is complete. So the intent and the purpose of the building is key. When the building is

> intended to house people, that has led to an emphasis on it being fit for occupation by such people.
>
> 80. That said, what amounts to being sufficiently ready for occupation is highly fact-sensitive. So, for example, if a building was to be ready for occupation by a family, but one or more of the bedrooms had been constructed in such a way that a member of the family would find it uncomfortable or inconvenient to occupy it then this may mean that the building was not ready for occupation and so there could not be practical completion. Context, therefore, is everything. So although I am not asked to determine this issue (see above) the mere fact that the Property could strictly now take students into each of its 348 bedrooms does not necessarily mean without more that the works are practically complete if in fact there would on any objective basis be a real problem in some of the students not being able to use these rooms or use them as intended."

54. He addressed at [83] (only to dismiss as irrelevant for the purposes of practical completion) any possible difference between an item of work that had not been finished and one that was defective:

> "It might be a moot point as to whether one describes a reduction in room size as a matter going to the work requiring to be finished or going to the quality of the work done, although in either event a breach of contract, but I do not think this matters. Put another way, it seems to me that any (other than "*de minimis*") breach of a building contract by the contractor, of whatever kind, could potentially stop practical completion depending on the nature and extent of it and the intended purpose of the building."

55. The judge also dealt with the alternative argument which arose that, on Mears' case, the fact that these breaches will never be remedied necessarily meant that practical completion could never be achieved. He rejected that argument in the following terms:

> "84. For those reasons, I fail to see why an irremediable breach should necessarily entail that it can never prevent practical completion. If, on the facts, it is sufficient to prevent practical completion the fact that it cannot be remedied does not alter the status of the building for the purpose of practical completion. If it were otherwise then, as Mears has pointed out, the contract-breaker gains by the nature of the breach. The only argument raised against that point is that in such an event, practical completion could be postponed indefinitely, with an indefinite obligation on the part of the contractor to pay liquidated damages for delay. That, in my view, is unrealistic. In the event of a case where the contract can simply now not be completed (at least not without starting again) the building owner is surely more likely to accept that situation and terminate the contract

> claiming damages from the contractor (for the defects not for the delay covered by liquidated damages) and decide what to do with the building. It would be no different from the contractor who has completed 75% of the works and then walked off site never to return.
>
> 85. Accordingly, the fact that the breach alleged here is not capable of remedy on any sensible basis does not mean that it cannot prevent practical completion. But on the other hand nor does it mean that it will always prevent practical completion."

4.3 The Parties' Contentions on Appeal

56. On behalf of Mears, Mr Dennison submitted that the certifier did not have a completely free hand: that, when certifying practical completion, he was bound by clause 6.2.1 and therefore bound to recognise that any failure to meet the 3% tolerance was a breach of contract. He went on to say that the certifier had to acknowledge that such a failure was a material breach of contract which automatically prevented any such breach being characterised as trifling or *de minimis*. I agree that, as a matter of logic, if the contract had stipulated that the failure to meet the 3% tolerance was a material breach (as it might have done), such a breach might objectively be regarded as trifling, but would still preclude practical completion. However, for the reasons I have given in Section 3 above, I reject that construction of the AFL.

57. On the law, Mr Dennison appeared to emphasise those authorities which concluded that the existence of any patent defects prevented the certification of practical completion (what might be called the 'stricter test').

58. In the alternative, Mr Dennison submitted that, since it was common ground that these were breaches of contract, and since it was also common ground that they could not be economically remedied (without knocking the property down and starting again) the fact that they were irremediable also prevented practical completion as a matter of law.

59. On behalf of PNSL, Mr Rigney said that practical completion was a matter of fact and degree and so it was a matter for the certifier as to whether or not the failure to achieve the 3% tolerance prevented practical completion. He emphasised those authorities which suggested that asking whether the works were fit for their intended purpose was an important way to test whether the works were practically complete.

60. As to the 'irremediable' point, Mr Rigney said that whether or not the defects were remediable did not matter; on the basis of the authorities, he argued that what mattered was whether the outstanding works could be regarded as trifling. If they were not trifling, practical completion could not be certified; if they were trifling then it could, irrespective of whether the outstanding items could economically be remedied.

61. As I have outlined, there were some subtle but nonetheless important differences between the parties on the law. Accordingly, I propose briefly to summarise the law relating to practical completion in the next section of this judgment, before analysing its application in the present case.

4.4 The Law

62. In *Jarvis & Sons Limited v Westminster Corporation & Another* [1969] 1 WLR 1448, Salmon LJ said at 1458D – F:

> "The obligation upon the contractors under clause 21 to complete the works by the date fixed for completion must, in my view be an obligation to complete the works in the sense in which the words "practically completed " and " practical completion " are used in clauses 15 and 16 of the contract. I take these words to mean completion for all practical purposes, that is to say, for the purpose of allowing the employers to take possession of the works and use them as intended. If completion in clause 21 meant completion down to the last detail, however trivial and unimportant, then clause 22 would be a penalty clause and as such unenforceable."

63. On appeal ([1970] 1 WLR 637), Viscount Dilhorne said at 646D – F:

> "The main contract not only states the date for completion of the contract works. It also provides by clause 15 (1) that when in the opinion of the architect the works are practically completed he shall issue a certificate to that effect and "practical completion of the works shall be deemed for all the purposes of this contract to have taken place on the day named in" the certificate. The contract does not define what is meant by "practically completed." One would normally say that a task was practically completed when it was almost but not entirely finished, but " practical completion " suggests that that is not the intended meaning and that what is meant is the completion of all the construction work that has to be done."

A little later, dealing with latent defects, he said:

> "It follows that a practical completion certificate can be issued when owing to latent defects, the works do not fulfil the contract requirements and that under the contract works can be completed despite the presence of such defects. Completion under the contract is not postponed until defects which became apparent only after the work had been finished have been remedied."

64. In *Kaye v Hosier & Dickinson* [1972] 1 WLR 146, where the argument was about the effect of the final certificate, Lord Diplock referred at 164A-B to practical completion being "the absence of any patent defects in materials or workmanship". Taken with

the comments of Viscount Dilhorne in *Jarvis*, noted above, that is perhaps the high watermark of the stricter test.

65. Two subsequent decisions of His Honour Judge Newey QC did much to apply the decisions in *Jarvis* and *Kaye* in a practical fashion. Thus:

i) In *H.W. Nevill (Sunblest) Limited v William Press & Son Limited* (1981) 20 BLR 78, the judge rejected the argument that, for the works to be practically complete, there had to be no apparent defects. He said at page 87:

> "…I think that the word "practically" in Clause 15(1), gave the architect a discretion to certify that William Press had fulfilled its obligation under Clause 21(1), where very minor *de minimis* work had not been carried out, but that if there were any patent defects in what William Press had done the architect could not have given a certificate of practical completion."

ii) In *Emson Eastern Limited (in receivership) v E.M.E. Developments Limited* (1991) 55 BLR 114, Judge Newey distinguished between construction contracts and contracts for the manufacture or sale of goods. He said:

> "…The size of the project, site conditions, use of many materials and employment of various types of operatives make it virtually impossible to achieve the same degree of perfection as can a manufacturer. It must be a rare new building in which every screw and every brush of paint is absolutely correct."

66. *Emson* is also important because it is the only place in which the mild tension between the more flexible approach of Salmon LJ in the Court of Appeal in *Jarvis* and the stricter test of Viscount Dilhorne in *Jarvis* and Lord Diplock in *Kaye* is expressly articulated. Judge Newey said that in *William Press*, he had "sought a position in between, and I think that that is probably right". It is certainly the approach that has been followed in the subsequent cases: see, for example, *Walter Lilley & Co. Limited v Mackay & Another (No. 2)* [2012] EWHC 1773 (TCC) at paragraph 372.

67. Both leading counsel referred to the useful decision of the Final Court of Appeal in Hong Kong in *Mariner International Hotels Limited & Another v Atlas Limited & Another* [2007] 10 HKCFAR 1. In that case, the vendor was arguing that practical completion had to mean less than "the state of affairs in which the works had been completed free from any patent defects other than ones to be ignored as trifling under the maximum *de minimis non curat lex*", contending that this was too exacting a standard. Their suggestion was that, because all the snagging and outstanding works could be completed without affecting the operation of the new building as a hotel, practical completion had been achieved. The court rejected that argument and accepted the submission that practical completion meant completion "free from patent defects, other than ones to be ignored as trifling".

68. In *Construction Law* (2nd Edition) by Julian Bailey, the learned author notes at paragraph 5.117 that practical completion meant a stage where the works had been physically completed "save for minor omissions or defects, and the works are

otherwise reasonably capable of their intended use". The footnote for that proposition refers to a large number of cases, some of which indicate that practical completion could be certified even though there are items of outstanding work which, on the face of it, appear to be more than *de minimis*, always provided that the works are fit for their purpose.

69. In my view, a certain caution is necessary when considering these authorities. For example, in *Menolly Investments 3 SARL v Cereps SARL* [2009] EWHC 516 (Ch.) at [91] – [92]) Warren J said that, in terms of completion, there was a difference between a missing storey and a missing porch. That was a hypothetical example, and it arose in connection with a different argument about whether or not a certificate of practical completion contained a manifest error. Speaking for myself, I can envisage the situation where a failure to construct a porch shown on the contract drawings might well mean that practical completion had *not* been achieved.

70. Of greater concern is *Bovis Lend Lease Ltd v Saillard Fuller & Partners* (2001) 77 Con LR 134, where the new building's water pressurisation system was only working at about 80% of its specified efficiency at the time of practical completion. Judge Thornton QC said at [187] that practical completion had been achieved, despite that failure, because "what is meant by practical completion is that the works as a whole are substantially complete *and are in a state that allows the building owner to take possession*" (emphasis added). No authority is cited for this passage and, in the light of the authorities I have identified above, I doubt that, without more, it is a correct summary of the law.

71. The court was referred to a number of cases which deal with 'substantial completion', a concept which was developed in the 19th Century to avoid a contractor pursuant to an entire contract being paid nothing at all by an employer, who sought to avoid payment by maintaining that there were still items of work outstanding. Whilst it has been said that there is now little difference between the meaning of practical completion, on the one hand, and substantial completion, on the other, I am not quite so confident about that. It is in any event unnecessary to decide that issue because it does not arise on this appeal.

72. Finally, on the question of irremediability, mention should be made of the well-known decision of the House of Lords in *Ruxley Electronics & Construction Limited v Forsyth* [1996] 1 AC 344. In that case, the swimming pool had a diving area which was only 6' deep, although the contract specified that it should be 7' 6''. The building owner said that, because it was an entire contract, the swimming pool had never been completed and he owed nothing. Secondly, he claimed the cost of rebuilding the pool even though he did not intend to do that work.

73. The first point was rejected by the judge at first instance, who found that it was not an entire contract and that in any event the pool was substantially complete. That finding was not the subject of an appeal. The second point did go to appeal, and the House of Lords concluded that, where the expenditure was out of all proportion to the benefit to be obtained, the appropriate measurement of loss was not the cost of reinstatement but the diminution in value.

74. I consider that the law on practical completion can therefore be summarised as follows:

a) Practical completion is easier to recognise than define: see *Keating on Construction Contracts, 10th Edition*, paragraph 20 – 169. There are no hard and fast rules: see *Bailey* paragraph 5.117, footnote 349.

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[1].

d) Although one interpretation of Viscount Dilhorne in *Jarvis* and Lord Diplock in *Kaye* suggests that the very existence of patent defect prevents practical completion, that was emphatically not the view of Salmon LJ in *Jarvis*, and the practical approach developed by Judge Newey in *William Press* and *Emson* has been adopted in all the subsequent cases. 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. *Mariner* is a good example of why such an approach is wrong. In consequence, I do not consider that paragraph [187] of the judgment in *Bovis Lend Lease*, with its emphasis on the employer's ability to take possession, should be regarded (without more) as an accurate statement of the law on practical completion.

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. And even *Ruxley* is of limited use because that issue did not go beyond the first instance decision. 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.

4.5 Analysis

75. In my view, Waksman J was right to refuse to grant Declarations 1-3. There are a number of reasons for that.

76. First, for the reasons set out in Section 3 above, I have rejected the contention that any failure to meet the 3% tolerance, no matter where or why it occurred, or how trivial

[1] As was the case here, where the Preliminaries referred to the list sent out with the certificate of practical completion containing "snagging/outstanding works" (paragraph 19 above).

the departure, automatically amounted to a material breach of contract. In those circumstances, it would be inappropriate to grant Declarations 1-3.

77. I do not doubt that the parties to a construction contract can agree particular parameters to guide and control a certifier in the exercise of his discretion in relation to practical completion. However, as I have said, that did not happen here: the failure to stay within the 3% tolerance was a breach of contract, but whether any particular departure from the drawings was trifling or otherwise is a matter of fact and degree. Furthermore, I am aware that none of the standard forms of building contract seek to provide any such guidance or control (which is doubtless why the learned commentator in *Keating* says that practical completion is a state "easier to recognise than to define").

78. Thus, in the absence of any express contractual definition or control, practical completion is, at least in the first instance, a question for the certifier. I am aware that, in the present case, Costplan consider that they would have certified practical completion notwithstanding the existence of these 56 rooms outside tolerance. I assume that that is on the basis that the departures from the 3% tolerance can properly be described as trifling. Whether or not that view is correct is not a matter for this appeal.

79. The only additional point to be made on this issue is the one foreshadowed at paragraph 74(e) above: the mere fact that the property is habitable as student accommodation does not, by itself, mean that the property is practically complete.

80. That leaves the question of the irremediable nature of the breaches. In my view, Mr Rigney was right to say that this is irrelevant to the issue of practical completion. 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. In this way, 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.

81. I consider that this conclusion is broadly consistent with *Ruxley*, particularly given that the question was not before the House of Lords. Furthermore I note that, in that case, the first instance judge who dealt with the question of the entire contract was motivated by the fact that the pool was quite capable of being used, and dived into, without difficulty. He found that the works were substantially complete notwithstanding the existence of the irremediable defect.

4.6 Conclusion

82. For these reasons, I consider that Waksman J was right to refuse to grant Declarations 1-3. He was also right to find that the fact that the defects in question may be incapable of economic repair was irrelevant to the question of practical completion.

5. Summary

83. For the reasons set out above, I would dismiss this appeal. But I would not wish to conclude this judgment without expressing my thanks to both leading counsel for the excellence of their written and oral submissions.

Lord Justice Newey :

84. I agree.

Lord Justice Lewison :

85. I also agree.