



PRACTICAL COMPLETION AND THE PERSIAN FLAW

A number of recent decisions in the English Courts concerned disputes regarding practical completion in building contracts. These decisions have given rise to calls for better definitions of practical completion. Why should such a critical point in any building contract be so contentious and why is the defining moment of a building contract, completion, simply left to the opinion of the contract administrator? Surely those drafting building contracts could put their heads together and provide a simple unambiguous definition of practical completion and thus avoid costly litigation. It seems so obvious but perhaps there is a lesson in the principle of the “Persian Flaw”.

The Persian Flaw is the concept that despite the fine craftsmanship and hours of skill and care taken in its creation, every Persian rug has a deliberate flaw. The reason being, that perfection is only in the hands of the gods and that even master craftsmen are incapable, and should not attempt, to claim such perfection. So, what could that have to do with practical completion?

The standard forms of building contract have three-stage mechanisms of practical completion, rectification and a final completion certificate for very good reasons.

The industry recognised that a single stage of completion was impractical. A contractor leaving a site with “zero defects” and handing over a building to an employer for immediate use, never to return, is setting a very high bar. The contract writers recognised that a more appropriate stage would be to identify when the works were “practically” complete in accordance with the design; that it was complete for practical purposes. It was foreseen that it was very likely that the contractor would return to site to rectify works or complete works that were considered “de minimis” in respect of the building’s practical use.

Under the traditional form of contract, the person responsible for determining whether the works were practically complete was the architect or contract administrator (CA). The Architect/CA’s opinion as to whether the works were practically complete was not informed by a definition in the contract but from an intimate understanding of the employer’s requirements and of the design that was intended to fulfil these requirements. The Architect/CA would, or certainly should, have been intimately familiar with the specification and standards to which the contractor was required to build. Furthermore, the ongoing process of inspection and certification provided a mechanism

1. Swansea Stadium Management Company Limited v City & County of Swansea, Interserve Construction Limited [2018]
University of Warwick v Balfour Beatty Group Ltd [2018]
Mears Ltd v Costplan Services (South East) Ltd (2) Plymouth (Notte Street) Ltd and (3) J.R. Pickstock Ltd [2018]

for the contractor to work with the architect towards a building that would be practically complete. Key to the process of certifying practical completion would have been the preparation of samples and mock-ups; agreements on standards and, perhaps in some cases, reality checks on what could and what could not be delivered. Consequently, the contractor and architect could then better understand what was required at practical completion. It was therefore entirely appropriate for the architect, in its role as the contract administrator, to validate practical completion: the architect would know that the works complied with the requirements of the contract and any subsequent variations to the extent that they were fit for practical purposes and were practically complete.

The alternative to such an approach could be to have a definition of practical completion within the contract and remove the apparent reliance on the judgement of the Architect/CA. But what would such a definition look like and how could such a standard definition be suitable for the apparently limitless circumstances that could arise? The wording would have to define practical completion in strict terms. In other words, the contract would have to describe what it considered to be perfection and this perfection would need to be delivered by the contractor. Therein lies the Persian Flaw; would any contractor be able to deliver the defined perfection required of the contract and could a defect, a “flaw”, not always be found? What impact would such a definition have on the operation of the contract?

A narrow definition would tie the hands of all the parties. No matter how apparently immaterial, a failure to satisfy the definition in every respect would mean a failure to complete and a party for whom non-completion would be beneficial would be in the position to exploit this narrow definition? An employer may be able to point to a minor defect that, by definition, prevents completion rather than be bound by an architect’s independent opinion. Is it not more beneficial to have a contract administrator with an intimate understanding of the works determine practical completion and assess whether any defects or outstanding work have any bearing upon whether the work was complete for practical purposes?

If a dispute arose regarding whether the works satisfied the narrow definition, how would that dispute be resolved within a practical timescale? Who could be called upon to give an informed impartial opinion on whether the work was practically complete within a timescale that would not be self-defeating? Who would have the necessary intimate knowledge to understand all the complex design requirements to determine that the works satisfy the employer’s requirements? We come, of course, full circle and back to the Architect/CA and its traditional role as the decision maker for practical completion.

I can hear the gasps of horror. The lawyers will say that their drafting skills will cover all eventualities; the contractors will see the contract administrator as being in the employer’s pocket; the employer will see the CA as being vulnerable to a bullish contractor and the architect will consider that its fees are not sufficient to cover such weighty responsibilities.

But that gets to the heart of the issue. The decision to issue a Certificate of Practical Completion requires critical judgement rather than strict compliance with a definition. It needs a thorough understanding of the employer’s requirements, the specification and the standards of workmanship being delivered by the contractor. Above all it requires an impartial, professional opinion behind which stands a professional indemnity insurance policy. Rather than avoiding these responsibilities, architects and engineers should be trained so that they can understand their central role and grasp this responsibility.

If the contract writers believe that practical completion can be defined, they should heed the warning in the Persian Flaw and that perfection can only be delivered by the gods.

ABOUT THE AUTHOR

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Hamish Clark is Director of HKA's Expert Engineering Services in Sydney, Australia. He is a Chartered Architect with over 30 years' experience working largely in the role of a project managing senior architect responsible for the delivery of commissions before concentrating his efforts as an Expert Witness.

Hamish has given evidence and been cross-examined in the International Court of Arbitration in Singapore and the Court of Session in Edinburgh. He has provided concurrent evidence in an International Arbitration. His expert reports cover matters such as building defects, compliance with building standards, design, standards of workmanship, professional negligence and contract administration and in addition to his own reports, Hamish has co-ordinated and reviewed expert reports prepared by specialist experts in acoustics, glass and swimming pools.

Hamish holds a BSc in Architecture from Scott Sutherland School of Architecture in the UK, and a Diploma in Construction Law from University of Strathclyde, UK.

Hamish is a Fellow of the Royal Incorporation of Architects in Scotland, Member of the Australian Institute of Architects, Member of the Royal Institute of British Architects, Member of the Chartered Institute of Arbitrators, Member of the Architects Registration Board (ARB), Accredited to the Royal Incorporation of Architects in Scotland Expert Witness Panel, included in the Royal Institute of British Architects Expert Register, Practising Member of the Academy of Experts, Who's Who Legal Construction: Expert Witness (2019) and Who's Who Legal Australia 2019: Construction.