ADR | Partnership
Partners in Alternative Dispute Resolution

Digest

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Welcome

In this edition of the *ADR Digest*, James Longbottom, Managing Director of ADR Partnership Limited reviews the recent English Technology and Construction Court (TCC) case of *Costain Limited and Charles Haswell and Partners Limited* [2009] which provides some useful lessons in preparing prolongation claims.

We are pleased to have two guest articles this month. Our first is a paper prepared by the British Chamber of Commerce Construction Industry Group which proposes the establishment of a Project Co-ordination Office (PCO) by the Hong Kong Government for the purposes of coordinating, planning and monitoring of public infrastructure projects. This is reminiscent of the old New Airport Project Coordination Office (NAPCO) which was established in 1991 for the overall management and coordination of the Airport Core Programme (ACP).

For our second guest article we are pleased to have Richard Wilmot-Smith QC of Thirty Nine Essex Street chambers in London. Richard, in his excellent article, considers the concept of experts and hot tubbing. Whilst the term may conjure up all sorts of exciting images, the reality is far less so, but may nevertheless revolutionize the way experts give evidence.

Our *ADR Analysis* series considers the meaning of 'Practical Completion' and the rules to be adopted in determining this important event. In our next edition of the *ADR Digest* we will consider the meaning of 'Substantial Completion'.

Patrick J O'Neill

Director

Prolongation Claims - Lessons from the TCC

*By **James B Longbottom** BSc(Hons) LLB(Hons) PgD(Law) FRICS FHKIS FCIArb RPS - Managing Director, ADR Partnership Limited*

Introduction

The recent English Technology and Construction Court (TCC) case of *Costain Limited and Charles Haswell and Partners Limited* [2009] provides some useful lessons in preparing prolongation claims, particularly for large infrastructure projects which involve multiple critical paths to completion.

Background

In 2002 Costain submitted a successful tender to United Utilities Water Limited to design and construct a new water and sludge treatment works. The water treatment part of the works comprised a total of 10 structures including a Rapid Gravity Filters Building (RGF) and Inlet Works (IW). Based on the advice of Costain's engineer, Haswell, the ground was to be surcharged to stiffen and strengthen it so that conventional foundations could be constructed. This ground treatment involved constructing a mound of earth and leaving it temporarily in place for a period of 6-8 weeks to pre-load and squeeze out the necessary settlement from the ground prior to construction of the foundations.

This scheme turned out to be inadequate such that Costain had to abandon it and substitute it for piled foundations causing around 8 weeks delay to the RGF and IW. This caused considerable extra costs and delay to the works in respect of which Costain sought compensation by way of damages from Haswell.

The prolongation part of the claim was for the recovery of general site overheads for running the site over the period of critical delay. However, whilst Costain was successful in establishing liability for prolongation costs it failed to fully establish the claimed prolongation costs, due to the following reasons:

- first, Costain provided no evidence to show that the claimed period of delay to the RGF and IW resulted in actual loss; and

- second, Costain did not establish that the loss from delays to the RGF and IW applied to all the site overheads.

Lesson 1 – Delay must result in actual loss

To recover damages, a contractor needs to show what losses he has incurred as a result of the prolongation of the activity in question. In this case, both programming experts agreed that the appropriate methodology to assess delay was a methodology known as 'time impact analysis'. This is a critical path based method of delay analysis commonly used in the construction industry to demonstrate the effects of excusable delays on a contract programme so that the probable effects of the event can be projected through to completion and, thereby, establish what would have happened had other issues not occurred. Having carried out such an analysis both experts agreed that the delays to the RGF and IW would, all other things being equal, have caused critical delay to the whole of the Works. However, neither expert investigated whether these delays actually caused delays to the completion date. This meant that Costain failed to prove there was a loss resulting from the actual delay because the eventual delay may have been mitigated, neutralized or exacerbated by later events. Justice Fernyhough QC, in his judgment, said:

> *"In a straightforward case where there is only one case of a critical delay involved so that it is obvious that it must have caused the resulting delay to the completion date, the Court may be prepared to accept the logic of the position maintained by Costain in this case. However, the present case is far from straightforward. The evidence shows there were many different causes of delay from the beginning of this job, some of which were accepted to be the responsibility of UU and some of which were accepted to be the responsibility of Costain... In the absence of any analysis of the interrelationship between all the operative delays from start to finish, which is absent in this case, in my judgment it is simply not possible for the Court to be satisfied on the balance of probabilities that the assumption upon which this part of Costain's case depends, is correct."*

Lesson 2 – Where there are multiple structures or cost centres, then the prolongation costs should be allocated accordingly

Costain calculated a weekly rate for its general site overheads over the period over which the delays occurred and applied this weekly rate to the period of delay.

The claim was based on the premise that the foundations were on the critical path to the project and that any delay to them would inevitably cause delay to the whole project. However, Haswell objected to this approach on the basis that Costain had not attempted to show that other activities on the site, which were not dependent on the completion of the foundations to the RGF and IW, were themselves delayed as the result of the foundation works. Haswell submitted that the correct way in which Costain should have claimed its damages in this case was to claim the cost of the delay to the foundations themselves

For a claim in damages to succeed there must be a causal link between the breach and actual loss. This means that the effect of a delay must be shown to cause actual loss.

together with the costs of any other site activities which themselves were delayed by reason of the foundation works. Justice Fernyhough QC, in his judgment, said:

> *"Costain has not called any evidence to show the relationship on site between the activity involving the RGF and the IW and the other activities going on at the same time or thereafter. It is known that there were ten structures to be built on the Lostock site of which the RGF and IW buildings were two. There is no reason to suppose that as a matter of course, progress to the other eight structures would be affected by delays to the RGF and IW... If therefore, as seems likely, the other activities on site were continuing regardless of the delays to the RGF and IW buildings, then there is no basis upon which it can be argued that Costain can recover the whole of its costs of maintaining the Lostock site simply as a result of delays to one part of the site."*

As a fallback position, Costain put forward an alternative prolongation claim based on the RGF and IW accounting for 13% of the tender sum. This percentage was applied to the agreed weekly rate to produce a much reduced prolongation claim. This alternative claim was accepted by Justice Fernyhough QC subject to an adjustment for double recovery elsewhere.

Commentary

For a claim in damages to succeed there must be a causal link between the breach and actual loss. This means that the effect of a delay must be shown to cause actual loss. The problem with Costain's case according to Justice Fernyhough QC was that the actual delay and loss may have been reduced by subsequent re-programming or acceleration measures. Alternatively, other delaying events may have contributed to the loss.

On large infrastructure projects in Hong Kong it is not uncommon to have multiple cost centres or Key Dates, and structures which are being carried out concurrently and independently of each other. Generally, in ADR's experience, site overheads on such projects can be classified as:

- **specific site overheads** (e.g. satellite offices, cranes and the like) which are specific to a particular cost centre or structure;

or

- **core site overheads** (e.g. senior management, the main site office and the like) which are unique to all the cost centres or structures.

Specific site overheads can be attributable directly to activities which have been prolonged by a compensable delaying event. They need not necessarily cause critical delay to be reimbursable. Core site overheads on the other hand should generally be prolonged by a dominant delay that causes actual delay to the completion date. They should be ascertained at the time of the delaying event, preferably as a daily rate and result in actual loss.

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A Project Coordination Office (PCO) for Coordinating Hong Kong Public Infrastructure Projects

*By **The Procurement Sub-Group**[1], British Chamber of Commerce Construction Industry Group*

Introduction

The Hong Kong Government has committed itself to substantially increasing public spending on construction works and is in the process of launching approximately thirty core infrastructure projects which are to be rolled out over the next few years. These projects include the Central-Wanchai Bypass, HK-Zhuhai-Macao Bridge, Guangzhou-Shenzhen-HK Express Rail Link, HK-Shenzhen Airport Rail Link, MTRC West Island Line, Kai Tak Development and the West Kowloon Cultural District. In addition to the major infrastructure works, there are also a host of smaller projects proposed which will have the effect of putting yet further pressure on the industry and its resources. Overall expenditure is projected to be in excess of HK$300bn.

... the BCC CIG, propose the establishment of a Project Co-ordination Office (PCO) by the HK Government for the purposes of coordinating, planning, and monitoring the multiple high-valued public projects, in order to best achieve the project objectives.

The British Chamber of Commerce's Construction Industry Group (BCC CIG), fully support the Government's proposals and the allocation of funds dedicated for public works infrastructure. However, given the magnitude of the works being proposed, Government may not be fully aware of the coordination works needed amongst the different interested groups in order to deal with the issues arising from these upcoming projects. Further, Government may not fully appreciate the pressures that will be put on local labour and management resources in attempting to undertake the works in such a compressed timeframe. There is also an obvious need to provide Hong Kong with a sustainable construction industry and this needs careful planning. There are also clear benefits in adopting a coordinated approach to environmental matters to maximize outcomes and to ensure compliance with the applicable environmental standards, rules and regulations.

In view of the above, the BCC CIG, propose the establishment of a Project Coordination Office (PCO) by the HK Government for the purposes of coordinating, planning, and monitoring the multiple high-valued public projects, in order to best achieve the project objectives.

Initiative: Establishing a Project Coordination Office

The proposed PCO will have six major benefits which are identified as follows:

Benefit 1: Importation of Labour

The importation of labour is likely to be one of many of the urgent construction issues demanding an efficient coordination of different government departments for the benefit of the projects. As many of the forthcoming projects are tunneling

works, the local construction market now requires skilled miners and geotechnical engineers etc. which are in short supply in Hong Kong. Under the current policy, contractors from different projects are required to file applications to the Immigration Department for preliminary approvals. The applications are then be referred to different projects' clients such as Highway Department (HyD), Civil Engineering and Development Department (CEDD), and MTR Corporation (MTRC), etc. for verifications of contractors, to the Census & Statistics Department for comments on wage levels, and also to the Labour Department for evaluation on the appropriateness of the job applications.

A one-stop service within the Government is thus needed ...

Meanwhile, the Labour Department needs to post vacancies in all local employment service offices for job-seekers, and also send the vacancies to some twenty relevant trade unions. The vacancies cannot be filled by imported labour until the above process is completed. It is clear that government procedure/controls/interactions between the different departments will likely delay the whole process and, potentially, project progress, and performance, might therefore be adversely impacted. Many of the projects will be sourcing materials and labour concurrently from a common pool and the interdependence and synergies between projects could be better managed with astute coordination of the importation of labour. A one-stop service within the Government is thus needed to speed up the application process and to help the industry seek the best procurement route to maximise project benefits. The PCO office can play a role in this effort.

Benefit 2: Coordinating Environmental Matters
The PCO can provide a coordination role in environmental matters in order to ensure that there is compliance with the applicable environmental standards, rules and regulations of Hong Kong including:

- participating with Government departments and branches in the development of environmental guidance;
- liaising with EPD on consistency in environmental policies affecting the works;
- promoting early resolution of environmental concerns with work agents and EPD;
- encouraging close cooperation with non-works branch entities with regard to environmental protection issues;
- encouraging the adoption of cost effective environmental protection measures; and
- providing information to both the government and the public concerning the environmental issues associated with the projects.

Benefit 3: Prevent the Industry from Overheating and provide Hong Kong with a more Sustainable Construction Industry
Given the aggressive timeframe over which the projects are due to be constructed, there is a real danger of the construction market overheating. As a consequence, Government will likely not receive best value and local labour and management resources are unlikely to be able to cope with the volume of work being undertaken. The PCO can therefore provide advice to Government on what might constitute a more realistic smoothing out of the curve together with more suitable methods of procurement in order to prevent the industry from overheating. There is also a need to provide Hong Kong with a more sustainable construction industry and the PCO can assist in advising Government on how this can be achieved.

Benefit 4: Improve the Overall Coordination of the Projects and thereby Help Avoid Economic Loss
The total value of the ten major infrastructure projects that are proposed, amounts to HK$300bn with an average of about HK$50bn proposed being spent per annum between 2010 and 2014. Delays or inefficiencies through lack of coordination will, therefore, potentially lead to a substantial economic loss to both Government and society.

The proposed PCO will assist Government in planning ahead in order to ensure that overall coordination between the projects is strengthened. The PCO is envisaged to act centrally in coordinating overall implementation and to work closely with Government in order to accomplish the projects effectively and avoid economic loss through any lack of coordination.

Benefit 5: Promote the Development of the Hong Kong Construction Industry
Although the forthcoming public projects will create tens of thousands of new posts for both construction professionals and labour, the construction industry has been in decline, partly due to the aging demography problem. The construction industry is not currently seen as an exciting industry that school leavers want to devote their career to. To help increase the attraction of younger talent to join the construction industry, PCO can play a role in:

- increasing training subsidies;
- helping to guarantee minimum wages; and
- improving the professional image of the construction industry.

To assist the industry in seeking improvements and long-term development, the PCO can assist the construction industry in promoting the construction industry generally.

Benefit 6: Match Long-Term Geographical and Economic Development
The upcoming projects, which are effectively spread across the entire Hong Kong territory, and, indeed, which integrate with the Pearl River Delta, will greatly affect the transportation, landscape and the economic structure of Hong Kong. With the construction of inter-city expressways and rail links to and from Guangzhou, Shenzhen, Zhuhai and Macao, Hong Kong will be provided with favorable conditions for further geographic and urban development and integration as a comprehensive transportation hub. A PCO can therefore liaise with the different interested parties including all relevant Mainland China and Macao units to co-develop the Greater Pearl River Delta to ensure a better coordinated transportation infrastructure for all.

Recommendations

In conclusion, the BCC CIG, urge the Hong Kong Government to set up a Project Co-ordination Office with immediate effect.

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The functions of PCO will be to (i) coordinate, (ii) plan, and (iii) monitor the multiple high-valued core projects now being proposed and in order to attain the following six goals:

- Assist in coordination relating to the importation of labour;
- To coordinate environmental issues associated with the projects;
- To prevent the industry from overheating and to help provide a more sustainable construction industry for Hong Kong;
- To improve the overall effectiveness of the scattered projects so as to maximize project benefits and avoid substantial economic loss through poor coordination;
- To promote the development of the construction industry; and
- To match long-term geographical and economic development.

The structure of the PCO may be similar to the New Airport Project Coordination Office. NAPCO was established in 1991 for the overall management of project implementation and coordination of the Airport Core Programme (ACP). It was part of the Works Branch (WB) of Development Bureau, staffed by a Director, a Deputy Director, a Project Manager, and legal advisers. It was responsible for preparing weekly reports for the Airport Development Steering Committee (ADSCOM) on the updates of new airport projects. It also advised the Secretary for Works on technical and works matters on the ACP. It helped speed up the completion of the project, by, for instance, facilitating the import of labour during the ACP works. After the Immigration Department received the applications from contractors, the applications were verified by NAPCO only, instead of being circulated through the respective development departments.

Based on the NAPCO example, the PCO can operate as a temporary office, rather than an over-arching one to other departments, and be responsible for the overall co-ordination, facilitation and monitoring of upcoming public projects. As a bridge connecting the industry with different Government departments, PCO could undoubtedly allow the industry to promptly realize the consensus from Government, and the Government likewise be in possession of a coordinated overview on all the public projects' updates. Potential coordination problems could be proactively resolved and disputes thereby avoided. Regarding the organization chart, this PCO is recommended to be small scale, with a staff of 2-3 officials from the existing departments, 3-4 non-Government consultants and supporting persons similar to NAPCO.

The budget of the proposed PCO is envisaged as being small. Compared to the HK$50 billions project value per annum, the extra expenditure per annum on the PCO would be minimal, and money well spent. The benefits from the establishment of PCO would be paramount and multi-dimensional across the whole Pearl Delta region.

The BCC CIG, thus hope Government considers the PCO initiative and the urgency to set up a Project Coordination Office as a coordination body with immediate effect.

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Footnotes:

1 Members of the Procurement Sub-Group are: Steve Rowlinson - University of Hong Kong; Mike Allen - E C Harris (Hong Kong) Limited; Colin Birkby - Nishimatsu Construction Co Limited; Kiki Cai - Gammon Construction Limited; Nigel White - Gammon Construction Limited; Patrick O'Neill - ADR Partnership Limited. Comments to the Sub-Group are always welcomed and should be addressed to Nigel White.

Experts & Hot Tubbing

By **Richard Wilmot-Smith** *QC, Thirty Nine Essex Street, London*

Expert evidence has long been a problem. In *The Case of the Fugitive Nurse* by Erle Stanley Gardner[1], Perry Mason cross examines the prosecution witness, Mr Dudley Lomax, "an expert in the science of 'criminalistics'", to you and me a type of forensic scientist. One extract from the cross examination illustrates a problem we still have:

> *"The objection is overruled," Judge Telford snapped. "The witness will answer the question."*
>
> *"Well, of course," Lomax said, "if I am to be absolutely fair I would have to state that under the conditions, which, I may state, are exceedingly unlikely, but under the conditions mentioned, my answer would have to be yes."*
>
> *"There was some reluctance on your part to be what you described as absolutely fair?"*
>
> *"None whatsoever."*
>
> *"Some hesitancy?*
>
> *"Well – of course – I am in rather a delicate position."*
>
> *"Does that position prevent you from being absolutely fair?"*
>
> *"Certainly not."*
>
> *"Why hesitate then?"*
>
> *"I wanted to think of the effect of my answer."*
>
> *"Not its truth; its effect?"*
>
> *"In a way, yes."*

I will not spoil the ending and say whether Mason got his client off. The extract above demonstrates Gardner's (a lawyer himself) contempt for expert witnesses who struggle to be fair and are *party prix*. There have been many cases where the expert has been biased and found fairness a struggle. Sometimes without the redemption Lomax found in the end. It is almost routine for experts to be cross examined on the basis that they are biased. The problem of biased experts has been attacked from many angles. We now have the declaration at the end of the report that the expert understands his or her duty to the court. *The Ikarian Reefer* and the guidance it gives does not seem to have solved the problem.

Particular vices of experts' reports include prolixity and reports which have extensive recitation of "the facts". Programming experts are particular offenders. At vast cost the reports are often no more than a fact finding exercise with a narrative slant towards the expert's client's point of view followed by *ad hominem* attacks. One judgment I read recently in a TCC case had the following paragraphs within it:

> *Mr F appears to be attempting a "second bite at the cherry" by introducing documents at paragraph 5 to which he did not refer in his Time Slice Analysis.*

It is almost routine for experts to be cross examined on the basis that they are biased.

> *Mr F rehearses old arguments about what was included within the Specification but these are matters for [other experts].*
>
> *I dismiss the remainder of Mr F's report down to paragraph 5.22 on the grounds that it is subjective and it covers issues already assessed...*
>
> *Mr F has failed to carry out his own investigation and attempt to identify the correct level of resources that should have been applied to the project and should have been applied to the project from the outset and hence his opinion on acceleration has no validity.*

The report itself was 205 pages long excluding six lever arch files of appendices, ignoring Dyson J's judgment in *Pozzolanic Lytag Ltd v. Bryan Hobson Associates*[2]:

> *57. This case provides a good illustration of a problem which is endemic in modern civil litigation. ...*
>
> *58. In the present case, the solicitors acting for BHA wished to call an engineer expert. The solicitors acting for PL contended that expert evidence was inappropriate. The learned Official Referee was persuaded to give leave for experts...*
>
> *59. In my view, the only issue to which expert evidence could properly have been directed was whether there is a common practice in the engineering profession as to what engineers, who are engaged as project managers, do in relation to the insurance obligations of contractors. That would have been a short point, which should have resulted in short reports. Instead of this, the experts prepared quite elaborate reports dealing with a number of other issues, which were inappropriate, and which no doubt added very considerably to the costs of this litigation. Thus, Mr Haggar reviewed some of the correspondence in the case. Mr Billingham, produced a report which runs to 44 pages (excluding annexures), much of which is taken up with a recitation of the events and extracts from the correspondence.*
>
> *60. The experts plainly went well beyond what the Official Referee had authorised. ... Prolix experts' reports directed to issues with which they should not be concerned merely add to the expense of litigation. Everything possible should be done to discourage this. In appropriate cases, this will include making special orders for costs.*

There is the concept of "hot tubbing". The experts give evidence concurrently and ask one another questions, aided by Counsel and the judge.

Clearly those words are routinely ignored. Can anything be done about it? Nothing has worked so far. There does need to be a new approach to experts so that Erle Stanley Gardner's and Dyson LJ's complaints are met. I think that there has to be a new approach to experts and the way that they give evidence.

There is the concept of "hot tubbing". The experts give evidence concurrently and ask one another questions, aided by Counsel and the judge. It has been described thus:

> *This procedure involves the parties' experts giving evidence at the same time. Written statements will have been filed prior to trial. After all the lay evidence on both sides has been given, the experts are sworn in and sit in the witness box – or at a suitably large table which is treated notionally as the witness box. They do not literally sit in a hot tub. Constraints of propriety and court design dictate a less exciting solution. A day or so previously, each expert will have filed a brief summary of his or her position in the light of all the evidence so far. In the box the plaintiff's expert will give a brief oral exposition, typically for 10 minutes or so. Then the defendant's expert will ask the plaintiff's expert questions, that is to say directly, without the intervention of counsel. Then the process is reversed. In effect, a brief colloquium takes place. Finally, each expert gives a brief summary. When all this is completed, counsel cross-examine and re-examine in the conventional way.*[3]

Concurrent evidence taking was used in London County Courts in landlord and tenant cases in the 1950s. It is now common in Australia and the subject of several articles in the specialist and not so specialist press and in newsletters[4]. It was revived by a judge in charge of the Australian Competition Tribunal, who put the experts at a table of their own to debate the issues, initially without the intervention of lawyers. By many accounts it works in Australia. It seems to me that it has the advantage of shortening matters as each controversy is grappled with simultaneously as opposed to sequentially. It also, in the first instance, takes the lawyers out of the equation. Too often experts get drawn into a gladiatorial contest with the opposing lawyer whereas the identical controversy has been dealt with courteously and fairly in an experts' meeting. Too often too, the expert's report has been "lawyered" and things an expert has agreed are withdrawn for tactical purposes.

The reason why hot tubbing should be tried is not only to try and change the gladiatorial and legal culture, but also to ensure that the judge is better informed as to the issues between the experts and does not throw up his hands in horror and dismay. Adam Liptak's article in the *New York Times* gives an illustration of how some judges react to the contest between experts[5]:

> *Judge Denver D. Dillard was trying to decide whether a slow-witted Iowa man accused of acting as a drug mule was competent to stand trial. But the conclusions of the two psychologists who gave expert testimony in the case, Judge Dillard said, were "polar opposites."*
>
> *One expert, who had been testifying for defendants for 20 years, said the accused, Timothy M. Wilkins, was mentally retarded, had a verbal I.Q. of 58 and did not understand the proceedings.*
>
> *The prosecution expert, who had testified for the state more than 200 times, said that Mr. Wilkins's verbal I.Q. was 88, far above the usual cutoffs for mental retardation, and that he was competent to stand trial.*

The reason why hot tubbing should be tried is not only to try and change the gladiatorial and legal culture, but also to ensure that the judge is better informed as to the issues between the experts ...

> *Judge Dillard, of the Johnson County District Court in Iowa City, did what American judges and juries often do after hearing from dueling experts: he threw up his hands. The two experts were biased in favor of the parties who employed them, the judge said, and they had given predictable testimony.*
>
> *"The two sides have canceled each other out," the judge wrote in 2005, refusing either expert's conclusion and complaining that "no funding mechanism" existed for him to appoint an expert.*

The same article quotes a trial lawyer saying:

> *"If I got myself an impartial witness, I'd think I was wasting my money."*

The sad thing about the *New York Times* article is that it praises the English system, as if somehow we have solved the problem. We have not. But we know we have a problem and whilst hot tubbing is neither new nor a cure-all, it is something to try. It will be, I believe, the coming thing in TCC litigation. Arbitrators do it now, but the practice is variable. We may see shortly whether it works in England.

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Footnotes:

1 First published in 1954 by Wm Morrow and Company, New York; in England in 1959 by Wm Heinemann Ltd. This extract of the cross examination is from the Pan edition 1962 at page 110.

2 [1998] EWHC 285 (TCC)

3 The Hon. Mr. Justice Peter Heerey, *Expert Evidence: The Australian Experience* (2002) 7 Bar Review, 166 at 170

4 http://www.nytimes.com/2008/08/12/us/12experts.html
http://www.abajournal.com/news/when_expert_witnesses_disagree_hot_tubbing_is_a_possible_solution/
http://lawprofessors.typepad.com/science_law/2008/08/old-news-on-exp.html
http://www.mallesons.com/publications/2006/Aug/8556824w.htm
http://www.jsijournal.ie/html/Volume%204%20No.%21/4%5B1%5D_O'Sullivan_A%20Hot%20Tub%20for%20Expert%20Witnesses.pdf

5 http://www.nytimes.com/2008/08/12/us/12experts.html

ADR | Analysis

The Meaning Of 'Practical Completion'

Various phrases are typically used in construction contracts to define completion, the two most common are:

- Practical Completion; and
- Substantial Completion.

The significance of the completion event itself is important and it is equally important for it to be the correct date, since it marks:

- the transfer of risks for Care of the Works from the Contractor to the Employer;
- the commencement of the defects liability period;
- the end of the Employer's entitlement to damages for late completion; and
- the Employer's entitlement to repossess the Site.

However, it would be wrong to consider Practical Completion as being equivalent to Substantial Completion and the difference needs to be understood. This first in a series of two *ADR Analysis* will consider Practical Completion; the second will consider Substantial Completion.

Practical Completion

From the legal cases of *HW Neville (Sunblest) Ltd v William Press and Sons Ltd* (1981) and *Westminster Corporation v Jarvis and Sons Ltd* (1970) the following rules to determine Practical Completion have gradually been developed:

- Practical Completion means the completion of all the construction work to be done;
- the Certifier may have discretion to certify Practical Completion where there are minor items of work to complete on a *de minimis* basis;
- a Certificate of Practical Completion cannot be issued if there are patent defects in the Works; and
- the Works can be practically complete notwithstanding latent defects.

To paraphrase the legal authorities, therefore, works that are almost but not entirely finished, are insufficient to constitute Practical Completion. Completion of all of the construction works that has to be done, must actually be done.

Non-patent defects should not, therefore, prevent Practical Completion, but apparent defects would, in theory, prevent it. Only if there were very minor unfinished works could Practical Completion be certified.

To summarise, Practical Completion in building contracts means a state of affairs in which the building has been completed free from any patent defects other than ones to be ignored as "trifling".

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ADR | Diary

Forthcoming Events 2010

7 May	*One Day International Seminar - Lighthouse Club, Hong Kong Convention & Exhibition Centre, Wanchai*
8 May	*Lighthouse Club Annual Ball - Hong Kong Convention & Exhibition Centre, Wanchai*
11 May	*'Common Problems Encountered with Variations, Valuations & Re-rating under HK Forms of Contract', Paul Barrett - Hong Kong Institute of Surveyors*
25 May	*'The Quantity Surveyor as Expert Witness', Michael Charlton - Hong Kong Institute of Surveyors*
3 Jun	*ADR Cocktails, The China Club*
4 Jun	*Lighthouse Club June Get Together – Delaney's 1st Floor, Wanchai*
11 Jun	*British Chamber of Commerce & Standard Chartered Bank Annual Ball 2010 – The Grand Hyatt*
2 Jul	*Lighthouse Club July Get Together – Delaney's 1st Floor, Wanchai*
22 Jul	*Lighthouse Club Eddie Ward Dinner – Royal Hong Kong Yacht Club, Causeway Bay*
6 Aug	*Lighthouse Club August Get Together – Delaney's 1st Floor, Wanchai*

Based in Hong Kong, ADR Partnership Limited is a dynamic practice of construction professionals providing specialist commercial and contractual services to the construction industry.

If you would like to discuss any of the articles published in this *Digest* or your project requirements, please contact James Longbottom, Patrick O'Neill or David Longbottom at ADR Partnership Limited on **(852) 2234 5228** or e-mail us at **info@adrpartnership.com**

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