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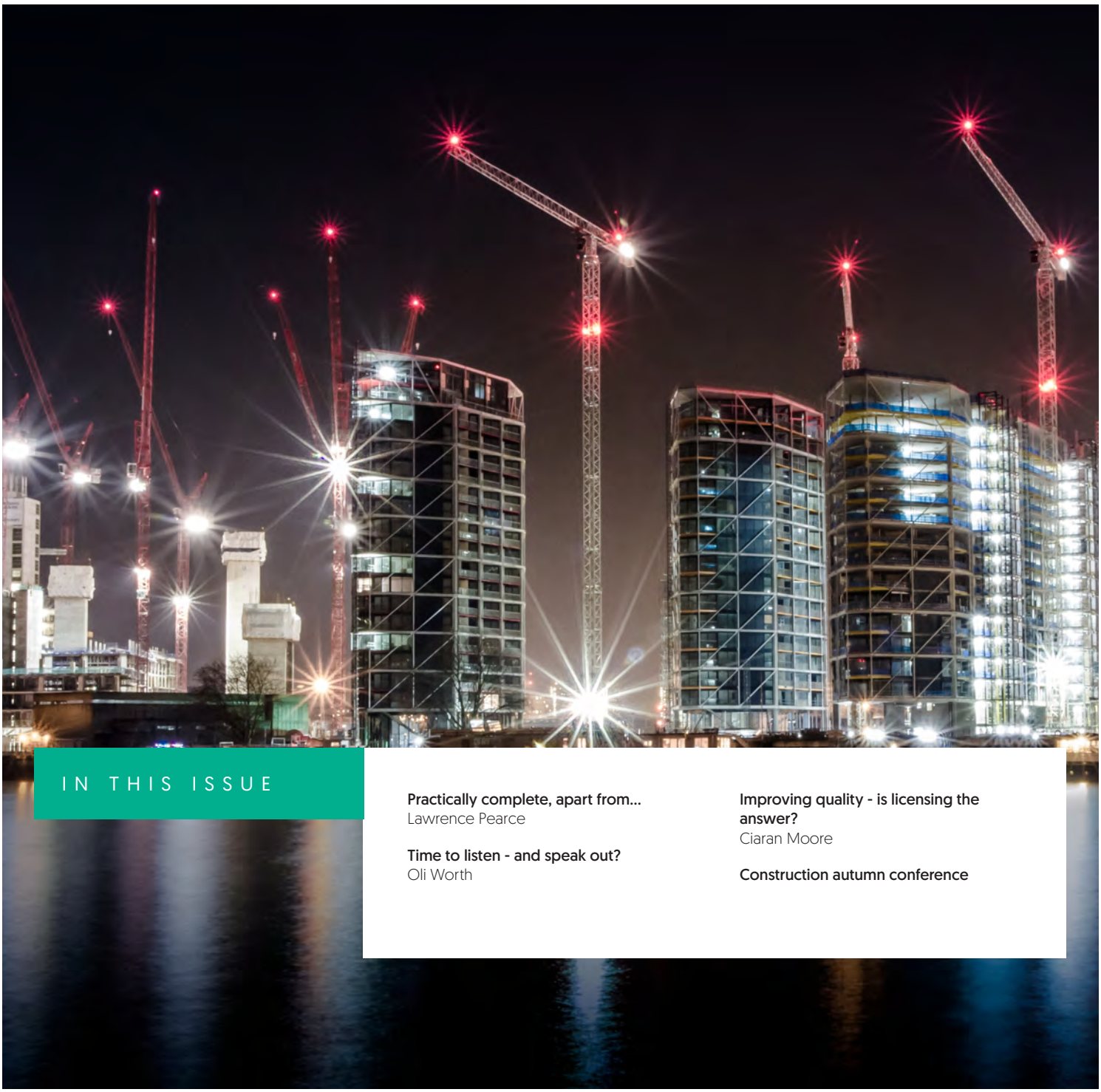
WELCOME TO THE JULY 2019 EDITION OF

Cornerstone



IN THIS ISSUE

Welcome to the July 2019 edition of Cornerstone, our newsletter for those working in the construction industry.

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Welcome to our latest edition of *Cornerstone*.

Practical completion is one of the key milestones on a project, so it's always been odd that the concept is rarely defined and generally relies on subjectivity. Lawrence Pearce looks at a recent Court of Appeal decision which might help with understanding what practical completion is – but its importance to all parties means that disputes are likely to remain common.

Also in this edition, Oli Worth notes two consultations that cover key issues for readers – a response on payment issues, and a call for input on fire safety issues. Meanwhile Ciaran Moore looks at proposals for a new licencing scheme which aims to restore confidence in the industry and boost its coffers by £10bn a year.

Finally, we have news of our autumn conference. This will take place at the Institution of Civil Engineers' HQ in central London over the morning of 30 October 2019 and, with the help of some special guests, we'll look at some of the practical issues that affect those in construction on a daily basis.

We hope you enjoy reading this edition of *Cornerstone*, in which we aim to be both informative and thought-provoking. As ever, if you have any queries or comments on the articles, we would be delighted to hear from you.

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IN THIS ISSUE

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Practically complete, apart from...

Over the years the term 'practical completion' has caused more than a few headaches. Practical completion is often the trigger for important milestones such as retention release, the rectification period, and the end of delay damages. But despite that, most contracts do not define what 'practical completion' is.

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Generally, it is considered the point at which a building project is complete except for minor defects that can be put right without undue interference or disturbance to an occupier. Some in the industry describe this point as when the building project is 'capable of beneficial occupation and use'. In effect, what is deemed practical completion is left to the professional judgement of the architect or contract administrator.

Up until recently, the construction industry looked to the judgment of Akenhead J in *Walter Lilly v Mackay.* He summarised the position as:

"*(a) Practical completion means completion for all practical purposes, and what that completion entails must depend upon the nature, scope and contractual definitions of the Works, as they may have developed by way of variation or architect's instructions.*

(b) De minimis snagging should not be a bar to practical completion unless there is so much of it that the building in question cannot be used for its intended purposes."

"

In effect, what is deemed practical completion is left to the professional judgement of the architect or contract administrator.

The trouble is, with all the will in the world, a term such as "completion for all practical purposes" does not really add much clarity. Without a definition in a contract, and with so much riding on it, it isn't difficult to see why so many disputes arise relating to whether or not practical completion has been achieved. However, in a recent case (*Mears v. Costplan (2019)*), the Court of Appeal provided welcome clarity as to how the courts should interpret the widely used but seldom defined term.

Background

The dispute related to an agreement for lease (AFL) between Mears (the Tenant), PNSL (the Landlord) and Pickstock (the Developer). Mears agreed to take a 21 year lease from PNSL of two blocks of student flats in Plymouth for an annual rental of £1,666,667 following the completion of their construction.

The judge at first instance found that 56 rooms had indeed been built more than 3% smaller than specified. But he refused to grant the declaration Mears had sought.

The AFL contained a number of key clauses that included:

- Clause 13.7.2: if a certificate of practical completion had not been issued by 11 September 2018 (the longstop date), Mears or PNSL could give notice of termination
- Clause 14.4: the issue or non-issue of a certificate of practical completion was to be in the "sole professional discretion" of the employer's agent
- Clause 6.2.1: PNSL was prohibited from making any variations to the works which materially affected the size of the rooms. It stated that a reduction in size of more than 3% from the sizes shown in the contract drawings was deemed to be material.

The works, which started in the middle of 2016, were delayed. In late summer 2018, Mears alleged that some of the rooms in the flats were more than 3% smaller than specified. However, by then the works were complete, the rooms had been built, and the longstop date was less than a month away.

Despite the rooms being 3% smaller than designed the employer's agent indicated that it intended to issue a certificate of practical completion. Mears not being happy with the employer's agent sought and obtained an injunction restraining the employer's agent from issuing the certificate until trial. Mears sought a declaration that on the proper interpretation of the AFL, a reduction in the room size exceeding 3% was itself a material variation and therefore a material breach of contract. This alone would prevent practical completion being certified.

The judge at first instance found that 56 rooms had indeed been built more than 3% smaller than specified. But he refused to grant the declaration Mears had sought. He held that Mears' argument was wrong as a matter of construction, and "commercially absurd".

The Court of Appeal was in complete agreement ... that it would be "commercially unworkable" if every departure from the contract drawings... had to be regarded as a breach of contract preventing practical completion...

The appeal

The Court of Appeal was in complete agreement with Waksman J in that 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 preventing practical completion. In deeming a reduction in size of more than 3% as "material", the parties were simply identifying what counted as a prohibited variation and, therefore, a breach of contract.

The court went on to provide a helpful review to the authorities on practical completion, from which he condensed the following:

1. Practical completion is easier to recognise than define
2. The existence of latent defects cannot prevent practical completion, since nobody knows about them

3. In relation to patent defects, there is no difference between an item of work which has to be completed (that is, an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can, and will usually, identify both
4. The fact that a defect is irremediable does not of itself prevent practical completion
5. That practical completion was a state of affairs in which the works have been completed "free from patent defects, other than ones to be ignored as trifling"
6. Whether or not a defect 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". However, this should not be elevated into the proposition that if a house can be 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 that remain to be completed or remedied.

"If parties think practical completion is likely to be contentious at the outset... they should consider including an explicit definition in the contract.

Conclusion

Although extremely helpful, the guidance is unlikely to curb the number of disputes on whether practical completion has been achieved. For many it feels like practical completion can easily be decided objectively but in reality, with so much riding on practical completion, it will continue to be decided subjectively. If parties think practical completion is likely to be contentious at the outset, or if it's particularly important to one party, they should consider including an explicit definition in the contract - provided such a definition is carefully thought through and worded, to avoid yet further disputes.

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Time to listen – and speak out?

The Government frequently consults on all manner of issues. On 19 June 2019, the Department for Business, Energy & Industrial Strategy (BEIS) responded, after many months, to a call for evidence it had put out in respect of late payment to small businesses.

Slightly earlier in June 2019, the Ministry of Housing, Communities and Local Government (MHCLG) put out a call for views on a "radically new building and fire safety system which puts residents' safety at its heart". Both could have a significant effect on construction firms.

Getting businesses paid

"The Construction Act...aims to help small businesses by mandating interim payments and offering adjudication as a fast-track dispute resolution method...

Small businesses are almost always dependent on cash flow, with those in the construction industry particularly exposed. The Construction Act (as it is colloquially known) aims to help small businesses by mandating interim payments and offering adjudication as a fast-track dispute resolution method - but that only helps so far.

The Government is aware of the problem, and has itself put in place further (non-construction specific) measures to help – such as its Prompt Payment Code, the Payment Practices Reporting Duty, and the Small Business Commissioner, who supports small businesses in resolving payment disputes with larger businesses.

Following a consultation last year and an interim response earlier in the year, BEIS has now outlined new initiatives that it hopes will further enhance the hand of small businesses. They include giving the Small Business Commissioner the ability to fine large businesses and impose binding payment plans, and placing an obligation on board directors of larger firms to report on payment issues. In an attempt to lead the way, any supplier who bids for a government contract above £5m per annum will be expected to pay 95% of invoices in 60 days across all their businesses from 1 September 2019.

These ideas are at an early stage, but may help small businesses get paid quicker - particularly given that many construction projects involve business that work with government, so if the commitment to pay regularly within 60 days trickles down, it could have a real impact. But while the Government does what it can, our experience is that businesses can do little better than to keep on top of payment applications and notices, and to act quickly and shout loudly if payment is delayed.

'Building a safer future'

"... the central feature of that regime would be to create five specific roles responsible for safety during construction, and... the 'accountable person'...

MHCLG's consultation follows the Hackitt Review of Building Regulations and Fire Safety, published in May 2018, which itself followed the tragedy at Grenfell Tower. In its words, it "proposes fundamental reform of building safety requirements so that residents are safe, and feel safe, in their homes".

The consultation seeks views on a proposed new regime that would apply to tall (more than 18m high) residential buildings. Arguably the central feature of that regime would be to create five specific roles responsible for safety during construction, and one continuing role - the 'accountable person' - who would be responsible for higher risk buildings once occupied. There would be some overlap with existing roles under the CDM Regulations so alignment with those is proposed, which may lead to amendment to the existing CDM Regulations.

The regime also seeks to strengthen residents' right to information and give them an ability to raise concerns, following criticism that it is too easy for residents to be ignored

at present. A new building safety regulator is also proposed to oversee the new regime, with that body given enhanced enforcement powers including criminal sanctions.

In parallel, the Home Office is asking for views on the Regulatory Reform (Fire Safety) Order 2005, which regulates fire safety in non-residential properties. The Government wants to ensure that the Fire Safety Order is fit for purpose and is in step with any changes to the residential regime that are brought about by MHCLG.

"The Government welcomes comment from anyone with an interest in or knowledge of the issues - including occupiers, contractors, developers and consultants.

Both consultations are open for comment until 31 July 2019. The Government welcomes comment from anyone with an interest in or knowledge of the issues – including occupiers, contractors, developers and consultants. A formal survey can be completed or, for brevity, comments can simply be emailed to the relevant department, details of which are available on the Government website.

Building and in particular fire safety has been in the spotlight over the last two years, for understandable (and tragic) reasons. These consultations have the potential to shape the next decade plus of construction and so anyone with an interest, which is likely to be most in the industry, is encouraged to consider the proposals and comment as they see fit.

Improving quality – is licensing the answer?

A new Construction Licensing Task Force has begun to develop a mandatory licensing scheme for UK construction companies.

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The scheme's principle aim will be to transform the construction industry's failing reputation, as highlighted by damning statistics published last year in a report by The Federation of Master Builders (FMB). The FMB found that:

- one in three homeowners are put off doing major improvement works requiring professionals - because they fear hiring a dodgy builder
- 55% of those who commissioned home improvement works had a negative experience with their builder
- nine in ten believe the Government should criminalise rogue and incompetent builders; and
- 78% want to see a licensing scheme introduced.

The FMB also calculated that homeowner distrust means the industry is missing out on over £10bn of business per year.

Liz Peace, the former Chief Executive of the British Property Federation, will chair the Task Force. She expressed confidence in the scheme being supported by industry leaders:

"*Licensing has support in principle from more than 30 construction organisations and consumer groups. The Task Force will be supported by major players and in an industry that is often criticised for being too fractured and disparate, I am heartened by the fact that the sector is coming together to lead the industry in a new direction.*"

Peace hopes that the licensing scheme will transform the UK industry into a world leading sector, helping "*drive up standards and (…) address the issue of quality and professionalism, which is some areas, is falling short*".

Various industry groups will be members of the Task Force as it explores options. These include the British Property Federation, the CIOB, the RICS, and various industry specific federations.

The UK's construction industry has arguably had a laissez faire approach to licensing in comparison to its European neighbours and Commonwealth cousins.

The UK's construction industry has arguably had a laissez faire approach to licensing in comparison to its European neighbours and Commonwealth cousins. As Brian Berry, chief executive at FMB alluded, "*in countries like Australia and Germany, building firms require a licence…we want to develop a scheme that regulates our industry in a similar manner.*"

So while the scheme may be ground-breaking in the UK, established licencing regimes are already in place in jurisdictions such as Japan, Russia and the United Arab Emirates.

The scheme is in its early stages, but could permanently change the way the construction industry is regulated if it emerges that the scheme is legally binding.

However, few details on the new licensing Task Force have been announced – although that's perhaps not surprising when its existence was only confirmed on 12 June 2019. It has not been announced if any resulting licensing scheme will be enforced by law, or become (another) industry badge scheme saturating an already confusingly regulated market.

The scheme is in its early stages, but could permanently change the way the construction industry is regulated if it emerges that the scheme is legally binding. The UK construction industry will wait with great interest for further detail on the nature of this new mandatory licencing scheme.

Construction autumn conference

This autumn we will be hosting a conference looking at some key issues in construction law including a review of some of the current hot topics affecting those in the industry.

Over a morning at the Institution of Civil Engineers' HQ in central London, we will consider a range of issues and, with some help from expert third parties, aim to shed some light on some of the trickier subjects we deal with, and answer your questions and hopefully set some new thoughts running. The conference will count as CPD for those that need it.

We're still finalising the precise programme, so if you have anything you'd particularly like to be covered we'd love to hear from you. Please contact Oli Worth who will be pleased to hear any ideas.

In the meantime, please save the date – Wednesday 30 October 2019 – and lookout for further details via email, on our website, or on our LinkedIn account.