

**Lighthouse Club Seminar on Contract Management  
"Complete or Not Complete, That is the Question"**

**19 June 2010**

Tim Hallworth, Associate



## Why is Practical Completion Important ?

### For Contractors

*No longer liable for Liquidated Damages*

*Half retention becomes due*

*Defect Liability Period commences*

*Insurance risks ends*

### For Employers

*Period for finalisation and agreement of Final Account starts*

*Possession and occupation starts*

## What is Practical Completion ? –Text Books

### Hudson's

*"Usually it (completion) will mean bona fide completion free of known or patent defects so as to enable the owner to enter into occupation".*

- *The words 'practical' or 'substantial' in English standard forms probably do no more than indicate that trivial defects not affecting beneficial occupancy will not prevent completion..."*

## Hong Kong "Building" Standard Forms (1)

### Hong Kong Standard Form of Building Contract Private Edition – With Quantities 2005 Edition

*"The state of completion where the Works... may not be absolutely completed or entirely free from defects but have reached the state where they can be taken over and used by the Employer for their intended purpose and where the unfinished items of work and the remaining defects then patent are only of a minor nature and extent and their completion or rectification will not unreasonably interfere with or interrupt the taking over of the Works..."*

- *Wording is less stringent than the Hudson's definition:*
  - *Most prescriptive definition*
  - *Can have patent defects but of a minor nature !*
  - *Whether defects are patent or minor defects will be a matter of fact*
  - *Discretion is left to the certifier*

## Hong Kong "Building" Standard Forms (2)

- **Government of Hong Kong General Conditions of Contract for Building Works 1993 Edition**

Clause 53. (1) *"When the Works have been substantially completed and have satisfactorily passed any final test that may be prescribed by the Contract..."*

Clause 53. (2) *... as soon as in the opinion of the Architect the Works have been substantially completed and satisfactorily passed any final test which may be prescribed by the Contract, the Architect shall issue a certificate of completion in respect of the Works"*

- No prescriptive definition as the new form !
- Often tests are not defined in the Specification
- More at the discretion of the Architect

## Hong Kong "Civil" Standard Form

- **Hong Kong Conditions of Contract for Civil Engineering Construction Contract 1977 Edition**

Clause 68. *"As soon as in the opinion of the Engineer the Works shall have been substantially completed and shall have satisfactorily passed any final test which may be prescribed by the Contract, the Engineer, on receiving a written undertaking by the Contractor ..., shall issue a certificate of completion in respect of the Works."*

- Similar to Building Works 1993 Edition
- No prescriptive definition
- Refers to final tests
- At the opinion of the Engineer
- Contractor makes application that the works are Practically Complete

## Other Standard Forms – No use of the term PC/SC !

### NEC3 Engineering and Construction Contract June 2005 Edition.

Defines 'Completion' as being:

When the Contractor has:

- (i) done all the work which the Works Information states he is to do by the Completion Date; and
- (ii) corrected notified Defects which would have prevented the Employer from using the works and Others from doing their work.

### FIDIC 1999 Form

Completion is defined by **tests and the completion** of specified work and the issuance of a Taking Over Certificate.

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7

## English Authorities (1)

### J. Jarvis and Sons -v- Westminster Corporation (1978) 7 BLR 64 HL

- Brief facts: Works delayed by a nominated piling contractor (defective piles)
- practical completion as completion for the purpose of allowing the employers to take possession of the works and use them as intended.
- practical completion did not mean completion down to the last detail, however trivial and unimportant.
- Only latent defects at the date of practical completion
- High standard !

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8

## English Authorities (2)

### H.W. Neville (Sunblest) Ltd -v- William Press and Son Ltd (1981) 20 BLR 78

- Brief facts: Contract for site preparation defective drains
- practical completion did not mean that very minor (de minimus work) had to be carried out, but did mean that if there were any patent defects the Architect should not give a certificate of practical completion.
- Free from patent obvious defects
- Diluted the strict interpretation of Jarvis !

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9

## English Authorities (3)

### Emson Eastern Ltd -v- E.M.E. Developments Ltd (1991) 55 BLR114

- Brief facts: PC certified after Emson went into receivership. Issues was if all snagging and remedial works were required to be made good before completion
- Realistic definition of practical completion !
- "should keep in mind that building construction is not like the manufacture of goods in a factory. ...[it was] impossible to achieve the same degree of perfection as can a manufacturer. His view was that it must be rare for a new building to have every screw and every brush of paint correct "

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10

## Hong Kong Cases (2)

### Mariner International Hotels Ltd v Atlas Ltd (2007) HKCFA

- Agreement signed for sale of hotel in Tsuen Wan 1998 (now serviced apartments)
- "Turnkey basis" equivalent to the Grand Plaza Hotel
- Completion of sale was conditional upon:
  - (1) Practical completion of hotel
  - (2) Occupation Permit for the hotel
  - (3) Licence for the Hotel to operate
- Architect issued PC certificates
- Mariner refused to complete the purchase and alleged the conditions had not been satisfied
- Atlas accepted that some defects were non-trifling

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11

## Mariner - The Arguments

- Mariner argued that PC in the building contract sense was not achieved as there were still patent defects which were not trifling ones
- Atlas argued the hotel was open for business and rectification works were still proceeding (PC in the Big Island sense)
- Lower court decisions were:
  - PC as certificates were issued (Atlas winner at CFI)
  - PC achieved if capable of being opened for business (Atlas winner at CA)

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12

## Mariner - Court of Final Appeal



- Atlas lost (PC was based on Mariners interpretation and the Hotel was NOT free from patent defects)
- The parties intended to mean PC in the building contract sense (turnkey contract)
- Ready for business not enough in the present case

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13

## Mariner - What does this mean to Architects and Engineers ??

- exacting standard: no patent defects except trifling ones
- The issue is that this definition has fundamentally switched what previously people thought was the issue around PC, namely beneficial use of occupation



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14

## Vigour Ltd v Hyundai Engineering and Construction (August 2008) HKCFI

- Application for leave to appeal against an award
- Definition of PC:

*"'Practical Completion' means ... the Works ... fully available for possession and use, subject only to items of minor works ... 'minor works' shall not include work which would otherwise inconvenience or unreasonably disturb occupants in their possession and use of the Works following Practical Completion."*

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15

## Vigour - Arbitrator decided

- "occupants" means "whoever is likely to occupy a particular part of the hotel" following completion
- Hyundai did not contract to build an operational hotel
- Direct contractors carried out follow on works (fitting out etc)
- "occupants" not necessarily hotel guests and staff  
e.g. plant rooms: maintenance staff  
cafe: fitting-out contractor



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16

## Vigour - Appeal - Court of First Instance

Court agreed with interpretation of Arbitrator:

1. Interpretation sensible where other contractors involved;
2. More consistent with "use and possession" of any given area; and
3. Nothing wrong with varying levels of tolerance.

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17

## Contract Management – Practical points

1. The discretion of the Architect/Engineer as to PC should be exercised with caution;
2. Works must be almost (if not entirely) finished !
3. Try to obtain acknowledgement of the items of work left incomplete;
4. Should be satisfied that the retention money will cover the cost of the remedial works;
5. If an Employer takes possession the Architect should state in writing to the Contractor that he reserves his rights that works are not practically complete (may be difficult!);
6. Should be satisfied there is no likelihood of the Employer suffering loss/interference with the use of the works while items are completed;

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18

