

RESOLUTION

Volume 1 Issue 5

March 2007

Special points of interest:

- **FREE - SEMINAR**
- "Tolent clauses"
- Practical completion

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Don't miss your chance to join us for a free half day seminar on Monday 14th May - Focusing on Risk Management - Limited places call now to reserve yours On 01480 426560 or email Pauline@arbicon.co.uk

When does a building project reach "practical completion"?

The issue of a certificate of practical completion by the architect or contract administrator will usually lead to a sigh of relief from the contractor.

Why?

The liability for liquidated damages ceases; the employer is obliged to insure; retention release is due and the defects period begins. Given the employers obligation it is not surprising that disputes frequently arise at this point in time. Unfortunately, in the standard forms of contract, there is no precise definition of what practical completion is legally. In J.Jarvis & Sons v Westminster Corporation (1978) the House of Lords ruled that practical completion for practical purposes was reached by "allowing the employer to take possession of the works and use them as intended." The court went on to say that a clause that requires completion down to the last detail, however trivial and unimportant amounts to a penalty clause and as such is unenforceable. However, within the same judgement it was also held that practical completion should be all of the work complete not nearly all of it. Following this case in Em

son Eastern Ltd v EME Developments Ltd (1991) it was held that given the complexity of resource employment on a building project that it was virtually impossible to achieve the same degree of perfection as can be achieved by say manufacture of goods in a factory. The court stated that it would be rare for a new building to have every screw in place and every brush of paint correct. Furthermore the court held that a building is seldom built precisely to the drawings and specifications. Judge John Newy held that practical completion is between the two judgements in Jarvis. This is generally held to be the most sensible legal interpretation.

Each case is different and should be taken on its merits, however if minor works have not been completed but the product has been supplied for its intended use (eg occupation) this is likely to be practical completion. This position is further reinforced by Skan-ska Corporation v Anglo-Amsterdam Corporation (2002) which also applies the rule to phased partial possession contracts. It would make the situation more clear if a clause is drafted into

contract stating that if the employer takes part or total possession of the works that practical completion has taken place. Confusion should not be allowed to arise between "employer access" and "employer possession", mere access will not be deemed practical completion, where as possession phases are, a word of caution, it is thus important to obtain clear evidence as to what is happening with say written exchanges, dated photographs, meetings, witnesses etc.

The moral of the story is if the employer is refusing to take possession of the building and he or the architect or appropriate refuse to issue the practical completion certificate and pay the retention money due, ensure that evidence is carefully prepared. If you would like assistance in dealing with practical completion issues please call Arbicon for assistance on 01480 426560 or email us at info@arbicon.co.uk





Put the 14th May in your diary!!

Due to the success of our seminar on "Managing Risk" we will be running the seminar again for those of you who could not make it the first time. We have had excellent feedback from those who have attended this seminar with **86%** of those who attended thinking the seminar overall was excellent/very good and **100%** would like to attend another seminar run by Arbicon. Other feedback from those who attended

"it is always good when the forum is opened up to debate"

"good content—very helpful"

"I would definitely attend another seminar"

For the second time we are running this course for **FREE**. We will be looking at an overview of preventative measures that can be taken to reduce your chances of ending up in a dispute. It also looks at how you can apply the preventative measures in a practical way.

For those of you who did attend the seminar we are planning the next seminar covering a new

topic. We are interested in hearing your views on the topics you would like to hear more about.

Please contact us to let us know the topics you are interested in and/or to reserve a place on a seminar.

Seminars will be held at our Huntingdon Offices. Places are limited so don't be disappointed and call or email today to reserve your place.

Pauline@arbicon.co.uk
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"Tolent" clauses still live on....!

It is generally accepted in the construction industry that contractual clauses requiring the referring party within an adjudication to pay the legal and other associated costs of the other party, should be outlawed and have survived for far to long.

Shame on the industry, government et al for allowing this unsatisfactory state of affairs to continue for so long. The Housing Grants, Construction and Regeneration Act has been with us now since 1998 and finally this year, some nine years later, it appears these onerous clauses are likely to be banished forever.

In the meantime many disgruntled parties have suffered as a result of there unreasonably worded clauses.

The issue is that many unwary sub-contractors, for those are the targets of the disguised amendments, have neither the time or the knowledge to locate these clauses hidden as they are amongst vast sways of paperwork issued at tender or contract stage.

Arbicon ADR Ltd are able to provide a service to clients seeking to clarify their contractual positions, either at the tender stage or

during the contract stage on this issue or any related contractual matters.

We are also compiling case studies on tolent clauses and how they have been applied in practice. If you have fallen foul of a tolent clause please email us at advice@arbicon.co.uk and have your say.

We cannot stress highly enough how important it is to review your contract before you commence building and under the watchful eye of a legal team to check and test for these amendments to familiar and trusted contracts.



Arbicon - A full range of services for all

Arbicon are actively seeking good quality QS staff to join their team and would like to hear from anyone interested in joining via email or by phone 01480 426560.

Arbicon aim to provide appropriate and equitable solutions to all contractual issues, through the wide range of dispute prevention and resolution services they offer. These include:-

- **Negotiation**
- **Adjudication**
- **Arbitration**

- **Support in litigation**
- **Risk management and dispute prevention**
- **Expert witness**
- **Quantity surveying and cost management services**

You might chose to employ our services simply on the

basis of :-

- One off issues—where you simply use us on a straight fee basis
- A telephone help line service for day to day issues providing an immediate response

Call us on 01480 426560

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