



## CONSTRUCTION LAW UPDATE No. 801

### What is practical completion?

#### Introduction

A recent decision of the District Court of South Australia ([2007] SADC 137) provides an interesting insight into the legal meaning of the term "practical completion" as applied to a residential housing contract.

Under the contract, the owner was required to make full payment at the time of practical completion. When the builder claimed the home was practically complete, the owner refused to pay, saying that the house was defective and/or incomplete. The builder registered liens over the land and took the owner to the District Court. The case has a number of interesting aspects. This update focuses only on two: the definition of the term "practical completion" and whether a failure to comply with the strict letter of the specification entitled the owner to damages.

#### The nails issue

The contract specified that galvanised nails were to be used throughout the home. The builder admitted that it had used non-galvanised nails on the interior of the roof structure. The owner said this was a breach of the contract. The builder said that the condition in the contract only required galvanised nails to be used on those parts of the roof exposed to the open air; this was common building practise.

The Court found that the contract clearly required the use of galvanised nails on the whole house. Because this was not done, the builder was in breach of the contract. The owner accepted that the breach was not capable of being remedied in the sense that the house would have to be dismantled and rebuilt using galvanised nails. The Court said:

*"It seems to me that the measure of the seriousness of the breach requires the taking into account of two matters: first, that the defendant says that the breach sounds in damages because the house has a lesser value; and, second, the expert evidence as to what effect the use of the non-galvanised nails has upon the structure of the house."*

The Court found that the use of non-galvanised nails would have no bearing on the value of the home and that it was a relatively minor breach. The Court said that the breach "both in the short-term and the long-term has had and will have no effect on the structural soundness of the house." Therefore, the Court said, the owner was not entitled to any compensation for the builder's breach of contract.

The failure by the owner to recoup damages for the use of non-galvanised nails resulted from a lack of

evidence as to the loss caused by the breach of contract.

#### Practical Completion

The builder said that practical completion, as defined in the building contract, was achieved in about mid June 2004. The builder continued to carry out remedial and additional work after June 2004, even though payment had not been made in respect of practical completion. In March 2005, the owner refused the builder any further access to the site and said that, at that time, practical completion had still not been reached.

The Court noted that the contract defined "practical completion" as requiring fulfilment of two limbs; the work had to be:

- substantially complete; and
- reasonably fit for use.

This is a common method of defining practical completion in construction contracts.

The owner's expert inspected the home in November 2004 and found a number of defects. Examples are given below to indicate the types of defects.

#### Documentary defects

An example of a documentary defect, of which there were several, was the failure by the builder to obtain provisional building rules consent for the roof truss details. The Court said that this type of defect could be rectified by documentation or by retrospective certification of the documents. The Court considered that documentary defects such as this did not preclude a finding that the home had reached practical completion.

#### Construction errors

The tie down details did not match the floor plan. The home was a timber framed structure built on stumps and accordingly any deficiency in the tie down structure created "an appreciable risk that, in high winds, the building might be dislodged from the piles which supported it". The court found that such a defect would preclude practical completion.

The Court said that both limbs, not substantially complete and not reasonably fit for use, applied to this type of defect. However, the builder had rectified the tie down details in early October 2004 and this initial issue was removed, although the date of practical completion could not have been said to occur until the later date.

### **General minor defects**

There were a number of minor defects that were subject to very similar findings by the Court. Given their similar treatment by the Court, we have combined them under the one heading.

- Roof sheets and cappings were not adequately screw fixed, some screws had missed the relevant timber supports.
- Many purlins were not adequately fixed to rafters or trusses.
- Girder trusses were not connected to the wall framing.
- Two standard trusses were out of plumb and bowed approximately 125 mm.
- Many rafters were not fixed to trusses at every junction.
- Top plates were not properly connected to the studs.
- The top of the bracing walls was not connected properly with the external walls.
- The plates were not adequately connected to the studs supporting the triple girder truss.
- Wall framing was not connected to the floor framing.
- Internal non-load bearing walls were not fixed to the roof framing.
- Verandah posts were bolted to fascia and not to floor framing.
- Floor joists were not in accordance with the approved documents.
- Bathroom floor joists were cut through and were not replaced.
- Some tie down angle bolts were too close to the bottom face of the floor framing.
- Floor frame did not provide adequate vertical support for verandah post and girder truss.
- Concrete block was not founded in firm soil.
- Stair risers were not of a consistent height - some exceeded 190 mm.
- Some of the fly screens had been damaged.

All of these defects had been rectified by the builder after June 2004 and before the owner refused the builder access to the site. However, the Court said that in themselves these defects taken together or individually would not preclude a finding of practical completion.

### **Wet area floors**

The wet area floors were constructed on compressed cement sheet over which was laid a cement screed before finishing with tiles – a relatively common method of constructing wet area rooms in timber homes. The owner complained that water was not draining adequately to the floor grates.

The applicable standard under the Building Rules had changed between the time that the building approval was granted and the time of the trial. The Court said that it was obliged to apply the standard that was applicable at the time of the trial, rather than that which was applicable at the time that the approval was granted.

In any event, independently of the applicable standard, the court said that there was a requirement

for the builder to provide adequate falls in the floors of the wet areas. As water continued to pond for a period of up to 40 minutes after water was originally deposited on the floors the Court found that this requirement had not been met. As this defect had not been rectified, the Court found that the home had not reached practical completion.

This finding did not preclude the builder from recovering the money due to it less the cost of the rectification works that had not been performed prior to the exclusion of the builder from the site.

It has not been possible in an update of this length to cover the many interesting issues that are dealt with in this case. However, there is likely to be a significant degree of interest in respect of the Court's comments as to the nature and extent of defects that would not prevent a home from being practically complete.

### **Conclusion**

Even where a breach of contract occurs, compensation will not be payable unless loss can be proved to flow from the breach.

The case clarifies the legal meaning of practical completion in relation to housing. Where parties wish to contract on terms that require a home to be more fully complete before final payment is due, they could include altered or additional terms in their contract. Commonly, parties include terms requiring the retention by the owner of a small percentage of the contract sum until defects have been rectified. Alternatively, parties might agree to modify the standard definition of practical completion.

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