

# LHAG Insights

Projects & Construction



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### Is it Completed?

Whether or not works have achieved “completion” or “practical completion” under a construction contract is often disputed. The date of achievement of construction completion has significant consequences. It usually marks the point where the employer is supposed to be able to take over the works and the beginning of the defects liability period. Failure to complete by the target date may also give rise to liquidated damages payable by the contractor to the employer.

Construction contracts, not unusually, will often spell out what constitutes “completion” or “practical completion”. However, some do not, and courts have had to determine its meaning in disputes on whether it has taken place. This article takes a look at how Malaysian and English courts have addressed this issue.

### English position

Previously, the English courts had two approaches in deciding on the meaning of “completion”:

- (a) one approach emphasised the “intended purpose of the works”. This means that completion is achieved despite the presence of minor outstanding works and defects which will not substantially affect the use of works for their intended purpose (see *Hosier*<sup>1</sup>);
- (b) an alternative, and also stricter, approach construes “completion” to mean all construction work to have been undertaken except for defects which are *de minimis* or no

<sup>1</sup> *Hosier & Dickinson Ltd v P & M Kaye Ltd* [1972] 1 WLR 146

more than trifling (see *J Jarvis & Sons*<sup>2</sup> and *H W Neville (Sunblest)*<sup>3</sup>).

There are also some cases that chose a position in between the approaches mentioned (see *Emson Eastern*<sup>4</sup>).

However, much clarity was given in the case of *Mears*.<sup>5</sup> The Court of Appeal confined the English common law position to the stricter approach and the central question discussed was whether a defect was *de minimis* or trifling. Such defect would not prevent practical completion.

The court went on further and provided helpful guidance as to what generally constitutes “completion” as follows:

1. Practical completion is easier to recognise than define.
2. The existence of a latent defect cannot prevent practical completion.
3. There is no difference between an item that has yet to be completed and one that has been completed but is defective.
4. The existence of patent defects will be sufficient to prevent practical completion, save where they are *de minimis* or trifling in nature.
5. The ability to use the works as intended may be a factor in considering whether a patent defect is trifling in nature. However, such an ability does not mean that the works must be regarded as practically complete.
6. The mere fact that a defect is irremediable does not mean the works are not practically complete. The question remains whether the defect is trifling in nature.

### Malaysian position

In the Court of Appeal case of *Kerajaan Malaysia*,<sup>6</sup> the court referred to both approaches in English law and acknowledged that there are divergent views on the meaning of “completion”. Unfortunately, the court did not elaborate and decide on which approach is preferable. Similarly, the High Court case of *Crest Worldwide*<sup>7</sup> and the High Court case of *Excel Metro*<sup>8</sup> referred to all the English law approaches without making a stand. Although neither approach was specifically preferred, *Excel Metro* provided some guidance in the instance where a construction contract does not define the meaning of “completion”. The court held that in determining the meaning of “completion”:

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<sup>2</sup> *J Jarvis & Sons Ltd v Westminster Corporation* [1970] 1 WLR 637  
<sup>3</sup> *H W Neville (Sunblest) Ltd v William Press & Son Ltd* (1981) 20 BLR 78  
<sup>4</sup> *Emson Eastern Ltd (in receivership) v EME Developments Ltd* (1992) 55 BLR 114  
<sup>5</sup> *Mears Ltd v Costplan Services (South East) Ltd* [2019] EWCA Civ 502  
<sup>6</sup> *Kerajaan Malaysia v Global Upline Sdn Bhd* [2017] 1 MLJ 170  
<sup>7</sup> *Crest Worldwide Resources Sdn Bhd v Mudajaya Corporation Berhad* [2019] MLJU 366  
<sup>8</sup> *Excel Metro Capital Sdn Bhd v Mohd Salleh Bin Sukiman* [2017] MLJU 1490

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- (i) it is sufficient to refer to the wordings of the contract and the common law position;
- (ii) the completion of construction works is not a perfect completion in its absolute sense; and
- (iii) the ultimate task whether completion had been achieved should be decided by the contract administrator or certifier.

Nonetheless, it may be that in light of *Mears*, Malaysian courts may start to lean towards the stricter approach. In the High Court case of *Infraprima Construction*,<sup>9</sup> one of the issues the court had to consider was whether or not an exit ramp had been completed. In concluding that the ramp had been completed, the court remarked that:

“If there were defects in the exit ramp after March 2017, I believe that they were... *de minimis* defects which did not affect completion...”.

### Conclusion

The cases above illustrate the importance in spelling out clearly what constitutes “completion” in a construction contract, particularly to clarify which approach is to be taken. Parties opting for a bespoke construction contract should pay particular attention to this. For those using the standard forms of contract typically used in Malaysia, such as the International Federation of Consulting Engineers (FIDIC) Red Book 2017, the Malaysian Institute of Architects (Pertubuhan Arkitek Malaysia) PAM Contract 2018 (Without Quantities) and the Malaysian Public Works Department PWD Form 203A (Rev. 1/2010), it should be noted that these standard forms of contract expressly state that practical completion (and taking over in FIDIC) means completing works in accordance with the contract and when the employer can use the works for its intended purposes except for minor defects and works. This reflects a position more generous to the contractor than the stricter approach in the *Mears* case. Whether it is a bespoke or standard form contract, parties could also consider taking a step further and contractually agree what constitutes “*minor*” outstanding work or defects to prevent disputes regarding completion.

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