It's All Over Now: Practical Completion and Defects

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PRACTICES Litigation, International Arbitration

Mears Ltd v Costplan Services (South East) Ltd & Ors [2019] EWCA Civ 502 is a recent decision of the Court of Appeal. In that case a prospective landlord agreed to construct two buildings (student accommodation blocks) on its land in accordance with a certain specification. A prospective tenant agreed it would take a 21 year lease of the buildings if "*practical completion*" was achieved before a certain date. The landlord's contractor proceeded to construct blocks in which some 55 or 56 rooms which were all at least 3% smaller than had been specified. The landlord maintained that the work was, nonetheless, "practically complete", and so that the tenant was obligated to enter into the lease.

The case provides some guidance on the meaning of the term "*practical completion*" (which plays an important role in the JCT standard form building contracts). Discussions of the case have focused on that aspect.

Mears is arguably also interesting, however, as part of wider discussion about whether English law (or those applying it) tend to treat contractors who build defective buildings rather more generously than manufacturers and sellers of defective goods, and whether that distinction is always justified.

Goods not as Described – Commercial Contracts

The Sale of Goods Act 1979 ("SOGA 1979") implies certain terms into commercial (i.e. business-to-business) "*contracts of sale of goods" including that "where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description*" (section 13(1)).

That implied term is, by default, a "*condition*" (section 13(2), though this can be negatived or varied (section 55). At common law, "*condition*" denotes a term which is so important that, if it is breached, the innocent party will be entitled to terminate the contract and reject the goods.

That position is modified slightly with respect to the condition in section 13(1) by section 15A(1) which says: "[w]*here … the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13 … but the breach is so slight that it would be unreasonable for him to reject them ... the breach is not to be treated as a breach of condition but may be treated as a breach of warranty*". The seller has the burden of proving that a breach falls within section 15A(1).

Section 13(1) applies unless a contrary intention appears in, or is to be implied from, the contract. Hence it is always open to the parties to agree that the implied term does not apply, or is not a condition, or is to have a different effect. It is common for parties to exclude (or tribunals to construe contracts as excluding) the section 13 implied term and the attendant right to terminate / reject goods if they do not comply with the description in the contract. See *Star Polaris LLC -v-HHIC-Phil Inc* [2016] EWHC 2941 (Comm) and *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm) for examples.

Nonetheless the default position is that section 13(1) does apply, and even complex, high value goods are regularly ordered, manufactured, bought and sold under much sparser contracts which do not modify that default position.

To read the full article, see the PDF linked below.

Its-All-Over-Now-Practical-Completion-and-Defects.PDF