Making Completion Pay

It was the golfer Bobby Locke who coined the phrase "You drive for show, but putt for dough." Like professional golfers, successful builders know how to finish. However, to reap the benefits of finishing it is important to get the contract admin right.

It is not just a question of securing the final payment and retention releases that are usually triggered by completion (or practical completion). There are four other legal consequences that provide builders with important risk management payoffs:

- Ending any liability for delay, such as liquidated damages,
- Transferring risk back to the owner, particularly with respect to occupier's liability and insurances,
- Defining the Defects Liability Period, and limitation periods generally, and
- Reducing the owner's (or superintendent's) powers under the contract (such as the power to require variations).

The profit on many a project has been lost, for the want of a builder appreciating the significance of completion to one or other of these risks. Part of the reason for this is problems with the word "completion" in construction contracts.

In construction contracts "completion" very rarely means completion. Almost inevitably, there will be minor works and defects the builder has to attend to even once occupation has been made available to the owners. Completion of the works is quite different from completion of the contract. Hence many contracts use the term "practical completion". On larger commercial projects nothing is left to chance, the contract will provide a regimen for a Practical Completion Certificate formally recording the date. However, on smaller projects, where delay damages may not be a major concern, projects can drift into an ill-defined completion, particularly where the owner takes early, late, or partial occupation. Often building defect claims are not made until years after the project is finished, and builders have to spend a fortune in legal fees and building disputes that could have been avoided had they ensured there was some objective record of when they actually completed the works.

Building Completion: A Lawyers Checklist for Builders

At completion, builders need to know what the relevant contract provides with respect to the following matters, and act accordingly.

1. How is completion defined? Is there a formal procedure for claiming completion? How is completion, and the date of completion, to be agreed and recorded? Is there a dispute resolution mechanism that will settle disagreements regarding completion?
2. Aside from completion of the physical works, what documents (including certificates and drawings) is the builder required to provide to the owner at completion?

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3. Is the right to final payment triggered by completion? If so, what procedures need to be followed?
4. If security, by way of retention or a bond, has been provided, when it is required to be released?
5. Does the contract allow the owners to take occupation before final payment?
6. Is it clear that the builder no longer has a duty of care with respect to keeping the property and any occupants or visitors safe from harm? If not, what is the extent to which the builder is still responsible for the care and control of the site? Does the insurance position need to be clarified with the owners?

If the contract is not clear about these issues, or there are special circumstances, builders should consider getting some short legal advice.

Key takeaways

- Completion in construction contracts often does not mean the end of all obligations for builders.
- Proper contract administration at completion can help builders avoid costly disputes.
- Builders should be aware of the legal implications of completion, including liability and insurance.
- Documentation and formal procedures are crucial for claiming completion and securing final payments.
- Builders should seek legal advice if contract terms regarding completion are unclear.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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