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**SOLICITORS**

**Construction Law:**

**A guide for Insurers**

## INTRODUCTION

In this seminar we will look at:

- The Role of a Professional
- His obligations
- Damages
- Points of interest for insurers
- Defects
- Dispute Resolution

## WHAT IS A PROFESSIONAL'S ROLE IN A CONSTRUCTION PROJECT?

The construction process comprises two main limbs of services as provided by Professionals. These consist of the pre-construction period when the project is designed, planning permission obtained and the building contract is let.

The second limb is the construction itself. The following are those that would normally be involved in the construction process:

- Planning and Development,
- Design
- Contract Administration
- Building Surveying,
- Project Management,
- Quantity Surveying and Construction
- Valuation

Although the design phase is normally led by Architects or Engineers, a crucial role is also played by Quantity Surveyors with respect to ascertaining the value of the works. On complicated projects there will normally be Bills of Quantities or other such pricing documents. These are prepared by the project quantity surveyor for the tendering contractors to price.

Once the construction has commenced, the Architect is normally the Lead Consultant. The other members of the Client's Professional Team consists of the various consultants who monitor the progress of the works. The Quantity Surveyors' role is to value the works before the Contractor Administrator (normally the Architect) certifies the progress which triggers a payment to the Contractor.

A further role on very large projects where there is a substantial level of Bank funding, the Bank may appoint a Quantity Surveyor to monitor the project and report to the Bank.

On smaller projects (such as residential extensions) there may not be an Architect (or he may have been appointed for design only) and a surveyor may be appointed as the Project Manager.

## WAYS IN WHICH PROFESSIONALS' LEGAL OBLIGATIONS ARISE

These obligations can arise in one of five ways as follows:

- Statutory obligations
- Regulatory obligations
- Common law obligations
- Contractual obligations
- Tortious obligations

These are examined in more detail below

### Statutory obligations

Statutory obligations derive principally from Acts of Parliament. These may be supplemented by what is known as delegated legislation such as Statutory Regulations or Statutory Instruments. The other source for Statutory Obligations is European Directives but these tend to be incorporated into Acts of Parliament (EG the European Convention on Human Rights which was enacted in the Human Rights Act).

Some examples of relevant statutes are:

### UK Legislation

- Building Act 1984
- The Party Wall Act 1996
- The Housing Grants, Construction & Regeneration Act 1996

### Statutory Regulation

- CDM Regulations 2007
- The Building Regulations 2000

### Statutory Instrument

- Statutory Instrument 1998 No. 649 The Scheme for Construction Contracts (England and Wales) Regulations 1998

### Regulatory obligations

Examples of Regulatory Obligations are codes of conduct established by trade organisations such as the Law Society or the RIBA. The RICS does not have compulsory membership. However it does have a Code of Conduct which requires the following:

- Members shall at all times act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with their professional obligations.
- Members shall carry out their professional work with due skill, care and diligence and with proper regard for the technical standards expected of them.
- Members shall carry out their professional work in a timely manner and with proper regard for standards of service and customer care expected of them.

### Common law obligations

Common law is any law **NOT** embodied in legislation i.e. “Case Law” (which are known as judicial precedents). Stroud’s Legal Dictionary defines it as:

*“The common law of England is that body of law which has been judicially evolved from the general custom of the realm”*

For example there is no statute law relating to “practical completion” and the law in this area is principally governed by a series of judgments such as:

- *Westminster CC v Jarvis & Sons Ltd - (1970) 1 All ER 943*
- *HL J Nevill (Sun Blest) Ltd v William Press & Son Ltd - (1982) 20 BLR 78*
- *Emson Eastern Ltd v EME Developments Ltd - (1991) 55 BLR 114*

### Contractual obligations

The judicial definition of a Contract was provided by Brett LJ in *Wilson v Bury (1880) 5 QBD 518 CA* where he stated:

*“A contract is a deliberate engagement between competent parties upon a legal consideration to do or abstain from doing some act”*

There are three basic requirements to form a contract:

- Intention to create enforceable legal relations
- Agreement (offer and acceptance)
- Consideration (payment)

As set out above, it is hoped that in a complicated construction scenario, each party will be appointed under a written contract. However if that isn't the case then it may be that the appointment is by way of an oral contract.

There is also a third method; that of a contract arising out of a 'course of dealings'. This, thankfully is very rare in the Construction Industry. Trying to determine scope from a 'course of dealings' is extremely difficult. The most pertinent example is a professional who is appointed on a repeat basis which leads to him moving from one project to another and relying on previous appointments as a guide to the terms and conditions which applies to the most recent appointment.

#### Where do we find the Professional's contractual obligations?

The Appointment, if in writing, will hopefully take the form of a Standard Form or a Bespoke Contract.

In large Construction projects, the Client often wants all the parties to sign up to a bespoke suite of contracts. Whilst such a suite of contracts may be cumbersome to draft and negotiate and expensive for all concerned in terms to lawyers' fees they do have certain key advantages:

- All parties have interrelated terms with the various scopes of services to be provided by the professionals to be clearly delineated.
- In the event of a dispute the procedure will allow for joinder of the relevant parties (whereas a standard JCT Contract may provide for arbitration between the Contractor and the Client with no right to join a member of the Professional Team).
- Perceived 'unfair terms' in the standard forms can be excluded.

## Appointment – “The Contract”

Hopefully the Professional’s appointment will be a formal contract in writing. In the Construction Industry a contract at its most basic is an agreement between two parties for one party to provide a service to another in respect of which the second party will pay the first party. (Known as “Consideration”)

However construction projects are normally sufficiently complicated that formal written contracts are required to provide certainty as to the scope of the services to be provided and the mechanism for payment to be made.

Construction contracts are notoriously lengthy and there are certain clauses that are often argued over by teams of lawyers. For example net contribution clauses and caps on liability (both of which are discussed in more detail below) can be very contentious.

At a more sophisticated level, contracts in general and those used by the Construction Industry in particular, are sometimes described as a mechanism to apportion risk between the parties to the contract. It should be the case that the party best able to bear the burden of the risk is allocated the risk but due to the inequality of bargaining power this is not always the case.

For example, the liability for unforeseen ground conditions could rest with the Client or the Main Contractor. This will be determined by the Contract. If the Contractor needs to win the contract for financial reasons he might take on this risk even though the consequences could be costly if the groundworks become more expensive or delay the project.

All of this assumes that the contract is in writing. If there is no written contract then the parties may still have entered into a binding contract based upon an oral agreement. This will be fraught with difficulties because there may be a disagreement as to the actual terms agreed. It is one thing to agree with your local garage that they will respray your car bumper for £100 without putting that in writing. It is entirely

different to employ a Professional to act on a £50 million rebuild without a formal appointment!

If there is no contract in writing and there is uncertainty as to the key terms then there may be no contract at all and the services carried out will be on a quantum meruit basis. This will normally lead to a dispute as to the value of those services!

### The Key Terms

To form a contract (whether in writing or orally) there must be an agreement as to the key terms. These are essentially:

- Scope
- Price
- Timescale

### What does he not do?

It seems self-evident but any professional should only undertake work as set out in his scope of services. For example it would be unusual for an Architect to value work or for a Quantity Surveyor to prepare a design. This is not just a case of not mixing up the various professionals' roles but more importantly protecting the various parties to the Contract. If a professional does take on a function that is beyond his contractual remit then he runs the risk that he will not be insured for providing this additional service. This leaves him exposed in the event of a claim for professional negligence and may leave the Client with no financial recourse if he has to bring such a claim.

The leading authority on this area of law is the 1998 case of *George Fisher Holding Limited (formerly George Fisher (Great Britain) Limited) (1) v Multi Design Consultants Limited (2) Roofdec Limited (3) Severfield-Reeve Plc (4) Davis Langdon & Everest (5)* [1998] EWHC QB 341.

This case involved the appointment of Davis Langdon & Everest as both the project Quantity Surveyor and the Client's Representative which carried the title of "Supervising Officer". There were no complaints as to the quantity surveying services provided but when the contractor became insolvent and there were defects in the

workmanship, the Client sought to sue Davis Langdon & Everest for breaches of their obligations in terms of the supervision provided as the Client's Representative.

The Judge found Davis Langdon & Everest to be liable for a number of defects that he considered they should have discovered on inspection and also for consenting to certain drawings and details. Davis Langdon & Everest had argued that they were not liable for the design but under the scope of their appointment they were to “...*carry out an appraisal of the design drawings...*”. Furthermore, if, as they argued, they were not responsible for design, they should not have approved the drawings.

The case demonstrates the difficulties for surveyors in taking on a multi-disciplinary role, especially where design becomes an issue.

However, it is not always the case that a formal appointment is made and it is common for a party to be appointed on an informal exchange of letters. This poses two issues.

#### Exchange of Letters

First, is there actually a contract in place at all? Often works are commenced under Letters of Intent. These have become the subject of considerable case law, especially when a formal contract is not put in place and the work is undertaken under the Letter of Intent alone, even though the Letter of Intent is stated not to be a contract!

The second issue is to identify what the terms of the contract are. The advantage of a formal appointment is that normally the draftsman has considered all the relevant requirements in a contract. Where there is an appointment by exchange of letters, even if a standard form of contract is incorporated by reference, there is a danger that the parties will not cover all the relevant terms and in the event of a dispute it will be left to a Judge to determine the terms of the contract.

### Tortious obligations

In a well drafted appointment, a professional's contractual obligations will be set out in detail. Even where some of the obligations are silent a combination of case law and statute will imply terms into the appointment.

However, there exists a separate body of obligations (or 'duties') as covered by the Law of Tort. These predominantly cover the areas of negligence, nuisance and trespass. Whilst a contract defines the obligations between the parties to the contract, the Law of Tort creates a 'Duty of Care' not just between the contracting parties but also to third parties.

Examples of Torts are:

- Negligence - breach of the duty to take reasonable care
- Nuisance - unjustified interference with a party's use of land
- Trespass - setting foot on land adjoining the project or allowing equipment to overhang that land without permission will constitute trespass

### Does the Professional owe a duty in Tort to the Client?

Regardless of the terms of the Appointment, the Professional owes the Client a duty of care. That is often expressed to as a duty of reasonable skill and care and the **standard expected is that of the ordinary skilled man exercising and professing to have that special skill.** (*Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 583)

Regardless of whether a contract is in place, a Professional owes the client a tortious duty of care. If there is a contract in place then the Professional will still owe the Client a concurrent liability in tort and contract. However if the Professional negotiates a limitation on his liability under the contract, then such a limit will apply to the duties he owes in tort.

### Does the Professional owe a duty in Tort to the Contractor?

Depending on the scope of the appointment the Professional may owe a duty of care to the Contractor in two respects:

- Negligent Misstatements before Contractor enters building contract with Client

This is where the Contractor acts in reliance upon a statement by the Professional which turns out to be negligent. Such a statement may be oral or written (*Hedley Byrne v Heller* [1964] AC 465).

- Breach of Warranty of Authority

This is the situation where the Professional gives instructions on behalf of the Client and by implication that he has the authority to do so. If this is not the case, the Contractor has the right to sue the agent for breach of authority (*Firbank's Executors v Humphreys* (1886) 18 QBD 54 and *Yonge v Toynbee* [1910] 1 KB 215).

However, case law has established that the Professional has no duty to the Contractor with respect to:

- administering and issuing certificates under the Building Contract (*Pacific Associates v Baxter* [1990] 1 QB 993); and
- regarding inspection (This is the obverse of the finding in *George Fisher v Davis Langdon & Everest* [1998] EWHC QB 341 as above in which the Court determined that any duty of care with respect to inspection would normally be limited to the Client and then only if specified in the Professional's appointment.

### Does the Professional owe a duty in Tort to Funders, Purchasers and Tenants?

This is conceivable but very difficult to establish. A third party such as a funder, purchaser, or a tenant must establish:

- A proximate relationship between the parties
- An assumption of responsibility to the third party by the Professional
- It is just and reasonable to impose a duty of care

Even a duty of care can be established, the losses likely to be sustained by the third parties (known as “economic loss”) are unlikely to be recoverable, unless the third party can establish a “special relationship” (*Murphy v Brentwood District Council* [1991] 1 AC 398). The cost of repairing building defects is regarded as “economic loss”

### Extending the Professional’s Contractual Obligations

This can occur through Collateral Warranties, the Third Parties Rights regime or through a Professional taking on board a Joint Liability.

#### Collateral Warranties

A Collateral Warranty is a contract with a third party with an interest in the project ie Funders, Purchasers or Tenants with whom the Professional is not normally in contract, and with whom he only usually has a tortious relationship.

The advantage to the third party is that in the event of the surveyor being negligent he can sue for breach of contract rather than breach of tort and “economic losses” are recoverable.

#### Third Parties Rights regime

The standard position has traditionally been that unless a Professional has entered into a direct collateral warranty with a third party then there is no ‘Privity of Contract’ and the third party had to rely upon a claim in tort.

The effect of this rule was reduced by the introduction of the Contract (Rights of Third Parties) Act 1999 which applies to contracts entered into after 11 May 2000. Unless the Appointment specifically contracts out of the Act, then a third party is,

subject to three tests as below allowed to enforce a contract (or certain terms of a contract) to which it is not a party.

The three tests are:

1. The Contract must state that a third party can enforce the terms of the contract.
2. One of the contractual terms confers a benefit on the third party.
3. The third party must be expressly identified in the contract by name, as a member of a class or answering a particular description but need not be in existence when the contract is entered into.

Initially this Act was treated with scepticism by construction lawyers who sought to contract out of it and rely upon collateral warranties. These however are not straight forward. They have to be agreed in advance and often consultants and sub-contractors do not execute them when called upon to do so.

More recently construction appointments have begun to rely upon the Act which has removed the need for warranties.

### The Professional's Joint Liability

If the Professional undertakes to approve, review, comment on, examine or otherwise check someone else's work (ie the Contractor's work or the work of another Consultant), then the law makes the Professional "jointly responsible" for that work with the other party.

The law then makes "each" person who is "jointly responsible" for that work "100% liable" for the anything wrong with that work, to the person (usually the Client) to whom they owe the duty of responsibility.

## TIME – FOR HOW LONG IS THE PROFESSIONAL LIABLE?

- Contract:
  - 12 or 6 years (from date of breach) depending on whether it is a deed or under hand
  
- Tort:
  - 6 years (from the date that the damage is suffered)
    - Special rules apply for damages in negligence in respect of latent damage not causing personal injury or death
    - The limitation period is the later of:
      - 6 years from when cause of action accrued; or
      - 3 years from the date the claimant knows or ought to have known the material facts of the loss suffered, the identity of the defendant and the cause of action
      - 15 year long-stop date from date of negligent act or omission
      - For negligence resulting in personal injury or death, 3 years from the when the cause of action accrued or from the date of claimant's knowledge of damage

## DAMAGES

### The principles governing the recovery of damages

Damages are awarded to put the claimant as nearly as possible in the same position as he would have been in if he had not sustained the wrong for which he is seeking compensation.

- Breach of contract: the claimant is to be placed in the same situation with regard to damages as if the contract had been performed
- Tort: the measure is the loss caused by the wrong

The courts have set a limit to the loss for which damages are recoverable. Loss beyond such a limit is said to be too remote

In an action for breach of contract, damages are awarded on the principle that the Claimant has been put so far as possible by monetary award, in the position he would have been in if the contractual duties had been properly carried out. In an action for negligence, the claimant is to be put in the position he would have been had the tort-feasor not been negligent.

One way of assessing monetary terms in a loss caused by defective work is to consider the cost of rectifying the defect.

A different way of assessing the loss is by reference to the reduced value of the final product in light of the existing defects.

It is sometimes claimed that even after repair works, there remains a residual diminution in value. If right, these circumstances may justify a combination of both approaches in assessing the true measure of loss.

In a case of a defect in a building, a more realistic measure of loss is the cost of reinstatement.

However diminution in value may be appropriate where the defect is irreparable or where the cost of reinstatement is out of all proportion of the benefit gained. This

came to light in the case of *Ruxley v Forsyth* (1996) known ubiquitously as the “swimming pool” case. The case was infamous; the swimming pool should have had a diving area of 7½ft but on completion the depth was only 6’ 9”. Although Mr Forsyth persuaded the Court of Appeal that he would rebuild the entire swimming pool, the House of Lords didn’t believe him and thought this was totally disproportionate and gave him nominal damages. In its view there was no diminution in value and they did not believe he would actually undertake the work.

Similarly in the case of *Birse Construction v Eastern Telegraph* (2004) the Court refused any award of damages with respect of substantial snagging lists where these defects had been left un-remedied in a building at the time it had been sold or was to be sold and there was no diminution in value brought about by the existence of the defects alone.

It is also necessary to consider betterment. Generally there is no discount for “new for old” replacement of damaged or defective property. If a higher specification is not necessary, a credit in respect of additional costs is allowed.

In effecting remediation of defects, the innocent party is under a duty to act reasonably. The burden of proof is upon the other party to show that the innocent party had acted unreasonably. The best example of this is the case of *Hospitals for Sick Children v McLoughlin and Harvey Plc* (1990) known as the “Great Ormond Street” case. In this case it was necessary to undertake extensive remedial work to a new wing of the hospital. Where works were carried out, it was not for the Court to consider from scratch what should have been done and what costs should have been incurred. The Claimant acted upon the advice of an expert whose views were within the range of those which a more than competent expert would have adopted and therefore the actual cost expendable was recoverable.

### Recovery of damages in contract

The defining case is that of *Hadley v Baxendale* (1854) 9 Exch 341. This provides that where two parties have made a contract which one of them has broken, the damages which the other parties ought to receive in respect of such breach of contract should be:

- such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things from such a breach of contract itself, or
- such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as a probable result of the breach of it

The rule for recovery of damages therefore has two limbs:

First limb:

- arising naturally, ie according to the usual course of things from such a breach of contract itself
- loss actually resulting as may fairly and reasonably be considered as arising naturally according to the usual course of things from the breach of contract
- judged at the time of the contract
- a reasonable man would have concluded that loss of the type occurred was ‘liable to result’
- ‘liable to result’ means ‘a serious probability’ and ‘a real danger’ and ‘not unlikely to occur’

Second limb:

- such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it
- This implies additional special knowledge

If the special circumstances were communicated by the Claimant to the Defendant, and thus known to both parties the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated.

## Recovery of Damages in Tort

The leading case is *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] UKPC 1 (known generically as “the Wagon Mound No 1”). This provides that:

- A party shall only be liable for any damage which was reasonably foreseeable
- if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was ‘direct’ or ‘natural’, equally it would be wrong that he should escape liability, however ‘indirect’ the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done.

## Professional Indemnity Insurance

### Do not confuse “Insured For” and “Liable For”

Professional Indemnity Insurance does protect the Professional’s position but a claim can exceed the limit of cover.

What the Professional is insured for, is not necessarily the same as an action (or omission) for which the Professional is liable.

### Express caps on liability

- These are total caps
- Each and every claim – recovery for each individual claim is limited
- On an aggregated basis - claims are grouped according to the particular event causing the damage
- Evaporation clauses – liability is limited to the amount available under your insurance policy
- Contracts sometimes exclude liability for ‘consequential loss’

### The exclusion of “Consequential Loss”

There is no standard definition of ‘consequential loss’. It will depend on the words used and context. A rough guide is that ‘consequential’ does not cover loss which directly or naturally results in the ordinary cause of events. Therefore, because of the vague nature of the definition, clear drafting is important.

### Examples of ‘Consequential loss’ clauses

A vague and therefore useless clause would be:

- “We are not under any circumstances to be liable for any consequential loss or damage”

By contrast a precise and well formulated clause would be:

- “Notwithstanding anything in the Contract to the contrary, express or implied, in no event shall the Contractor be liable for any direct damages for loss of profit, loss of production, loss of contracts or for any financial loss or for any special, indirect or consequential loss or damages including without limitation damages for loss of profit, loss of production, loss of contracts or for any financial loss howsoever caused including without limitation the fault, breach of contract, tort (including the concurrent or sole and exclusive negligence) breach of duty, strict liability or otherwise and whether a claim is based on contract, tort, at law, in equity, or otherwise”

### Net Contribution Clauses

The purpose of a net contribution clause is to overcome the general common law principle of “joint and several” liability. Net contribution clauses have become increasingly popular in recent years as professional indemnity insurers continue to look at ways to limit or exclude the liability of their insured.

For example, where a Client appoints a Professional, the Client may be asked to accept a net contribution clause in the appointment. The main problem for the Client is that the risk of insolvency of any other party who might be liable is passed back to the Client. They in turn are then unable to rely on the common law position of “joint and several liability” due to the inclusion of a net contribution clause.

Where liability arises under the appointment, rather than two consultants being jointly and severally liable to the Client, they will only be liable to the extent it is “just and equitable” which, in the absence of agreement, will be decided by the court.

The RIBA conditions of engagement has the following clause:

*“The architect’s liability for loss or damage shall be limited to such as the architect ought reasonably to pay having regard to his responsibility for the same on the basis that all other Surveyors, specialists and the contractor, shall where appointed, be deemed to have provided to the Client contractual undertakings in respect of their services and shall be deemed to have paid to the Client such contribution as may be appropriate having regard to the extent of their responsibility for such loss and damage”*

## DEFECTS

“Defects will occur in buildings. It is one of the great certainties in construction, the equivalent of death and taxes in life more generally”. (Professor Anthony Lavers)

### **What is a defect?**

The first attempt to define a defect arose in the case of *Yarmouth v France* (1887) with respect of a carthorse that was considered vicious and unfit to be driven. The Plaintiff was injured in an accident whilst driving the cart that was pulled by the horse in question. The Court considered that the horse constituted plant and if it was unfit for the use for which it was intended then it was defective.

The issue in the slightly later case *Tate v Latham* (1897) was whether the absence of a guard on a circular saw was a defect and the condition of the machinery under Section 1(1) of the Employers’ Liability Act 1880.

It was held that “defect” means the absence of something essential to completeness. The absence of the guard to the saw constituted a defect in this respect.

Whilst we might now argue that the definition of a horse as plant, these two cases combined provides us with a starting point.

It may be that a contract will define a defect but in the absence of such a definition it is necessary to look at what is required under the contract and if the specification is silent then whether the product is fit for purpose.

A defect does not necessarily mean that something fails to fulfil its function.

For example, a specification may require the use of redbrick and if the Contractor uses yellow brick then this lack of compliance with the specification will render the wall defective.

### Patent/latent defects

There is nothing to distinguish between patent and latent defects. It may be that a contract has specific mechanisms where defects become patent during a certain period (eg a defects liability period) whereas latent defects will be dealt with in a different way.

In the case of *Salsden v National Coal Board* (1969) the Trial Judge stated the following:

*“A patent defect is not latent when there is none to observe it. The natural meaning of the word “patent” is objective, not subjective. It must be “observable” not “observed”. A patent defect must be apparent on inspection, and does not depend on the eye of the observer; it can blush unseen. In this case, although the defect was in darkness, it was patent. Had the Plaintiff or his mate shone their lamps on it then they would have seen it”.*

The concept of a latent defect is not difficult. It is a concealed flaw. What is a flaw? It is the actual defect in the workmanship or design not the danger presented by the defect.

In summary, whether a defect is latent or patent is to be determined objectively. The fact that a defect was not in fact identified may therefore be of some evidential value but is not of itself determinative of the question of whether, at any particular time, a defect was latent or patent.

A patent defect can include those matters which are the necessary consequence of something observable.

Whether a defect is latent will depend upon the extent or inspection to which the produce is ordinarily – or in fact – subjective.

### **Defects liability**

It is common place that standard form contracts include defects liability provisions. Usually the liability commences at completion of the works (normally defined as Practical Completion or substantial completion or something similar) and lasts for a defined period agreed upon between the parties. The clause will impose obligations upon the Contractor to make good defects, those objections will also usually be counter balanced by the right of the Employer to make good defects. This would ordinarily be to the Contractor’s advantage given that this is likely to be less costly than providing an indemnity to the Employer against the cost of having another contractor fix the defective work.

Note that the 2005 Suite of JCT Contracts has now replaced the phase “*defects liability period*” with what is now called a “*rectification period*”. The principle remains the same but the wording has been simplified.

The key to commencement of the defects liability period under the JCT Suite is Practical Completion.

A synopsis of the case law on this subject suggests the following:

- As at the date of Practical Completion, the work should be complete. This means that the work should not include any patent defects.
- The works can be practically complete notwithstanding the presence of latent defects (as yet undiscovered).
- The Employer’s taking possession of the site is linked to the Certificate of Practical Completion.
- The defects liability period is provided so that defects which are not apparent at the date of Practical Completion can be rectified.
- There is discretion to certify Practical Completion where there exists minor or de minimis work to be carried out, but beyond that a certificate of Practical Completion should not be granted.
- This is often referred to as qualified completion and it is not unusual to find Practical Completion where there is a snagging list attached to the Certificate of Practical Completion. This is often the case where a client (developer or Employer) is keen to take completion in order to move on for other purposes (such as fit out or to allow tenants in etc). Note that the Architect or Contract Administrator owes a duty of care to the Employer not to certify Practical Completion when any item that should be considered more than a de minimis defect remains. Such a professional would be well advised to:
  - Exercise his discretion with care. By wrongfully issuing a certificate whilst patent defects exist, the Architect would potentially deprive the Employer of his right to liquidated damages;

- Obtain a written undertaking from the Contractor in relation to items remaining outstanding;
- Obtain the Employer's consent to the issue of Practical Completion certificate if in reality the snagging list arguably contains more significant items;
- Ensure that any retention would be sufficient to rectify the outstanding matters should the Contractor not do to.

By contrast to the JCT standard forms the Institute of Civil Engineers forms of contract do make a provision for the concept of substantial completion. However it is rare to find this form of contract used with the type of property development work that we advise on. This is far more common in the engineering world.

For example the construction of a power station will not necessarily rely upon completion of the landscaping and although the contract will not have reached "Practical Completion" as per the JCT definition it will be sufficiently substantially complete to allow substantial completion to be certified which then allow the power station owner to start generating electricity and therefore income.

Note that the New Engineering Contract standard form 3<sup>rd</sup> edition defines a defect as:

- Part of the works which is not in accordance with the Works Information;
- A part of the work designed by the Contractor which is not in accordance with the applicable law or the Contractor's design which the Project Manager has accepted.

It is of course dependent upon the wording of the relevant clause as to which defects are caught by a defects liability provision. It is usually only defects that appear during the defects liability period which are caught by its provisions, both in terms of giving the Contractor the obligation to make good, also the right to make good.

The proper operation of the defects liability clause will therefore depend to an extent upon the proper certification of practical or substantial completion (as the case may be).

If a defect appears before the issue of such a certificate, the certificate should not have been issued. However, such a pre-existing defect cannot then be said to “appear” during the defects liability period. It is for this reason that it is important that an Architect or Contract Administrator is careful to ensure the Contractor acknowledges his obligation to rectify any minor patent defects which an Architect or Contract Administrator has decided (in the exercise of its discretion) should not hold up the issue of the certificate.

The JCT standard forms have clauses which provide the Final Certificate has a conclusive effect subject to dispute resolution provisions. These clauses are of great importance when considering what liabilities a Contractor would have in relation to defects following the completion of the works. The leading case is *Crown Estate Commissioners v John Mowlem* (1994).

It was held that this form of certificate conclusive as to the quality of the materials and the standard of workmanship where approval of such matters was something for the opinion of the Architect. Since this case the JCT standard contracts have been amended so that the conclusive effect is limited to those matters in relation to which it was expressly stated in the contract document would be to the reasonable satisfaction of the Architect.

It does however remain the case that the binding effect of the Final Certificate is capable of substantively affecting the rights of the Employer in relation to certain defects. In reality the effect of the Final Certificate is to rule out any action with respect of ongoing patent defects.

## DISPUTE RESOLUTION: WHAT ARE THE MAIN FORMS AVAILABLE?

### High Court

When can arbitration be used:

- If there is an arbitration clause in an agreement usually binding unless parties agree otherwise (may not have any choice);
- Parties can otherwise agree to arbitrate.

Pros of arbitration;

- Confidential;
- Choice of arbitrator;
- More flexible;
- Procedure less strict ie no obligation to disclose all documents relevant to your case; and
- Arbitrator's decision binding.

Cons of arbitration:

- Can be more expensive than High Court proceedings as the parties are obliged to pay the arbitrator's fees and other disbursements such as room hire etc;
- Process usually takes longer;
- Lack of disclosure may be unhelpful;
- An arbitrator who has been chosen for technical expertise may not have the necessary expertise in terms of hearing witnesses and determining who is telling truth;
- Very few grounds to overturn an arbitrator's decision.

### V Arbitration

When can litigation be used:

- At any time (although subject to the terms of any applicable dispute resolution clause in any agreement (s) between the parties).

Pros of High Court proceedings;

- Judge;
- Tightly controlled procedure;
- Efficiency (courts now more efficient than previously);
- Do not have to pay the costs of judge and courtroom etc

Cons of High Court proceedings;

- Not private;
- Ability to appeal judge's decision, which has an impact on time and costs.

## Mediation

- Consensual resolution;
- Pros and cons.
  - Often effective; but
  - Can be a delaying or fishing exercise

## Adjudication:

- Mandatory dispute resolution procedure in the field of construction contracts (section 108 of the Housing Grants Construction and Regeneration Act 1996); and
- Fast track (28 days or as otherwise agreed between the parties)
- Applies to all construction contracts;
  - Definition of what constitutes a construction contract under the Act;
  - Which construction contracts are excluded under the Act (ie residential, certain agreements entered into under statute, a contract entered into under a private finance initiative (“PFI”) (nb does not apply to the construction contract or any related contracts), certain other finance agreements and development agreements; and
  - Requirement that the construction contract must be in writing;
  - There must be a dispute
- The requirements of the Act:
  - Right to refer a dispute to Adjudication at any time;
  - Adjudicator must reach decision within 28 days of referral (or 42 days from that date with the consent of the parties);
  - Adjudicator has a duty to act impartially;
  - Adjudicator to take the initiative in ascertaining facts and law;
  - Adjudicator’s decision is to be binding until dispute finally determined by legal proceedings, arbitration or agreement;
  - Adjudicator is not liable for anything done in discharge of his obligations.

## Contact us

### Lewis Cohen

020 7264 7860

lewis.cohen@blaketurner.com