

**BLAKE-TURNER & CO SOLICITORS**

**BUILDING DEFECTS; THE  
LEGAL POSITION!**

## Introduction

“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 bluish 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 phrase “*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.

### Temporary disconformity

Following the dissenting speech of Lord Diplock in *P & M Kaye v Hosier and Dickinson* (1972) there has been a theory that if a Contractor carries out defective work during the course of the contract he is not in breach of contract until completion or handover because it is open to him to rectify his works.

This concept has been watered down over the years as:

- Where the Employer through the Architect or otherwise has an express right to give instructions relating to defective work, the temporary disconformity theory is of limited application;
- In a contract such as the NEC where the Contractor is under a specific obligation throughout the contract to correct defects whether notified or not it is equally difficult to see how the theory could be applied.

If in fact defects during the course of the works are rectified prior to completion, the only effect is likely to be one of delay. This will usually be compensated by liquidated damages in a building contract or otherwise by general damages caused by prolongation of the contract period. It is unlikely there will be anything other than nominal damages caused by the breach.

If the Employer terminates early either pursuant to Contractor termination provisions or by accepting the Contractor's repudiatory breach then the issue of temporary disconformity may become very relevant.

If the Employer wishes to use defective work to be corrected in order to justify termination he should be very careful if there is a contractual right for him to instruct the Contractor to remedy defective works. Furthermore such an Employer should be very cautious to allege repudiatory breach of contract by reason of defective work where such work is obviously capable of remedy.

### Claims for defective work in tort

The absence of a provision in a contract allowing a third party rights (or in contrast dis-applying third party rights) unless the benefit of a contract is assigned or direct warranties are given by the Contractor to third parties such as tenants, purchasers or funders, the only recourse that third parties may have is in tort. In particular the Defective Premises Act 1972 applies with respect to residential property.

There is a long line of case law from *D & F Estates Limited*, *Murphy v Brentwood* and *Pirelli v Oscar Faber* with respect to claims in tort. There is also the issue of economic loss addressed in *Hedley Byrne and Heller*. However this falls outside the remit of this seminar which considers rights and remedies relating to defects in contract law.

In the main, issues relating to defects arising from the type of work we undertake will normally fall to be resolved by contractual mechanisms and will normally relate to contracts between Employer and Contractor.

You should be aware that construction professionals stand on the fringe in this respect but to bring them within a tortious duty of care it is necessary to demonstrate a special relationship and to really cover this subject would require an entire seminar in itself.

### **Limitation periods**

The normal rules apply. The ordinary time limit in which a Claimant must bring a claim is six years from the date of breach of contract. If the contract is under seal then the time limit will be 12 years from the date of the breach.

If a specific term of a contract warrants or guarantees the works be question for a period beyond the time limits then the time for an action for breach of the warranty should be bought by reference to the extended period.

The position is different where defects have been deliberately concealed but in general terms the time would run from the date of the breach of the contract.

This differs in tort which would be six years from the date on which the cause of action accrued. The case law (*Pirelli v Oscar Faber*) provides that the cause of action accrues on the date the damage occurs.

The other issue to be addressed is the Latent Damages Act. This applies to actions in negligence and extends the time period in which to bring an action. This does not apply to contract law.

### **Net contribution clauses**

The rules of causation in negligence have potentially onerous repercussion for construction professionals. Consider for example the position of an Architect on a building project that goes wrong resulting in substantial loss to the Employer. The loss incurred may well be the fault of many parties and say for argument sake that the Architect is 25% to blame and the remainder of the responsibility lies with a negligent building subcontractor.

The Architect could be sued by the Employer or be liable for all the damages whatever his share of the blame assuming that the claim is for the same damage and the same loss. In theory the Architect may make a claim for a contribution from the subcontractor under the

Civil Liability (Contribution) Act 1978 but this does not provide much comfort if the subcontractor is insolvent.

Because of the risks, construction professionals are now likely to include net contribution clause in their standard terms and conditions. Such a clause attempts to limit a professional's liability to the Claimant for his fair share of the damages where the Claimant's loss has been caused by more than one of its advisers.

## Damages

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 unremedied 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.

## Contact us

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