

Defects & Rectification

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Disputes. Defects. Dilapidations.



Construction Defects

- ▶ Unsurprisingly, defects are one of the major causes of dispute and construction litigation.
- ▶ Dealing with construction failures requires various degrees of familiarity with law, building technology and practice.
- ▶ There is often disagreement when it comes to identifying what a construction defect is.
- ▶ This, of course, will be down to the differing viewpoints and interests of those who are asking the question and/or making the determination.
- ▶ These parties typically include the builder, developer, contractor, subcontractor, material supplier, product manufacturer and homeowner.



What are we going to cover?

▶ Section 1 – Implied Terms

- ▶ Workmanship
- ▶ Materials
- ▶ Reasonable skill and care test
- ▶ Fitness for Purpose

▶ Section 2 – Defects

- ▶ Definition of Defects
- ▶ Categorisation of Defect
- ▶ Patent and Latent Defects
- ▶ Latent Defects & Reasonable examination
- ▶ The importance of distinction between Patent and Latent Defects
- ▶ Case study example
- ▶ The Ruxley Case

What are we going to cover? (Continued)

▶ **Section 3 – Reference Materials & Problem Areas**

- ▶ Manufacturer's Guidance
- ▶ British Standards
- ▶ Case Study

▶ **Section 4 – Defining Completion and Rectification**

- ▶ When is a project complete
- ▶ Impact of completion
- ▶ Completion under main forms of contract
- ▶ Works not in accordance with the contract and incomplete works
- ▶ Defects within Defects Liability Period
- ▶ Defects outwith Defects Liability Period & Latent Defects

SECTION 1 – IMPLIED TERMS

Implied Terms - Workmanship and Materials (Legal background)

- ▶ The law in relation to workmanship and materials was considered fully in *Young & Marten v McManus Childs (1969)*.
- ▶ The Contractor must do the work with all proper skill and care.
- ▶ Sometimes expressed as one to do the work in a good and workmanlike manner using the skill and care to be expected of a builder of ordinary competence.
- ▶ It is suggested that this is a continuing duty during construction and not only upon completion.
- ▶ Breach of the duty includes the use of materials containing patent defects, even though such materials may have been chosen by the Employer.



Materials – Sale of Goods/Consumer Rights

- ▶ The warranties implied by law are now set out in Sale of Goods Act for “business to business” contracts and the Consumer Rights Act 2015 for “consumer to business” contracts.
- ▶ **If the Contractor is to supply materials, he warrants that the materials to be used are (1) reasonably fit for purpose for which they will be used and (2) of good quality, unless the express terms of the Contract and any admissible circumstances show that the parties intended to exclude either or both warranties.**
- ▶ The first warranty only applies where the Employer makes known to the Contractor, expressly or impliedly, any particular purpose for which the materials are to be acquired.
- ▶ It does not apply and the fitness for purpose warranty can be excluded if in the selection of materials in question, the Employer places no reliance on the Contractor’s skill or judgement.

Materials

- ▶ The effect of the second warranty is to make the Contractor liable for latent defects even though the Employer may have chosen the materials or nominated the supplier and there has been no lack of care and skill on the part of the Contractor.
- ▶ There will not often be circumstances where the warranty of quality is excluded but the courts will infer an intention to exclude this warranty if the Employer chooses materials which he and the Contractor know can only be obtained from a supplier upon terms which remove or substantially limit the Contractor's right of recourse against his supplier for defects of quality in such materials.

SECTION 1 – IMPLIED TERMS



Workmanship

- ▶ There are two overlapping duties, namely an obligation to exercise **reasonable care and skill**, and an obligation to achieve the particular standards of workmanship as may be stipulated in the contract.
- ▶ Reasonable care and skill obligation for supply of services is set down within Sale of Goods Act/Consumer Rights Act.
- ▶ Reasonable skill and care is a minimum standard in the absence of some expressly or impliedly stipulated standard.
- ▶ To the extent therefore that builders carry out work that fails to conform to the standard reasonably to be expected of an ordinarily competent workman, then the work in question will be defective.
- ▶ Model conditions tend to fix the standards of workmanship by reference to incorporated documents, such as a specification, contract bills or employer's requirements.

SECTION 1 – IMPLIED TERMS



Reasonable Skill and Care – The Bolam Test

- ▶ *Bolam v. Friern Hospital Management Committee* (1957)
- ▶ ‘Where you get a situation which involves the use of some special skill or competence . . . the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill . . . it is sufficient if he exercises the ordinary skill of the ordinary competent man exercising that particular art.’
- ▶ *Saif Ali v. Sydney Mitchell & Co* (1980)
- ▶ ‘No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgement, unless the error was such as no reasonably well-informed and competent member of that profession could have made.’
- ▶ In many cases with regards to Construction Defects, such an assessments of “reasonable care and skill” will be subjective which can lead to differing Expert Opinions.

SECTION 1 – IMPLIED TERMS



Reasonable Skill and Care

- ▶ Plant Construction Plc v. Clive Adams and JMH Construction Services Ltd (2000),
- ▶ Plant had been retained by Ford to install two engine mounts in a research and development centre at Laidon in Essex. Plant sub-contracted the substructure works to JMH Construction, and these included the provision of temporary works for the underpinning of a roof. During the course of the works the temporary propping installed by JMH failed and the roof collapsed.
- ▶ It transpired that the design of the temporary works which Ford's representative instructed was inadequate, and negligently so. Since JMH had been instructed to adopt this design by Ford the Judge held that it was not contractually responsible for the design of it.
- ▶ JMH had a duty to use due care and skill in carrying out its works and to advise (or warn) Plant as to the adequacy of the temporary design. JMH had, on various occasions, raised its doubts with Plant, but in the Judge's view it had still failed to discharge its responsibility. Whilst Plant (and its consulting engineer) bore the bulk of responsibility, the Judge held that JMH was liable for 20% of the recoverable damages.

Reasonable Skill and Care

- ▶ The Court of Appeal, in *Plant Construction*, found that:
- ▶ ‘. . . the factual extent of the performance which . . . [the care and skill] . . . Term requires will depend on all relevant circumstances . . . But . . . may . . . Include the size, nature and details of the works; the experience and perceived expertise of the contractor; relevant elements of the relationship between the contractor and the employer and their respective relationships with others, for example, architects, engineers, surveyors, contracts managers, clerks of works, sub-contractors, local authority building inspectors and so forth; and crucially details of the particular parts of the works and other facts which give rise to the question whether the contractor fulfilled the obligation which the implied term imports.’
- ▶ In other words “reasonable skill and care” depends on the facts and circumstances of the particular case, whilst can contain an obligation to warn.
- ▶ Application of the Bolam test is dependent on expert evidence as to proper peer group practice.

Fitness for Purpose

- ▶ An obligation that a design or material is fit for purpose can be contained in a contract or implied.
- ▶ Fitness for purpose is an undertaking that the design or materials will perform its intended functions.
- ▶ Fitness for purpose will not arise for Contractor in traditional procurement as their obligations will be to build in accordance with the specification of the design team.
- ▶ There is a professional duty on the design team to design with reasonable skill and care.
- ▶ However, where an Employer relies upon a Contractor in the selection of materials, there is a deemed warranty that the materials will be fit for their purpose.
- ▶ It is worth noting that even if the Contractor is not responsible for design, this does not relieve him of a responsibility to exercise a degree of care in carrying out his works.
- ▶ This duty will arise where the Contractor could reasonably be expected to have spotted the design flaw in carrying out his contractual obligations under the building contract.
- ▶ *Lindenberg v Canning (1992)* and *Plant Construction plc v Clive Adams Associates* – address a Contractor's duty to warn.

Fitness for Purpose

- ▶ In Design & Build contracts, the Contractor takes responsibility for both the design and construction of the works which includes an implied obligation that the building will be fit for its intended purpose.
- ▶ Where the Employer makes known to the Contractor the particular purpose for which the work is to be done and the work is of a kind which the Contractor holds himself out as performing, and the circumstances show that the Employer relied upon the Contractor's skill and judgement in the matter, there is an implied warranty that the work, as completed, will be reasonable fit for the particular purpose.
- ▶ Again, exclusions may arise where the Employer has not made known any particular purpose or where the Employer placed no reliance on the Contractor's skill or judgement.

SECTION 1 – IMPLIED TERMS



Fitness for Purpose

- ▶ Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners (1975) illustrates application of Fitness for Purpose.
- ▶ Greaves were building contractors employed to construct a warehouse.
- ▶ In addition to providing labour and materials they were to employ the architects and engineers as sub-consultants.
- ▶ The warehouse was required for the storage of oil drums which were to be kept on the first floor of the warehouse and when required for despatch, were to be moved by forklift stacker trucks.
- ▶ Greaves know the purpose for which the warehouse was required and was therefore under a duty to the company to see that the building was reasonably fit for that purpose.
- ▶ Greaves brought an action against Baynham (a firm of consulting engineers) who has been contracted by Greaves to design the structure.

SECTION 1 – IMPLIED TERMS



Fitness for Purpose

- ▶ The Structure was to be built according to a new system of construction which was governed by a British Standard Code of Practice.
- ▶ A circular had been issued by the British Standards Institution warning designers of the effects of vibration caused by imposed loadings in such constructions.
- ▶ Greaves made known to Baynham the purpose for which the warehouse was required and in particular that the first floor would have to take the weight of loaded fork lift trucks moving to and fro.
- ▶ Baynham were aware of the circular but did not read it as a warning against vibrations so did not take measures to deal with the random impulses of fork lifts.
- ▶ After time, the first floor cracked and remedial works in excess of £100,000 were required.
- ▶ The trial judge held that the design was inadequate for intended purpose and that Baynham were in breach of duty and in breach of an implied term that the design should be fit for purpose.

SECTION 1 – IMPLIED TERMS



Fitness for Purpose

- ▶ Baynham appealed.
- ▶ It was dismissed as there should, as a matter of fact, be implied into the agreement between Greaves and Baynham an absolute warranty that the design would be fit for its intended purpose since the evidence established that it was the common intention of the parties that Baynham design a warehouse which would be fit for the purpose for which it was required.

Fitness for Purpose v Reasonable Skill and Care

- ▶ There is an important distinction between “fitness for purpose” and “reasonable skill and care”.
- ▶ Typically an important point when considering design liabilities.
- ▶ **Reasonable Skill and Care**
 - ▶ Due to the reliance on skill and judgement, a designer’s duty does not necessarily require him to achieve a particular result as long as he has exercised the requisite level of care.
 - ▶ As such, a design can have flaws or defects whilst there may not necessarily be a breach in exercising reasonable skill and care.
- ▶ **Fitness for Purpose**
 - ▶ By contrast, a fitness for purpose obligation imposes a higher duty, as it is an absolute obligation to achieve a specified result, a breach of which does not require proof of negligence.
- ▶ Litigation Solicitors should state to an Expert what standard is being assessed against to prevent an Expert stepping outwith their “circle of knowledge” into points of law.

SECTION 1 – IMPLIED TERMS



Inspection of Materials

- ▶ A typical dispute area relates to damaged materials noticed by an Employer once fitted/installed where such materials are supplied or specified by the Employer.
- ▶ Contractor's will often raise a standard defence.
- ▶ What is a Contractor's duty regarding Inspection of Materials?
 - ▶ The care and skill implied term obliges builders to subject materials delivered to site to a reasonable inspection.
 - ▶ The absence of a reasonable inspection and consequent rejection of patently defective materials constitutes a lack of care and skill.

SECTION 2 – DEFECTS

Defect Definition & Categorisation of Defect

- ▶ Within this Section, we will cover:
- ▶ Definition of Defects
- ▶ Categorisation of Defect
- ▶ Patent and Latent Defects
- ▶ Latent Defects & Reasonable examination
- ▶ The importance of distinction between Patent and Latent Defects
- ▶ Case study example
- ▶ The Ruxley Case



Defects – What is a defect?

- ▶ There is no recognised standard definition of defects.
- ▶ Generally held to be work which fails to comply with the express descriptions or requirements of the contract, including any drawings or specifications, together with any implied terms as to its quality, workmanship, performance or design.

- ▶ In plain terms, therefore, a defect is something that has a fault or a flaw:
 - ▶ 1) in terms of the goods themselves – this may be because:-
 - (a) something does not do what it should (a defect in the ordinary sense that the thing does not work);
 - (b) something that does what it ought to do but is simply not what was asked for (non-compliance with specification) or goods are of a lower standard or quality than requested:

SECTION 2 - DEFECTS

Defects – What is a defect?

- ▶ 2) in terms of defective workmanship, this would include defective setting out and positioning and defective assembly and non-compliance with accepted, or specified practices and codes or exercising reasonable skill and care:
- ▶ 3) in terms of defective design, where there is an element of choice or option in how the works are done and what materials are used and the designer fails to use proper skill and care.



Categorisation of Defect

- ▶ The courts have recognised that construction defects can be grouped into the following four major categories:
 - ▶ Design deficiencies
 - ▶ Material deficiencies
 - ▶ Specification deficiencies
 - ▶ Workmanship deficiencies

- ▶ It is important on establishing a defect to categorise this within one of the areas in order to then understand liability prior to considering any litigation action.
- ▶ It may be the case that a Contractor is not liable for each category where for instance they have followed the design of the design of the Employer's architect.

Patent and Latent Defects Definitions

- ▶ Defects, may be patent or latent.
- ▶ Often an important distinction with possibly different consequences.
- ▶ How to define a Patent Defect?
 - ▶ *Yandle & Sons v. Sutton, Young and Sutton (1922)*, which decided that a defect is patent if it is open or visible to the eye.
 - ▶ *Sanderson v. National Coal Board (1961)*, a defect was said to be patent if observable, whether or not actually observed.
- ▶ Latent defects, on the other hand, are those that are hidden and therefore not observable.

Latent Defect Assessment

- ▶ *Baxall Securities Ltd v. Sheard Walshaw Partnership* (2002) discussed latent defects.
- ▶ ‘The concept of a latent defect is not a difficult one. It means a concealed flaw. What is a flaw? It is the actual defect in the workmanship or design . . .’
- ▶ But when is a concealed flaw in workmanship or design (and for that matter materials) to be regarded as observable even though not actually observed?
- ▶ *Riverstone Meat Pty Ltd v. Lancashire Shipping Company Ltd* (1961) – a case that concerned the carriage of goods by sea – it was decided that defects were not latent if discoverable by the exercise of due diligence.

Latent Defects – Reasonable Examination

- ▶ In *Rotherham MBC v. Frank Haslam Milan & Co Ltd and M. J. Gleeson (Northern) Ltd* (1996) – a building case concerning the suitability of materials – the term latent defect was described as meaning
- ▶ ‘in its widest sense a . . . failure in work or materials to conform to contract in a respect not apparent on reasonable examination’.
- ▶ In this case it was not appreciated by the specifier or builder at the time of specification or supply – and could not have been ascertained by the customary examination available – that the specified materials suffered from an inherent characteristic that rendered them unsuitable for the purpose for which they had been specified. The defect was therefore truly latent.

Reasonable Examination

- ▶ As previously touched upon - 'a defect is not latent if it is discoverable by the exercise of due diligence whether or not due diligence was in fact exercised.'
- ▶ *In Baxall* – where the Court of Appeal had to decide whether an architect who had designed a warehouse was liable to a subsequent owner of the warehouse for loss caused by flooding when the warehouse drainage system was overwhelmed during a storm.
- ▶ The defect that caused the flood in Baxall was found to have been discoverable upon a competent inspection by a third party surveyor advising a subsequent owner prior to purchase of the warehouse.
- ▶ The defect was found to have been patent because it could, with reasonable care, have been discovered by the surveyor before the flood occurred.

Reasonable Examination

- ▶ If a reasonable investigation does not reveal the true nature of a defect, then the danger it presents remains latent.
- ▶ *Nitrigin Eireann Teoranta v. Inco Alloys Ltd* (1992), where cracking to recently installed pipework was discovered and repaired in 1983.
- ▶ Unfortunately, despite reasonable investigation the true nature of the cause of cracking – and the danger it presented – went undiscovered, so that the real defect was not rectified.
- ▶ The defect subsequently caused an explosion that damaged adjacent property.
- ▶ Limitation period from date of cracking identification or from explosion?
- ▶ The court concluded that although the injured party ‘may have known that there was damage in 1983 . . . they were unaware of the cause . . . despite reasonable investigation and accordingly were not aware of the defect.’

Reasonable Examination

- ▶ What constitutes reasonable examination and when it should take place – where these are relevant issues – depends on the circumstances, but it is not necessarily limited to visual inspection.
- ▶ It may include analysis or microscopic examination (see *Pinnock Bros v. Lewis & Peet Ltd* (1923)) or known or customary tests (see *Parente v. Bayville Marine Inc* (1975)).
- ▶ Ultimately, the nature of the inspection depends upon either the contractual stipulations or good practice requiring Expert Opinion.

Patent/Latent Defect - The Importance of Distinction

- ▶ Defects are of fundamental importance because they affect the value of work done (and therefore the obligation to pay, or the right to receive payment); they may prevent work being regarded as complete; they may entitle purchasers (and sometimes third parties) to compensation; and they may even entitle purchasers to terminate the building contract or the appointment of professional consultants.
- ▶ The importance of the distinction between patent and latent defects often depends on the contractual terms. For example, it may not be permissible to certify completion if there are patent defects, or it may be that liability for loss is excluded in respect of latent, but not patent, defects. Further, whether defects are patent may be relevant to the duty to mitigate loss.
- ▶ Finally, whether a defect is patent or latent may sometimes be relevant to the commencement of the relevant limitation period.

SECTION 2 - DEFECTS

Defects – a practical example

- ▶ Professional Negligence case
- ▶ Large industrial unit.
- ▶ Chartered Surveyors undertook survey of premises at lease commencement.
- ▶ Concrete floor defects – floor breaking up throughout.
- ▶ Hundreds of thousands repair build, plus relocation costs
- ▶ Patent or Latent?
- ▶ Reasonable examination?



The Ruxley Case

- ▶ *Ruxley Electronics & Construction Limited -v- Forsyth* concerns a swimming pool.
- ▶ Mr Forsyth had a swimming pool built. He specified that it should be 7 foot 6 inches at the deep end. It was built only to a depth of 6 foot 9 inches. He did not pay for the pool. He was sued for payment and he sought to set off the cost of rebuilding the pool to the right depth against the price of the pool. The fault could not be remedied without rebuilding the pool, which would have cost £21,000.00.
- ▶ At the trial, the judge decided that the slight shallowness did not decrease the value of the pool. He also considered that Mr Forsyth did not intend to rebuild the pool. He therefore awarded him only £2,500.00 on his counterclaim for loss of pleasure and amenity. Mr Forsyth had to pay for the pool.

The Ruxley Case (cont)

- ▶ On appeal, Mr Forsyth claimed the full replacement cost of the pool and undertook that he would rebuild the pool if he won. The Court of Appeal gave him the full replacement costs. Ruxley appealed to the House of Lords. The House of Lords restored the decision of the trial judge.
- ▶ The House of Lords made the following points:
- ▶ Contractual law requires that a person affected by a breach of contract should be given financial compensation that will, so far as money can do, place him in the position he would have been in if the contract had not been broken. However, this does not enable the wronged person to insist on the money equivalent of performance. The court has to work out what loss has actually been suffered by the breach of contract and pay him that loss.

The Ruxley Case (cont)

- ▶ The reinstatement cost is not the only way of valuing and compensating a loss suffered and it is not the appropriate way where it would be out of all proportion to the breach of contract. The court can instead award the reduction in value of the finished works, i.e. the difference between the value of the works with the defect and the value without the defect.
- ▶ Furthermore, Lord Lloyd of Berwick said, *“If reinstatement is not the reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff’s loss. If there is no diminution in value, the plaintiff has suffered no loss. His damages will be nominal”*.

SECTION 3 – REFERENCE MATERIALS & PROBLEM AREAS



INTRODUCTION

- ▶ Manufacturer's Guidance
- ▶ British Standards
- ▶ A Case Study

The Role of Manufacturer's Guidance

- ▶ What if specifications are silent on compliance with Manufacturer's Guidance?
- ▶ Most products contain either Manufacturer's Instructions or Guidance relating to their installation.
- ▶ Many Expert Opinions will reference Manufacturer's Guidance.
- ▶ The reason many Expert Opinions will reference such Guidance is:
 - ▶ i) to move away from what would otherwise be a purely subjective opinion
 - ▶ ii) provide substantiation to an opinion being expressed
 - ▶ iii) where otherwise an Expert may be unsure of the correct way to install the product
- ▶ In the event that there is no express term to comply with Manufacturer's Guidance, there is no specific obligation for a contractor to comply with same.
 - ▶ Often misunderstood and many professionals will detail every possible deviation, stating that every deviation requires rectification.

The Role of Manufacturer's Guidance

- ▶ There is no statutory requirement to comply with Manufacturer's Guidance.
- ▶ Is there an implied term to comply with Manufacturer's Guidance?
- ▶ The obligation of a Contractor is to exercise reasonable skill and care to be expected of an ordinarily competent Contractor.
- ▶ Many Experts will argue that someone exercising "reasonable skill and care" would comply with Manufacturer's Guidance.
- ▶ In many cases, Manufacturer's Guidance may represent "best practice", however it does not automatically follow that a deviation brings the installation below the implied contract terms.
- ▶ My personal view is that compliance with Manufacturer's Guidance is dependant on the particular facts of the case, content of the Guidance and specific defects evidenced.
- ▶ In some cases Manufacturer's Guidance and exercising reasonable skill and care will align, in other cases they won't.

The Role of British Standards

- ▶ What are they?
- ▶ For the most part, British Standards are guidance documents and codes of practice, representing what may be considered “good or best practice”.
- ▶ Compliance with the relevant British Standard relating to alleged poor workmanship will offer the Contractor a very good defence.
- ▶ In Standard Building Contracts with professionally prepared Specifications and Drawings, a professional consultant may cross reference compliance against British Standards, in so doing they may become express contract terms.
- ▶ In the absence of any specific contractual express obligation, compliance with British Standards will not be an implied term.
- ▶ The workmanship standard remains “reasonable skill and care”, although it is open to an expert to argue that these may be one and the same on the particular circumstances of the case.
- ▶ There are however some parts of British Standards that are enshrined within legislation and require to be complied with, such as BS7671 electrics, BS6262 for low level glass.

Case Study

- ▶ An example
 - ▶ Multi-million pound claim relating to bathroom tiling and the structure behind comprising of plywood substrate, timber framework and fixings.
 - ▶ Claim extended to every Bathroom across a very large development.
 - ▶ Defects evidenced were localised cracking of grouting and 2 bathroom tiles had fallen from the walls.
 - ▶ Pursuer's Expert progressed opening up works and detailed every conceivable non-compliance from British Standards.
 - ▶ Remedial works claimed were full replacement of all tiling, plywood etc.
 - ▶ Development was completed a number of years ago, claim made just within prescription period.
 - ▶ Do remedial works equal the extent of physical damage evident? Risk?

INTRODUCTION

- ▶ When is a construction and engineering contract complete?
- ▶ Works not in accordance with contract and incomplete works
- ▶ Defect rectification – within Defect Liability Period
- ▶ Defect rectification – outwith Defect Liability Period

When is a construction and engineering project complete?

- ▶ Subject to any express provisions in the contract, construction and engineering projects are not complete until all of the services required by the contract have been provided to a standard consistent with the requirements of the contract.
- ▶ Such services may include the provision of manuals, demonstrations and training, which, unless the contract states otherwise, will be required to be provided before the works can be said to be complete.
- ▶ The criteria relating to whether or not the service or workmanship has been provided to the required standard will include:
 - ▶ any relevant provisions of the contract
 - ▶ any relevant provision of the specification
 - ▶ the purpose for which the works are intended, and
 - ▶ any statements made by the contractor prior to his or her appointment, such as specific skills or experience.

Why does it matter?

- ▶ Completion of a construction project often directly triggers a number of consequent actions or obligations, or marks the end of any further liabilities. Some common examples, depending on the contract involved, are:
 - ▶ The client takes possession and control of the building
 - ▶ Cessation of any further liability for delay damages, whether liquidated or unliquidated
 - ▶ Risk of loss or damage to the works passes to the client, which therefore terminates any further requirement on the contractor to insure and secure the works
 - ▶ Commencement of a defects liability, rectification or maintenance period
 - ▶ Milestone payment or release of retention monies
 - ▶ A requirement for an account of the works to be prepared
 - ▶ Obligations under third party agreements such as funding arrangements, bonds, guarantees, leases, sale agreements etc.

Practical completion under the JCT forms of contract

- ▶ Under the JCT contracts, completion of the works is generally referred to as ‘practical completion’.
- ▶ Some have tried to interpret the phrase as allowing a state of less than full completion. In this context, the phrase ‘beneficial occupation’ was often used to describe the standard of completion that was required by the phrase ‘practical completion’, meaning the client is physically able to take occupation of the works and use them for their intended purpose. There is, however, no legal basis for the use of such a test. Even if the works can be beneficially occupied, unless the contract provides otherwise, if the works are not finished the client is not obliged to take possession.
- ▶ The test of completion is, however, subject to a limited test of reasonableness known as the *de minimis* principle. This means that certification of completion of the works should not be refused if there are only very minor defects in the works.

Completion under the NEC forms of contract

- ▶ Under the NEC form of contract, completion is defined as when all the work required by the 'works information' is completed by the specified completion date, and all notified defects that would prevent the client from using the works are corrected.
- ▶ This implies that completion is achieved even if there are notified defects still present within the works, provided that those defects do not prevent the client from using the works.

Completion under the FIDIC forms of contract

- ▶ Under the FIDIC forms of contract (which are principally used on international projects)
- ▶ the client takes possession of the works when the works have reached a state of completion known as ‘substantial completion’.
- ▶ Substantial completion is primarily determined by whether or not the works are sufficiently complete to be fit for their purpose from a functional perspective.
- ▶ Other criteria might include the cost of remedial works in proportion to the value of the original works.

Works not in accordance with the contract and incomplete works

- ▶ Completion of the works may be certified notwithstanding the existence of patent defects or even incomplete works. This would include works not in accordance with the contract.
- ▶ Under the JCT contracts the contract administrator usually has discretion as to whether or not to certify completion even though there are patent defects or incomplete works. That discretion is usually (and legitimately) exercised after consultation with the client.
- ▶ The extent to which the client will be prepared to take possession notwithstanding patent defects or incomplete works will be directly proportionate to the client's need for possession. However the contractor will wish to avoid the client taking possession if there is too much work outstanding as once the client is in occupation, completion of the outstanding works will often be much more difficult.

Works not in accordance with the contract and incomplete works

- ▶ If the client should wish to take possession when there are still considerable amounts of remedial works / incomplete works to finish, and the contractor is agreeable to the client taking possession, it may be preferable for the client and contractor to record their agreement in a supplemental contract.
- ▶ This could then also deal with the additional restrictions within which the contractor would be required to work, the timescales within which the works are to be complete and any damages payable in the event that those conditions are not achieved.
- ▶ Contract Administrators need to be careful when issuing Practical Completion if defects are present.
 - ▶ Liability issues can arise where patent defects are missed that should have prevented PC being issued.

Defects within the Defect Liability Period

- ▶ During the defects liability period the contractor has a right to return to the works and undertake the remedial works himself.
- ▶ This is likely to be less expensive for the contractor than paying the client the costs associated with him bringing in a third party contractor to carry out the remedial works.
- ▶ It is important that the Contract Administrator inspects within the Defect Liability Period **and** provides effective notification within this timescale.
 - ▶ Failure for the Contract Administrator to fulfil this duty can result in a claim against the CA.

Defects outwith Defect Liability Period and Latent Defects

- ▶ In the event that latent defects in the works are discovered after completion of the works has been certified then, subject to any limitation clauses in the contract and subject to the limitation period not having expired, the contractor will be liable for direct costs reasonably incurred by the client as a result.
- ▶ This will include the cost of any appropriate remedial works and also any loss of profit or such like reasonably suffered by the client.
 - ▶ Limitations – if silent then typically 5 years from date latent defect could reasonably have been identified.

ANY QUESTIONS?



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Disputes. Defects. Dilapidations.

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