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Defect

Construction Law Terms: A to Z

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D is for Defect

What is a defect?

A contract may define what is meant by a "defect". For example, the NEC4 suite of contracts includes the following:

"A Defect is:

- *a part of the works which is not in accordance with the Scope or*
- *a part of the works designed by the Contractor which is not in accordance with the applicable law or the Contractor's design which the Project Manager has accepted."* [1]

Absent an express contractual definition, there is no "standard" definition of a defect. However, in the case of *Yarmouth -v- France*[2], a defect was described as *"anything which renders the plant … unfit for the use for which it is intended, when used in a reasonable way and with reasonable care"* and Hudson's Building and Engineering Contracts states: *"Defective work is work which fails to comply with the requirements of the contract and so is a breach of contract. For large construction or engineering contracts, this will mean work which does not conform to express descriptions or requirements, including any drawings or specifications, together with any implied terms as to its quality, workmanship, performance or design."* [3]

Therefore, depending on the terms of the contract, work might be defective even if it has been carried out with reasonable skill and care, because the real question is whether it meets the required specification.[4]

"Patent" and "Latent" defects

Patent Defects

A "patent" defect is one that can be detected at, or by, a specific time, usually before practical completion or within the defects liability period. The test of whether a defect is detectable or not is an objective test. What matters is whether the defect is *observable*, or *apparent*, on inspection and not whether it was actually *observed*.[5] Although on walking around a project at the time of practical completion, one may not have spotted the defective work, the question is whether it was nevertheless visible? For example, a crack in a wall or missing roof tiles would usually be observable and, therefore, a patent defect.

1. NEC4, engineering and construction contract, clause 11.2(6).
2. (1887) 19 QBD 647
3. 14th edition, paragraph 4-075.
4. *MT Højgaard A/S -v- E.On Climate & Renewables UK Robin Rigg East Limited and another* [2017] UKSC 59
5. *Sanderson -v- National Coal Board* [1961] 2 QB 244

In the case of *Baxall Securities Ltd -v- Sheard Walshaw Partnership*[6], the Court of Appeal ruled that, in the commercial context, a defect will be patent where it is *"reasonably discoverable ... with the benefit of such skilled third party advice as he might be expected to retain."*

Latent Defects

By comparison, a "*latent*" defect is one which exists, but would not be discovered following the nature of inspection that the defendant might reasonably anticipate the article would be subjected to.[7] It is concealed and may develop over time so that it does not manifest itself for several years. In very simple terms, it is a concealed flaw. For example, shallow or inadequate foundations which, over time, result in subsidence, or defective tanking, which allows water ingress causing damp.

Does the existence of defects preclude practical completion?

Where a contract defines practical completion (or an equivalent term), whether it has been achieved or not will be determined by the contract terms.

Where there is no such definition, the case of *Mears Ltd -v- Costplan Services (South East) Ltd*[8] is relevant. The court considered the law relating to practical completion and noted that *"The existence of latent defects cannot prevent practical completion (Jarvis & Sons Limited v Westminster Corporation & Another [1969] 1 WLR 1448). In many ways that is self-evident: if the defect is latent, nobody knows about it and it cannot therefore prevent the certifier from concluding that practical completion has been achieved."* But, with regards to patent defects it considered that:

- There is no difference between an item of work that has yet to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.
- Practical completion can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling.[9]
- Whether or not an item is "*trifling*" is a matter of fact and degree, to be measured against *"the purpose of allowing the employers to take possession of the works and to use them as intended"*.[10]

The Parties' rights and obligations in respect of defects

Where, in breach of contract, work is defective then the starting point is that the employer is entitled to be put into the position it would have been in if the work was free from defects.

Once a defect is identified, the employer will want it to be remedied as soon as possible. It may want the contractor to come back to remedy the defect (on the basis that the contractor knows what has been done to date and so is best placed to remedy it), or it may want a replacement contractor to carry out the remedial works (because it has lost confidence in the contractor's ability).

A contractor does not have a right to return to remedy a defect unless the contract expressly confers that right. Therefore, in the absence of a contractual right for a contractor to return, an employer can appoint a replacement contractor to remedy a defect.

Typically, construction and engineering contracts contain defect liability provisions which confer a right to return and remedy defects for a limited period of time. In those circumstances, it is generally (although not always) in both parties' interest for the contractor to remedy defects promptly on being given notice.

6. [2002] EWCA Civ 9
7. *Baxall Securities Ltd -v- Sheard Walshaw Partnership* [2002] EWCA Civ 9
8. [2019] EWCA Civ 502
9. *Mariner International Hotels Limited & Another -v- Atlas Limited & Another* [2007] 10 HKCFAR 1
10. Jarvis & Sons Limited -v- *Westminster Corporation & Another* [1969] 1 WLR 1448

If the contractor does not return to remedy the defect, then the employer can have the defective work remedied by an alternative contractor, and recover damages. These damages will generally be based on the reasonable cost of repair or, in certain circumstances, the difference in value or loss of amenity of the relevant work (see, for example, *Ruxley -v- Forsyth*[11] where in respect of a swimming pool that wasn't deep enough to dive into, the employer was entitled to recover £3,500 for loss of amenity rather than £21,560 which it would have cost to rebuild the pool to the correct depth).

Conversely, if the employer engages a third party to remedy a defect, instead of allowing the original contractor to return, the employer may be criticised for failing to mitigate its loss, and the employer's losses may be limited to what it would have cost the original contractor to remedy the defect in question.[12]

Conclusion

When there are suspected defects in a project, technical and legal expertise will be required to ascertain whether there is, in fact, a defect and, if so, how it is to be dealt with. The issue will not be helped by the fact that, at this stage, a contractor and employer may no longer have an ongoing relationship – the contractor may have already moved onto its next project. As ever, the contract is crucial to navigating the situation, in terms of establishing whether a defect exists and, if so, how it is to be dealt with.

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11. [1996] AC 344
12. *Pearce and High Limited -v- Baxter and Baxter (1999)* BLR 101

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