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Defect Claims in Construction Projects

Anyone who has ever undertaken a construction project, whether a large commercial development or a small domestic job, is likely to be well aware that things do not always go to plan.

Defects can range from something as trivial as a swimming pool that is too shallow to the far more serious such as defective cladding. Unsurprisingly, disputes as to who is to blame for the defects are common, and we deal with a significant number of defects claims each year on behalf of clients.

This article will look at:

- what a construction defect is,
- where the liability for such defects sits, and
- how defect claims might be resolved.

What are Construction Defects?

There is no agreed definition of a “defect”, and this term is rarely defined in standard construction contracts (with the exception of the NEC suite of contracts). However, in broad terms a defect is essentially a deficiency in the design or construction of a building or other structure as a result of a failure to comply with the relevant contractual or statutory requirements.

Examples of Construction Defects

Many different types of defects can arise in construction projects. For example:

- Defective design of the works, which may lead to a structure or its components not functioning as intended. For example, a designer specifying the plumbing system of a property with the wrong size of pipe, leading to blockages and leaks.
- Specifying unsuitable or unsafe materials to be included within the works. For example, the specification of ACM cladding or flammable insulation in the construction of high-rise buildings. This can overlap with the designer's failure to comply with building regulations.
- Faults in the quality of workmanship used in carrying out the works. For example, a contractor inserting a screw or bolt into the wrong place, piercing a waterproof membrane and leading to water ingress.
- Failure to comply with a contractual specification. For example, where the dimensions of a swimming pool are smaller than specified i.e. it is still a useable pool, but it isn't as deep as the client wanted.

Defects Liability Period

An important concept that is fairly unique to the construction industry is the defects liability period (“**DLP**”), sometimes known as the rectification period. This is a period of time following practical completion of the works (commonly 12 months, though it does vary) where the contractor is obliged to return to site to make good any notified defects. Most defects are likely to manifest during this 12 months period.

During the DLP, the contractor usually has both the right and obligation to rectify any defects notified by the employer. Retention monies, deducted from sums otherwise payable to the contractor for the works, are often held during this period as security for the contractor’s obligation to rectify notified defects. It is therefore important that defects are promptly notified, before the retention is due for release at the end of the DLP.

Employers should be wary of refusing to allow willing contractors to rectify defects, as this may prevent the employer from deducting the cost of employing third parties to carry out the remedial works (as the original contractor would have carried out the work for free).

Patent and Latent Defects

There is a distinction between:

- defects that are “**patent**” i.e. those defects that are readily observable, and
- defects that are “**latent**” i.e. concealed flaws which would not be discovered by a reasonable inspection.

Patent defects are generally more obvious and therefore potentially easier to fix, examples include a cracked window or wrong size of beam. On the other hand, latent defects can be more problematic and potentially expensive.

A contractor is usually liable for defects in its work, regardless of whether such defects are patent or latent. However, latent defects may not be detected until the DLP has expired, such that the contractor no longer has the right to rectify the defects itself (subject to the employer’s general duty to mitigate its losses) and the employer is no longer holding retention as security.

Liability for Construction Defects

Who is to blame if a defect arises? The employer may have different causes of action against a number of different parties. For example, there may be contractual claims, tortious negligence claims and/or claims under legislation such as the Defective Premises Act 1972 (the “**DPA**”).

- **The Contractor:** the contractor’s obligations will generally be expressly set out in the building contract. If not, then terms may be implied by the Supply of Goods and Services Act 1982 or the Consumer Rights Act 2015.

- The contractual obligations will often include a requirement to carry out the works in accordance with the specification, not to include deleterious materials and to use reasonable skill and care when carrying out the works. Contractors can also be liable under the DPA (if the works relate to a dwelling) where defective works render the dwelling unfit for habitation.
- The employer may also have direct rights against the relevant subcontractors if it has the benefit of collateral warranties or equivalent rights under the Contracts (Rights of Third Parties) Act 1999.
- **The Design Team:** a designer is typically responsible for preparing the design using reasonable skill and care. If they fail to do so, and the design is consequently defective, then the designer may be liable to the employer.
- **Product Manufacturers:** if goods are inherently defective and this causes personal injury or property damage, then the manufacturer of those goods may be liable in tort to those injured. Manufacturers will also have contractual liabilities to parties who purchase their products. In addition, some manufacturers may provide product guarantees, which can provide some means of redress to the ultimate end-user of the product.

If several parties are jointly responsible for the same loss, the principle of joint and several liability usually allows a claimant to recover all of its losses from any one of the responsible parties. This can be important if not all the parties are solvent. However, contracts will sometimes include a 'net contribution clause', which creates a contractual exception to the usual common law position. Net contribution clauses seek to limit the damages payable by the defaulting party to a "fair and reasonable" or "just and equitable" proportion of the claimant's total losses.

Duty to Warn of Defects

Any party involved in a construction project (but, in particular, the professional consultant team) could face the accusation that they failed to warn the employer about defects in the works. The courtsⁱ have adopted the approach that:

- where a consultant/contractor is retained under a contract, the court will first look at what the contract says;
- the duty to warn is an aspect of the obligation to act with reasonable skill and care (as required by most contracts);
- whether the duty arises depends on all the circumstances of the case;
- the duty to warn will arise where there is "*an obvious and significant danger either to life and limb or to property*", and can also arise where the consultant/contractor "*ought to have known of such danger*"; and
- in the case that the consultant/contractor "*ought to have known of such danger*", the possibility that the contractor may fail to carry out the works properly is not sufficient to create a duty to warn.

Limitation Periods

Once the DLP has expired, the contractor no longer has an express contractual obligation to rectify any further defects that may arise and the employer no longer has retention as security.

However, this does not mean that the contractor has no further liability for defects. There is a statutory limitation period during which the employer may still bring a claim against the contractor in relation to defects.

The statutory limitation period depends on the cause of action:

the limitation period for breach of contract claims runs from the date of breach (typically the date of practical completion) for:

- six years for a simple contract; or
- twelve years if the contract was executed as a deed;

(unless the contract terms specify a different period).

the limitation period for claims under the tort of negligence runs for the later of:

- six years from the date on which the damage occurred; or
- three years from the date on which the claimant had the requisite knowledge and right to bring such an action.

the limitation period for claims under the DPA has recently been extended to:

- 15 years prospectively for claims that accrue after the BSA took effect; and
- 30 years retrospectively for claims that accrued before the BSA took effect i.e. claims in relation to new build dwellings completed prior to 28 June 2022.

Summary

Unfortunately, defects are commonplace in a construction projects, whether during the works or following completion. This is not entirely surprising, given the usual cost and time pressures, inefficient working practices and low margins.

While there are often a number of different legal avenues of redress, it is only worth pursuing a party that has sufficient assets or insurance to meet the claim. Therefore, it is important to ensure that adequate consideration is given at the outset of a project to mitigating the risk of defects by due diligence on the contracting parties and robust contract terms.