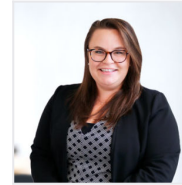




AUTHOR / KEY CONTACT

Construction A-Z: Defects



Amy Lewis
Associate

✉ amy.lewis@LA-Law.com
☎ 023 8082 7423

In construction and engineering projects, defects can be a major source of disputes, including determining whether there is, in fact, a defect, the obligation (or right) for a contractor to rectify defects and latent (hidden) defects.

But what are defects and what provisions under construction contracts govern defects?

Definition - What is a defect?

Surprisingly, there is no agreed statutory or industry definition of defect. Even standard-form construction contracts (except the NEC suite) often do not clearly define what is meant by 'defect'.

However, generally, defects are work that does not meet a specification or standard required by a contract due to fault(s) in the work, materials or design or because of deficiencies in the quality of the work, i.e., poor workmanship.

Defects are common on construction projects and can range from minor items included in a snagging list at practical completion ("PC") to major undetected issues which can appear years after PC (known as latent defects, which are covered below).

Defects liability period

Most construction contracts provide for the contractor to return to the site and rectify any defects that emerge or are discovered for a specified period (usually 6 or 12 months from the date of PC) free of charge. This defects liability period also allows for completion of any snagging items or minor defects in the works when PC was certified.

It is worth noting that, contrary to popular belief in the construction industry, a contractor does not have the "right" to return to the site to remedy defects unless the contract expressly confers that right, for example, through a defects liability clause. In fact, without an express right to return, an employer is entitled to hire another contractor to rectify any defects arising post-PC and deduct such costs from the contractor's retention.

However, where the contract provides for the contractor to return and remedy defects without any other alternative option for the employer, the employer who chooses to hire someone else to carry out the remedial works, without giving the original contractor the opportunity to do so first (free of charge), may not only be in breach of contract, but also criticised for failing to mitigate its loss.

An unwarranted refusal to allow the contractor back on site may prevent the employer from claiming more than it would have cost the original contractor to remedy the defects in question. This may be significantly less (or nothing) than the cost for the defects to be rectified by a third party.

Patent and latent defects

It is important to understand the difference between patent and latent defects, particularly when considering a contractor's liability for defects discovered after PC. Whilst patent defects are those identified before the end of the defects liability period, latent defects are not immediately apparent and may remain hidden for many years after PC.

Although a contractor is usually liable for any defects in their work (whether they are patent or latent), latent defects that are not detected before the defects liability period expires will be difficult to resolve as the contractor no longer has the right to rectify the defects itself and the employer no longer holds the retention as security.

Indeed, some latent defects may not appear until after the contractual limitation period (usually 6 or 12 years from the date of PC). A building owner who discovers a defect in these circumstances would be unable to bring a claim against the party responsible for that defect for breach of contract. However, the building owner may be able to rely on:

1. [The Latent Damage Act 1986](#), which extends the time limitation for negligence claims in respect of latent defects: a claimant has three years from the date that the defect was discovered or was discoverable to commence an action. This is subject to an overall deadline that requires an action to be brought no later than 15 years after the negligent act occurred.
2. Latent defects insurance – this is essentially a structural warranty and can be difficult and costly to obtain in the current UK insurance market.

Claims for defects

Here are a few examples where a party may be able to bring a claim against a contractor or consultant in relation to defects:

1. Breach of construction contract:

- For example, an employer could bring a claim against a contractor for using a prohibited material, or against a consultant for failure to exercise reasonable skill and care in designing the project, if these were terms of the building contract or professional appointment.
- Alternatively, even if works have been designed and carried out in accordance with the contract and PC has been achieved, an employer may still bring a claim during the defects liability period if the contractor refuses to return to site to rectify defects after being instructed to do so in accordance with its obligation under the contract.

2. **Breach of collateral warranty or third-party rights:** a third party who has a contractual relationship with a contractor or consultant responsible for a defect through a collateral warranty or third-party rights could bring a claim under it where the defects breach certain obligations. For example, most collateral warranties provide for the contractor or consultant to warrant that it has performed its duties and obligations in accordance with the underlying construction contract or appointment.

3. **Negligence:** in certain cases, there may be scope for a claim to be brought against a contractor or a consultant for damage to other property (i.e. not to the works themselves) where the contractor and/or consultant negligently caused damage to that property or where a defect caused injury to people on-site during the project, or to occupiers after completion.

4. **Defective Premises Act 1972 (“DPA”):** for works involving the construction or refurbishment of a dwelling, an interested party may bring a claim for defects against the developer or contractor under the [Defective Premises Act 1972](#). Parties carrying out (or with an interest in) such works should make themselves aware of the extended limitation periods under the Act, introduced by the [Building Safety Act 2022](#). Broadly, the new limitation periods are 30 years retrospectively for claims accruing before 28 June 2022 and 15 years for claims accruing after 28 June 2022. These extended limitation periods are likely to give rise to an increase in claims referencing the DPA where other methods of recourse are no longer available.

Tip – The importance of defining practical completion in your construction contracts

As described above, the defects liability period often starts on the date of PC. Too often, disputes on what PC means and when it should take place arise because it was not properly defined in the building contract (indeed, it is not defined at all within the standard JCT suite of contracts). When drafting your building contract, it is, therefore, crucial to clearly define when PC should be certified to avoid later disputes on whether it has properly

occurred and when the defects liability period starts and expires.

For more complex projects, it is worth considering appointing a clerk of works or monitoring surveyor who will visit the site on a regular basis to check that the works are being carried out properly and safely and in accordance with various applicable standards and statutory requirements.

Whether you are a developer, contractor, consultant or project manager, please get in touch with our [construction](#) team if you are encountering any issues relating to defects on your project, email amy.lewis@la-law.com or call [023 8082 7502](tel:02380827502).