

HOW NOT TO RECTIFY DEFECTS

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INTRODUCTION

Defective works are, unfortunately, a frequent occurrence in construction projects and another series of cases on this issue highlight how they can easily lead to disputes. However, with some expert advice and helpful guidance, employers procuring construction works can effectively manage the resolution of any defects that arise on their projects.

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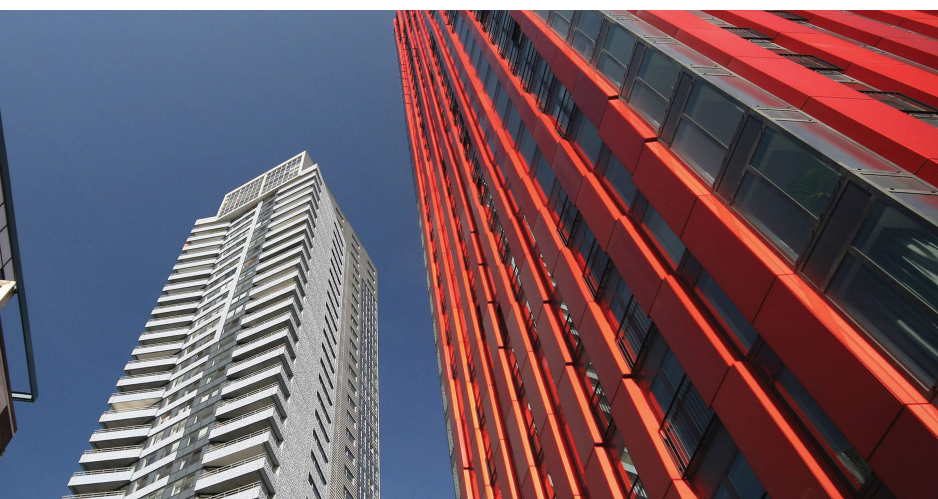
Don't assume that all problems are defects: A defect is where an element in the design or construction of a structure, or in the delivery of goods or services, falls short of what should have been supplied. There must be a discrepancy between what ought to have been supplied and what was supplied. Goods or works may still be defective where they do not satisfy the specification, even if they are capable of being used. Equally, if the contractor has provided what it promised then the works may not necessarily be defective, despite any problems with the completed works.

Don't ignore the specification: The emphasis is therefore on what was supplied against the contractual specification. The more detailed the specification, the easier it will be to determine whether the completed works or goods meet the required performance criteria. In the absence of a specification, the contractor is required to

complete the works to a reasonable standard. This will make it more difficult to assess whether the works have been properly completed and so using a contractual specification is always to be preferred. The contractor is required to perform that which has been specified unless the client agrees otherwise. It does not matter whether the contractor considers that an alternative material or working method is equivalent or better to that specified.

Don't rush to claim damages for defects: Works may sometimes fail to meet the requirements of the building contract while under construction. Although performing works in a defective manner may result in breaches of other obligations, such as the Building Regulations, a temporary disconformity in unfinished works does not mean the contractor has repudiated its contractual obligations. An employer's right to claim damages only arises after the employer takes possession of the works.

Don't overlook the defects liability period: Most building contracts contain a period between practical and final completion of the works when the contractor is required to return to site and rectify defects at its own expense. A period of six or twelve months is market standard. If the employer requires defective works to be rectified, they should first check whether a defect's rectification period exists and if it has expired. If it has not, then the contractor should be promptly notified of the defects and asked to remedy them. Sometimes the contractor will not be able to return to the site to carry out the repairs and a deduction to the contract price will be agreed as an alternative. However, if the contractor is to carry out the repairs then it is for them to decide how the defects should be remedied. Where several remedial options exist, the contractor chooses which to pursue. After the defects have been remedied, the employer's right to claim damages comes to an end.



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Exercise caution when instructing third parties to rectify: Sometimes the employer may not want the original contractor to return to the site to rectify defects. In practice, the employer can instruct anyone it chooses to rectify defective works but where a live defects rectification period exists, the employer cannot recover damages for rectification costs from the original contractor unless they have first given them the opportunity to remedy. There are some exceptions to this principle, such as where the original contractor refuses or is unable to rectify or where there has been a loss of confidence on the part of the employer in the ability of the original contractor to perform, perhaps due to their poor performance. Whether it was reasonable for the employer to instruct a third party to remedy the defects without giving the original contractor the opportunity to do so will be a question of fact and degree. If the employer's actions were not reasonable then the original contractor's liability will be limited to the costs they would have incurred in repairing the defects, which could be minimal.

Don't assume the contractor will return to site after the defects rectification period: A contractor is not required to return to the site to correct defects after the defects liability period expires but the employer may still claim damages from the contractor for recovering the costs of rectifying defects for which the contractor was responsible. This could include the costs of correcting latent defects, namely items of non-conformance which were imperceptible at completion. The contractor's liability for completed works will last for the duration of the agreed liability period, regardless of expiry of the defects rectification period. This is usually a period of six or twelve years depending on whether the contract was executed under hand or as a deed and will be subject to a statutory fifteen-year longstop for latent defects. The statutory liability period can be displaced by the parties' agreement. In some building contracts parties agree that the contractor will not be liable for defects identified after the end of the defects liability period. Liability for defects may also be extinguished upon issue of a final certificate. It is important to check the building contract to confirm what was agreed. If a claim is unavoidable, don't forget to check for a contractual link between the employer and the contractor due to the legal principle that damages arising from physical damage to buildings are too remote to be recoverable in tort.

Don't assume all losses can be claimed: Damages for breach of contract for defective works are intended to compensate the employer by putting them into the position they would have been had the contract been properly performed. This "cost of cure" measure is calculated as the cost of repairing the defect to the standard required by the building contract. The contractor cannot be expected to pay for costs of rectification that represent more than what was damaged but there are a few exceptions to this prohibition on recovering costs of betterment. For example, an employer who has no choice but to remedy a defect by improving on what was contracted to be supplied is entitled to the full cost of the more expensive replacement.

Don't assume costs can be claimed immediately: Sometimes the works contain defects that may not immediately materialise into an actual loss for the employer. In such cases, it might be appropriate for an indemnity to be given for any future loss that arises and the employer may be required to mitigate its loss by accepting that indemnity or guarantee instead of commencing a claim for the rectification costs. Much will depend on the nature of the defects and the indemnity being offered.

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The law relating to defects can appear complex and may be seen to impose restrictions on those who simply want to have defects remedied as quickly as possible. Indeed, the employer's eagerness to remedy may explain why there are so many disputes in this area. Owners and developers can easily find themselves in a situation where the defects in completed works have been rectified by a third party contractor but that they have been prevented from recovering the full costs of rectification from the original contractor. By taking legal advice early, owners and developers can ensure that defects are not only rectified quickly and to the required standard, but that later defects-related disputes are avoided.

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