



Many build-quality, snag and defect management problems experienced by developers are often a consequence of a poorly written 'Build Contract'.

A great deal of this can be overcome by better structure and detail, so that a Contractor fully understands your process and procedure and exactly what is expected of them, when problems arise.

These notes are designed to help you address the Defect Management clause within your Build Contract.

PLEASE NOTE:

These words are for 'guidance' purposes and should not be relied upon without the input of a contract lawyer.

Presumption:

The Agreement between Employer (developer) and Contractor will be a recognised JCT (Joint Contracts Tribunal) form. Modern JCT contracts no longer refer to the **Defects Liability Period**, but the **Defects Rectification Period**.

A sensible and balanced Agreement would be if the Contractor is back-to-back with the Employer; for open market residential build, under the terms of the **New Homes Quality Code**, the developer is required to provide Defect Rectification for 2 years following Legal Completion.

Additionally, a financial retention should be held against the Contractor to ensure defects are either rectified by the Contractor or, that there is a fund available to pay an alternative trade.

These are points that need to be made clear when going out to tender as they carry financial implications for the Contractor. Consider that a Contractor, unwilling to meet such terms may seek to trade that level of obligation for a more competitive price resulting in 'money saved' over the short term, but there will be an 'on-cost' to the Employer later when they are forced to procure alternative trades beyond the agreed rectification period. If the Contractor is free of any condition requiring that they return and make good, failed workmanship, they have little incentive to ensure a consistently high standard of work.

Beware, if the rectification period is not defined, the industry default position is that the Contractor is obligated for 6 months from Practical Completion.

Provisions: A section is required for **Practical Completion and Defects Rectification** within the Agreement between the developer ("Employer") and either main contractor or sub-contractors ("Contractor").

Purpose:

To provide clarity of obligation regarding the management of defects, so there is no confusion about either the remedy or the timing of the remedy when defects are reported.

Considerations:

If a development comprises a mix of buildings e.g., commercial, and residential, the clauses detailing Practical Completion and Defect Rectification should be dealt with separately, as what may be acceptable for the former is less likely to be acceptable for the latter.

Contractor's obligation:

All works as completed are to be fit for purpose as specified in the terms of the warranty and by the New Homes Quality Code.

Liability:

Liability for Latent Defects survives the end of the rectification period even if a certificate of making good has been issued. There is an argument that liability continues even for patent* defects that have not been notified to the Contractor. (In both cases, this is because the certificate relates only to the defects notified to the Contractor within 14 days of the expiry of the rectification period). Parties should also be aware that the Employer can claim for consequential losses caused by defects, even if they are notified and rectified.

In 1986, the **Latent Damage Act** introduced an extension to the ordinary six-year statutory limitation period. This extension is available for negligence claims for latent defects – a defect in a property is caused by a fault in design, materials or workmanship that existed at the time. It does not apply to personal injury claims. Where there is a latent defect, the time limit is the latter of:

- Six years from the date of accrual of the cause of action being raised, and
- Three years from the earliest date on which the potential claimant knew, or reasonably ought to have known, material facts necessary to bring an action alleging negligence subject to an overall limit of fifteen years from the accrual of damage.

**Patent defects are those which can be discovered by reasonable inspection; latent defects are those which cannot be discovered by reasonable inspection.*

Suggested structure:

[Value] = Suggested, but to be determined by the developer.

Include in the Agreement these definitions:

"Defect Rectification Period" - in respect of each residential unit shall be the period commencing on the date of Practical Completion and expiring [24] months after the date on which the sale by the Employer of the relevant unit is completed, subject to a minimum period of [24] months and a maximum period of [30] months in respect of each such unit.

"Aftercare Manager" - the person or organisation engaged by the Employer (e.g. After Build) to manage the liaison with purchasers and tenants of individual residential units in relation to Defects and aftercare issues arising during the Defects Rectification Period.

"Retention Percentage" - the percentage so stated in the Agreement from which funds may be used to employ and pay other persons to respond to the Defect if the Contractor fails to respond within the applicable time period.

“Defect” – a Defect is workmanship or materials that met the warranty build standard at the point of Legal Completion but have subsequently become defective (during the Defects Rectification Period). It is important to note that we cite Legal Completion here not Practical Completion as the Warranty only commences at the point the property is sold to the purchaser i.e. Legal Completion.

“Snag” - something that is broken, missing or not finished at Legal Completion stage. This is why it is important that the Employer identifies all Snags before accepting Practical Completion otherwise a ‘cracked WC pan’ could be something the Employer has to pay for if only identified beyond Practical Completion as the Contractor could argue that it wasn’t broken when the Employer accepted Practical Completion.

1. Practical Completion and Defects Rectification

- 1.1 When in the opinion of the Employer or their Aftercare Manager any residential unit is practically complete and any pre-conditions to Practical Completion of that unit set out in this Agreement have been satisfied, he shall issue a certificate to that effect and Practical Completion of that unit shall be deemed for all purposes of this Agreement to have taken place on the day named in such certificate. It is crucial that the Employer is satisfied that each plot has been carefully inspected by the Employer or their Aftercare Manager against a list of recommended standard tests *before* accepting the property as Snags remain the contractor’s responsibility up to Practical Completion (see Quality Assurance Inspection Appendix 1).
- 1.2 Notwithstanding clause 1.1, the Employer may issue a certificate of Practical Completion of any residential unit accompanied by a list of minor outstanding or defective items of work if the Contractor shall first have undertaken to the Employer in writing to complete such items as soon as practicable and in any event within 30 days following the issue of such certificate.
- 1.3 The Employer shall with such certificate issue to the Contractor his estimate of the cost of completing such items and the Employer may retain the amount of such estimate from any amount which would otherwise fall due for release to the Contractor on Practical Completion of that residential unit until such items have been completed by the Contractor to the satisfaction of the Employer or his Aftercare Manager.
- 1.4 The Employer or his Aftercare Manager may, whenever he considers it necessary to do so, issue instructions requiring any Defects which shall appear in any residential unit within the relevant Defects Rectification Period to be made good. The Contractor shall forthwith upon receipt of such instructions, and within the applicable time period set out in clause 1.6, comply with the same at no cost to the Employer.
- 1.5 Defects shall be categorised as:
 - 1.5.1 Emergency
 - i) loss of electrical power (not related to statutory mains supplies)
 - ii) dangerous partial loss of electrical power or electrical fault
 - iii) loss of water supply (not related to statutory mains supply)
 - iv) leaks in gas pipework
 - v) leaking water or heating pipe where the leak cannot be contained
 - vi) blocked or leaking foul drain, soil stack or WC pan (in cases where there is only one WC in the residential unit)
 - vii) blocked flue to open fire or boiler

- viii) total loss of heating (between 1st October and 31st March)
- ix) roof leak resulting in serious water penetration
- x) defective windows or external doors that would compromise security
- xi) any Defect that is liable to cause injury to the public and/or employees of the Employer.

1.5.2 Urgent

- i) partial loss of heating (between 1st October and 31st March)
- ii) blocked WC (in cases where there is more than 1 WC in the residential unit).

1.5.3 Routine

- i) everything remaining with the exception of the Defects in clause 1.5.4.

1.6 The applicable time periods for Defect rectification are:

- 1.6.1 attend within [4] hours and rectify within [12] hours (24 hours a day, 365 days per year) for Emergency Defects
- 1.6.2 attend and rectify within [3] working days for Urgent Defects
- 1.6.3 attend and rectify within 30 days for Routine Defects (deemed as reasonable by the New Homes Quality Code).

1.7 When entering any residential unit in order to respond to a Defect, the Contractor shall:

- 1.7.1 liaise and co-operate with the Aftercare Manager as necessary to secure such access as he requires
- 1.7.2 present the appearance expected of a professional tradesman and act in a courteous and workmanlike manner as would be expected from a professional tradesman, and present evidence of identity if requested
- 1.7.3 cause as little disruption and inconvenience as reasonably possible to the occupiers of the residential unit
- 1.7.4 make good all damage caused as soon as reasonably practicable.

1.8 If the Contractor fails to respond to a Defect within the applicable time period set out in clause 1.6, the Employer or his Aftercare Manager, without further notice to the Contractor may employ and pay other persons to respond to the Defect and may deduct from any monies due or to become due to the Contractor under this Agreement or may recover from the Contractor as a debt:

- 1.8.1 all costs incurred by him in connection with the employment of such other persons, plus a management fee of 10%; or
- 1.8.2 if greater, the sum of £500.

1.9 When in the opinion of the Employer any Defects which he or his Aftercare Manager may have required to be made good under clause 1.4, shall have been made good, he shall issue a certificate to that effect and completion of making good Defects in that residential unit shall be deemed for all purposes of this Agreement to have taken place on the day named in the certificate.

Appendix 1

Quality Assurance Inspection

Decoration

- Check walls for visible imperfections (shrinkage/settlement cracks, trowel marks, dinks, snots etc.) when viewed at 2 metres in natural daylight with no up/down lighters
- Check ceilings for same
- Check dry lining (walls and ceilings) for blown tapes and screw pops
- Examine paintwork to window boards, doors (non-factory finished), windows (non-factory finished) architrave, box-work, skirting and trim for paint runs, grinning untreated knots etc.

Doors and windows

- Check open and close correctly without sticking
- Check for scratched glass – stand 2 meters away in natural daylight and look through the glass
- Check trickle vents work (where fitted)
- Check all ironmongery correctly attached and that all screw holes have received a screw (hinges, handles, latches, locks etc.)
- Check for excess play when window/door is closed
- Check for keep rattle
- Check keys turn in locks
- Visually does door fit frame evenly (look for excessive gaps)
- Ensure door clearance is sufficient where developer has fitted carpets

Kitchen cabinets

- Check opening of all doors and drawers
- Are all adjusted and fully aligned
- Look for missing 'soft closers'
- Check for scratches or marks
- Ensure all handles and knobs secure and aligned

Electrical

- Run all fitted appliances i.e. washer, dryer, dishwasher, fridge/freezer
- Make sure where water fed there are no leaks
- Make sure water empties with no leaks
- Check ceiling mounted extractor fans (bathroom, kitchen etc.)
- Check door bell
- Check security alarm
- Check TV socket (use signal strength meter)
- Check fire (where electrical)
- Check radiators (where electrical)

Plumbing

- Run heating and hot water – give time to reach temperature
- Check radiators (do they need bleeding)
- Where system is an unvented gas fuelled boiler check water pressure
- Make sure filling loop is provided – check works
- Check programmer
- Where underfloor heating test zone controls work

Bathroom/cloakrooms

- Chipped/cracked/stained sanitary ware
- Scratched taps
- Check taps work
- Check waste plumbing for leaks
- Check WHB overflow
- Check bath overflow
- Test shower
- Check screen/tray for leaks
- Check wall mirror(s) for scratches, chips/cracks
- Check quality/continuity of silicone joints

Tiles - kitchens/cloaks/bathrooms (walls and floors)

- Cracked/chipped tiles
- Unevenly applied tiles
- Missing/cracked grout
- Missing/poor silicone joints

Flooring

- Check carpets taught (no sag or slack)
- Check laminate not scratched or marked

Loft/attic (house not apartment)

- Check hatch operates correctly
- Check loft ladder operates correctly
- Check fully insulated and that material has been evenly distributed
- Check light (where fitted) operates
- Check hoses from extractor to roof vents are connected at both ends
- Check for abandoned rubbish

External (house not apartment)

- Slipped/missing/broken roof tiles
- Damaged/poor brickwork
- Missing mastic (door/window frames)
- Check outside tap
- Check water butt connection where provided
- Dropped pavements/flags
- Missing/damaged turf