JBCC: Latent & Patent Defects – Contractor’s liability outside of the defects liability period?

1. Introduction

A defect is described in the definition section of The Joint Building Contracts Committee Principal Building Agreement: JBCC series 2000 edition 5.0 (Reprint 1) Code 2101 © July 2007 (“JBCC”) as –

“any aspect of material and workmanship forming part of the works that, in the opinion of the principal agent, is due to the failure of the contractor to comply with his obligations in terms of the agreement”.

Sub-Clause 27.0 of the JBCC states that the contractor’s liability for latent defects comes to an end 5 (five) years after the date of issuing of the final completion certificate.

The question this article explores is whether the contractor can be held liable for defects outside of the defects liability period?

2. The definition of Latent & Patent Defects

A latent defect is defined in JBCC as –

“a defect that a reasonable inspection of the works by the principal agent would not have revealed before the issue of the defects list.”

In the case of Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) SA 670 (A) a latent defect is described as:

“… one which is not visible or discoverable upon an inspection of the res vendita.”

Based on the definitions contained above a patent defect, which is the opposite of a latent defect, is therefore one which is visible or discoverable upon an ordinary and proper inspection.

3. Contractor’s liability for latent and patent defects before the final completion certificate is issued

In terms of the JBCC, the principal agent addresses patent defects by conducting a visual inspection of the works and listing the items which it considers fall short of the contractor’s contractual obligations.

2 Above
3 Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) SA 670 (A) at 683 (H)

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These defective items, colloquially known to be contained in a “snag list” are required to be rectified by the contractor before he achieves practical completion, and then the next stages of completion, namely works completion, and final completion can be achieved.

The JBCC does not leave open-ended the time period within which the next sequence of completion certificate is to be issued. Sub-clauses 24.0, 25.0 and 26.0 respectively provide the contractor with an opportunity to have the principal agent come and inspect the rectified items - where the contractor believes he has complied with the snag list - and failing the principal agent conducting the inspection timeously, there is a deeming provision that the works are complete and the next stage of completion has been achieved.

Accordingly the contractor’s liability for patent defects ends on the date that the completion certificate next in sequence has either been issued by the principal agent or deemed to have been issued.

The latent defect period commences at the start of the construction period and ends 5 (five) years from the date that final completion was achieved.

4. Contractor’s liability for latent and patent defects after the final completion certificate is issued

At this point the contractor may be breathing a sigh of relief thinking he has a rough guesstimate of when he will be discharged from all liability in respect of the defect, however, there is a further period contained in the Prescription Act No. 68 of 1969 that both the contractor and employer need to be aware of because the consequences of this Act apply to both of them and its impact will effect whether the contractor will be discharged from liability for the latent defect.

The position, as confirmed in the case of Electricity Supply Commission v Stewarts and Lloyds of South Africa (Pty) Ltd 1981 (3) SA 340 (A) is that prescription would start running on the first day after the end of the defect period. This position was later crystalised by an amendment to section 12(3) of the Prescription Act No. 68 of 1969 which fixes the date for commencement of prescription as the date the creditor knew or ought reasonably to have known of the breach.

Accordingly the employer still has a common law remedy, calculated three years from the date he knew or ought reasonably to have known of the defect to lodge a claim against the contractor for him to remedy the defect.

In practice the way the process would work is as follows:

From the date the final completion certificate is issued the defects liability period commences and runs for a period of five years. Where a latent defect is discovered during those five years the employer will notify the contractor to remedy it in terms of the contract between the parties.

Should the contractor fail to remedy the defect, the employer has three years from the time that he discovered the defect and identifies who was responsible for the same to enforce his right to have the defect remedied. If the contractor drags his feet and does not act, then the employer must sue the contractor to force him to comply. If the three year period expires without a summons being served on the contractor, the employer’s rights will prescribe and then the contractor will be released from any further liability.

5. Conclusion

Provided there have been no amendments to the general terms and conditions of the JBCC agreement the contractor’s liability for patent defects will come to an end either by the issuing of the various certificates or through the deeming provisions in the contract. Liability for latent defects will continue for a period of five years after the final completion certificate is issued and at common law a further three years thereafter.

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Of utmost importance to the contractor to avoid being liable for defects outside of the defect period will be to keep copious records of the:

- Principal agent’s snag list items;
- The contractor’s letters addressed to the principal agent inviting him to inspect the rectified works; or
- The contractor’s letter to the principal agent deeming that completion has been achieved.
- The contractor should also be aware that for three years from the end of the defects period the employer can hold him liable for a latent defect that occurs during this period.

The employer must also remain vigilant so that he is not caught unawares and brings the claim out of time. Prescription is an absolute legal defence as it is premised on the position that a claim or potential claim cannot linger indefinitely as there must be finality to a claim.

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