

JBCC ADVISORY NOTE: EDITION 6.2

DOCUMENT/S

**Principal Building Agreement
N/S Subcontract Agreement
Minor Works Agreement (Clause 16.0)**

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22.0 LATENT DEFECTS LIABILITY PERIOD – Transfer of ownership

- 22.1 The **latent defects** liability period for the **works** shall commence at the start of the **construction period** and end five (5) years from the certified date of **final completion**
- 22.2 The **contractor** shall make good all **latent defects** that appear up to the date of expiry of the **latent defects** liability period [3.3]

The question:

If the employer sells his property to another owner say three (3) years after the issue of the final completion certificate is the contractor still liable to make good latent defects as per the contract between him and the employer (original owner)?

INTERPRETATION

1. General comments with regard to defects

- 1.1 Patent defects are those obvious defects which can be discovered after an inspection by an ordinary intelligent buyer.
- 1.2 Latent (*hidden*) defects are those which cannot be discovered by reasonable or proper inspection by an ordinary intelligent buyer such as, for example, problems with foundations which may not become apparent for several years after completion when settlement causes cracking in a building.

[Note: In Holmdene Brickworks (Pty) Ltd v Roberts Construction Ltd 1977 (3) SA 670 (A) the Supreme Court of Appeal broadly defined a latent defect as “an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita for the purpose for which it has been sold or for which it is commonly used. Such defect is latent when it is one which is not visible or discoverable upon an inspection of the res vendita”. In Odendaal v Ferraris 2009 (4) SA 313 (SCA) the Supreme Court of Appeal extended this definition to include “in a broad sense, any material imperfection preventing or hindering the ordinary or common use of the res vendita”, thereby including not only physical defects but also non-physical defects such as building plans. The court did, however, stress that each case must be decided on its own merits.]

- 1.3 The Oxford Dictionary (Concise Oxford Dictionary 7th Edition) defines the word latent in the following terms:

“hidden, concealed; existing but not yet developed or manifest; dormant;”

2. Liability

2.1 In general the seller is held liable for any latent defects in the works which are present at the time of the sale and which either destroys or substantially impairs its utility or effectiveness for the purpose for which it was sold or for which it is commonly used.

[Notes: 1. There appears to be a general notion that the seller is only liable for the latent defects of which he was 'aware'. If the defects were not readily visible upon inspection by the buyer they are 'latent'.

2. There also seems to be a 'contradiction in terms' because if there is a defect of which the seller is aware which he then does not disclose, the seller commits fraud on the purchaser (a misrepresentation) and is liable.

*3. Kerr (in 'The Law of Sale and Lease Third Edition (2004)) is of the opinion that the buyer does not have to prove that the defect was apparent at the time of the sale; only that the thing sold had within it the beginnings of what is later seen to be a defect (p. 115); and that the extension of the aedilician actions to cases in which **the seller** was unaware of the defect is the main reason for the survival of the actions in modern times (p. 124). (Our emphasis)]*

2.2 A buyer only has a remedy in respect of defects which exist at the time of sale. The onus of proving that the latent defect existed at the time of the sale is on the buyer.

2.3 Having regard to the *Notes* above the seller will be protected by a *voetstoots* clause where he was not aware of the defects as such and did not conceal them from the purchaser or where no warranty, expressly, implied or tacitly was given to the purchaser by the seller.

3. Defects Liability Period:

3.1 The defects liability period begins to run from the date of the 'Certificate of Practical Completion', and after the defects liability period has run and defects attended to, a 'Certificate of Final Completion' is issued. The defects liability period runs in tandem with the period of remaining security or of retention, and once a 'Certificate of Final Completion' is issued, the final contractual payment can be made.

3.2 The legal position is that *but for latent defects* a 'Certificate of Final Completion' shall be conclusive evidence as to the sufficiency of the works.

3.3 In other words the 'Certificate of Final Completion' as to the sufficiency of the works does not derogate from the common law right of the building owner to claim in respect of defects or faults in the execution of the works which only become apparent thereafter.

4. The JBCC

4.1 See extract from Clause 22.0 at the start of this Advisory Note.

4.2 The conditions of contract stated in Clause 22.0 will prevail and the employer will have no claim against the contractor for latent defects that manifest after the 5-year period.

4.3 If the employer sells the property 3 years after the issue of the 'Final Completion Certificate', in the absence of a stipulation to the contrary in the agreement of sale between the employer and the buyer, the employer remains liable (*in common law*) to the buyer for latent defects no matter when those latent defects manifest itself.

[Note: In this example the buyer was not a party to the JBCC agreement and is accordingly not bound by any of the limitations that may be contained therein.]

4.4 If the latent defects manifest itself within the 5-year contractual period mentioned in 4.2 above and the buyer issues a summons against the employer (*as seller*) within the remainder of the period, the employer will of course have recourse against the contractor. If the defects manifest thereafter then the employer is liable without recourse to the contractor. As mentioned above the anomaly is then - was the employer aware of the defect or not?

4.5 The only proviso is that the buyer's claim against the employer will prescribe within 3 years after the defects are discovered or should have been discovered by exercising reasonable care or is stayed for such a

time as the seller wilfully prevented the purchaser from discovering the existence of the defect, and for the buyer to succeed he must issue a summons within the 3-year period.

4.6 In this instance the employer *could* be protected by the traditional 'voetstoots' clause which in general states that the seller would not be responsible for any latent or patent defects or answerable for any warranties either express or implied and that the purchasers confirmed that they had satisfied themselves as to the condition of the property personally or by a duly authorised person on their behalf.

5. The Consumer Protection Act (CPA)

[Note: A discussion of the CPA warrants extensive research. The short summary that follows covers only a small part thereof. In terms of the question posed (is the contractor still liable?) it is deemed that this is a once off sale by the employer of his property to another owner.]

5.1 The CPA provides for fundamental consumer rights and the protection of the *vulnerable consumer*.

5.2 Many sale agreements fall outside the ambit of the CPA; -

5.2.1 where the consumer is a juristic person with an asset value or annual turnover, at the time of the transaction that equals or exceeds the threshold value as determined by the Minister of Trade and Industry;

5.2.2 where goods are supplied other than in the ordinary course of business; and

5.2.3 (*importantly*) where the transaction is - a 'once-off' transaction.

5.3 In such instances the common law position prior to the commencement of the CPA will remain.

5.4 Accordingly if the buyer in the example is a natural person/private individual (*in other words a 'consumer'*) the CPA in general affords the consumer:

5.4.1 Additional protection against 'unfair, unreasonable or unjust' contract terms (*such as to waive his common law right to claim for latent defects*); and

5.4.2 A statutory implied warranty of quality which would include a warranty on the part of the contractor in our example above.

5.5 The buyer will then be in the fortunate position that he could claim from either the employer or the contractor.

5.6 Generally, in common law the seller could then be protected by the voetstoots clause (*being a clause to the effect that the seller is not responsible for defects and the property is sold 'as it stands' or 'with all its faults'*). The effect is that the seller does not take the risk in respect of any defects but - as mentioned before - is liable for misrepresentations such as the non-disclosure of a known defect.

5.7 With the principles mentioned in 5.2 above in mind (*the CPA not being applicable to once-off transactions or where the consumer is a juristic person with an asset value or annual turnover, at the time of the transaction that equals or exceeds the threshold value as determined by the Minister of Trade and Industry*) where a home owner for example wants to sell his residential property or even vacation property and sells it once-off or not in the ordinary course of his business, the common law position discussed above will be applicable.

6. The liability of the contractor

With all of the above in mind the question remains - is there any basis upon which the contractor could still be held liable?

6.1 If in the context it is found that the CPA is applicable (*where for instance the employer/seller is the developer of a complex and he has sold but one of a number of properties which is then on-sold*) then neither the employer/seller nor the contractor can escape liability.

6.2 If in the context the CPA is not applicable then in the absence of a direct contractual relationship between the contractor and the ultimate purchaser, the contractor can only be held liable in delict - and then only if the ultimate purchaser can allege and prove that under the particular circumstances the contractor owed the ultimate purchaser a *duty of care* to the effect that the construction works would be carried out with professional skill and care and that the contractor negligently failed in this duty as a result of which the ultimate purchaser suffered damages.

6.3 If the existence of the duty of care cannot be proven, then the required wrongfulness of the contractor's ostensible negligent conduct would be absent and the liability for the loss would fall away. If the duty of care can be proved then additionally negligence on the part of the contractor must also be proved.

COMMENT

The discussion above on latent defects after transfer of ownership is not a JBCC contractual issue as such. Contractually there will be two other source documents that determine this transfer:

1. The purchase agreement or "offer to purchase" of which there is no standard form but is provided by the relevant sales agency
2. The Title Deed

These documents strive to transfer all benefits to a new owner and "its successors in title or assigns", with the latter probably be the dominant one in a court case.

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