Defective Construction Work
and the Project Team
To Mandy and Tom
Long after I am gone, this book, like my love for you, will endure.
Defective Construction Work and the Project Team

Kevin Barrett
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Maison D’Or took three years to build, but for a further three years stood empty above the harbour of St Aubin, where the hillside properties enjoy wonderful views across the bay. It no longer stands there. Its short life ended when the man who lavished more than £1.7 m on its construction chose to demolish it and start again. He considered it so badly designed and built that he sued his builder, his architect, his structural, electrical and mechanical engineers, his quantity surveyor and his project manager for compensation. He wanted £3.6 m for the cost of demolition and rebuilding, or £2.5 m for the cost of repairing the individual defects. After a trial lasting 24 days the court issued a 156 page judgment awarding £600,000 against some of the defendants.

The judgment in McGlinn v. Waltham Contractors (2007) tells a sorry tale of construction procurement, and is a painful reminder of the importance of putting the legal relationship with the project team on to a sound footing, and of the inevitability that those who suffer harm – whether physical, financial or aesthetic – as a result of poor building work will look to the project team for compensation.

Only by properly discharging their respective – and sometimes overlapping – responsibilities will the individual members of the project team avoid liability when defects occur. This book sets out to examine those responsibilities, and the consequences if they are inadequately discharged.

For convenience, the masculine has been habitually used in this book, but this is done in the spirit of section 6(a) of the Interpretation Act 1978, which provides that ‘words importing the masculine gender, include the feminine.’
# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CDM regulations</td>
<td>Construction (Design and Management) Regulations 2007</td>
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<tr>
<td>CPR</td>
<td>Civil Procedure Rules</td>
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<tr>
<td>HGCRA</td>
<td>Housing Grants, Construction and Regeneration Act 1996</td>
</tr>
<tr>
<td>ICE conditions</td>
<td>ICE Conditions Measurement version, 7th edition</td>
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<td>JCT</td>
<td>Joint Contracts Tribunal</td>
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<td>JCT DB conditions</td>
<td>the JCT Design and Build contract 2007</td>
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<td>JCT conditions</td>
<td>the suite of contracts published by the Joint Contracts Tribunal</td>
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<td>JCT C/CMA conditions</td>
<td>the JCT Construction Management Agreement 2007</td>
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<tr>
<td>JCT SBC conditions</td>
<td>the JCT Standard Building contract 2007</td>
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<tr>
<td>JCT SBCSub/C</td>
<td>JCT Standard Building Sub-Contract Conditions 2007</td>
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<tr>
<td>MF/1 conditions</td>
<td>the Model Form of General Conditions for use in connection with home or</td>
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<tr>
<td></td>
<td>overseas contracts for the supply of electrical, electronic, or mechanical</td>
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<td></td>
<td>plant with erection recommended by the Institution of Mechanical Engineers,</td>
</tr>
<tr>
<td></td>
<td>the Institution of Electrical Engineers and the Association of Consulting</td>
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<td></td>
<td>Engineers 2000 edition (Rev 4)</td>
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<tr>
<td>NEC3</td>
<td>The New Engineering Contract, 3rd edition</td>
</tr>
<tr>
<td>RIBA</td>
<td>Royal Institute of British Architects</td>
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<tr>
<td>RIBA CE/95</td>
<td>RIBA Conditions of Engagement for the Appointment of an Architect 1995</td>
</tr>
<tr>
<td>RIBA conditions</td>
<td>RIBA Standard Conditions of Appointment for an Architect (CA-S-07-A) 2007</td>
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<td>Architect (S-Con-07-A)</td>
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<tr>
<td>RIBA Schedule</td>
<td>RIBA Schedule of Role Specifications (SS-RS-07) 2007 edition</td>
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<td>TCC</td>
<td>Technology and Construction Court</td>
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Chapter 1

Definition and Categorisation of Defects

In 1987 Mr Steven Forsyth discovered that his recently constructed swimming pool was shallower by 9 inches than the specification called for. Despite the workmanship and materials conforming in all other respects with the quality requirements of the specification, the pool was nonetheless, in law, defective. Mr Forsyth sued for compensation, and ultimately found himself before the House of Lords, in Ruxley Electronics & Construction Ltd v. Forsyth (1995), where he lost an appeal about the correct approach to the assessment of compensation. Mr Forsyth’s complaint about the depth of his pool serves as an illustration that defects can encapsulate more than just bad workmanship and materials, and that quality is just one category of defective work. It is useful therefore to have a general definition of the term ‘defect’, to understand what is meant by ‘patent’ and ‘latent’ defects, and to appreciate the impact of discoverability on the status and legal consequences of defects.

1.1 Definition of ‘defect’

One hundred years before Ruxley the term ‘defect’ was defined, in Tate v. Latham & Son (1897), as meaning ‘a lack or absence of something essential to completeness’. The Tate definition arose in the context of a workman’s compensation claim under the Employers’ Liability Act 1880. In that case a fence intended to protect the operator was missing from a dangerous piece of machinery, so it was defective. Tate is just one of a number of attempts over the years to define the term ‘defect’. Other examples include McGiffin v. Palmers Shipbuilding & Iron Co Ltd (1882), where an obstruction protruding from a furnace (but which was not a part of it) did not render the furnace defective; Yarmouth v. France (1897), where it was decided that a defect in an item of plant included ‘anything which renders the plant, etc. unfit for the use for which it is intended, when used in a reasonable way and with reasonable care’; and the curious decision in Jackson v. Mumford (1902), which decided that the word ‘defect’ did not include a design defect.

The Tate definition is not sufficiently all embracing – after all, building work can be complete but nonetheless defective – and the Yarmouth definition is potentially too wide, as a building can be unfit for use, yet not be defective in the sense that someone can be held responsible for its
unfitness. Further, the *Jackson* decision should be treated with some caution. It was not followed – although, to be fair, it was not cited – in *Baxall Securities Ltd v. Sheard Walshaw Partnership* (2002), where the Court of Appeal considered that a flaw includes design as well as workmanship. So, *Jackson* (which concerned the interpretation of an agreement) is, perhaps, one of those cases that should be treated as confined to its own special facts – a recurring judicial euphemism for binding decisions that do not sit easily with established principles or a prior line of authority.

If the cases do not provide a complete definition of the term ‘defect’, then the dictionaries cannot be criticised if they do no better. For example, *Black’s Law Dictionary* (7th edition) somewhat enigmatically defines ‘defect’ as meaning ‘an imperfection or shortcoming’, without identifying how the imperfection or shortcoming should be judged.

The elusive definition is matched only by the variety of terms used to describe defects. These include: disconformity, non-conformity, non-compliant and incomplete. The phrase ‘temporary disconformity’ is also encountered, and has a special significance (see Chapter 11, section 11.1), as does the commonplace term ‘snagging’ (a much misused term, but one that generally refers to work that is in fact – and in law – defective) (see Chapter 12, section 12.3). None of these labels throws any additional light on the meaning of the term ‘defect’.

It is convenient then to return to Mr Forsyth’s pool. The insufficiency of the pool’s depth meant that it did not conform to the specification. The builder was contractually obliged to achieve the requirements of the specification. As he had not done so, he had breached his contract with Mr Forsyth. So, in the context of building work, a more useful definition of the term ‘defect’ is simply to say that something that does not conform to the agreed specification is defective.

Mr Forsyth’s pool enjoys some small degree of notoriety for reasons that will be dealt with later, but for the moment the *Ruxley* decision serves simply to demonstrate that defects come in many guises, as do the terms used to describe them. These guises are essentially qualitative, but sometimes they are concerned with whether defects are patent or latent, and therefore relate to discoverability.

### 1.2 Qualitative defects

Qualitative defects can be categorised in various ways, including:

- work (including design) or materials not of acceptable quality;
- work (including design) or materials that are in themselves of acceptable quality, but which nonetheless do not conform with the specification (as occurred in *Ruxley*) or the design brief; and
- work that is incomplete.
Builders must complete the agreed work using materials and workmanship conforming to the contractual requirements. If they fail to provide anything necessary to bring about completion in accordance with the contractual requirements then the work is – latent defects excepted – incomplete. In this respect the third category (i.e. incomplete work) may encapsulate the first and second categories if the non-conforming work or materials are discovered before completion of the works. Defects falling into any of these three categories may give rise to claims against some or all of the project team.

1.3 Patent/latent defects

Defects, whatever their qualitative nature, may be patent or latent. The importance of this distinction is dealt with in section 1.5 below, but broadly the consequences may differ depending on whether defects are patent or latent. The fact that there may be different consequences means that it is important to be able to decide when a defect is patent and when it is latent.

The starting point, in terms of the case law, is Yandle & Sons v. Sutton, Young and Sutton (1922), which decided that a defect is patent if it is open or visible to the eye. But later, in Sanderson v. National Coal Board (1961), a defect was said to be patent if observable, whether or not actually observed.

Latent defects, on the other hand, are those that are hidden and, as a corollary to Sanderson, not observable. In Baxall it was explained that whether a defect is latent is determined by reference to the inadequacy of the work or materials: ‘The concept of a latent defect is not a difficult one. It means a concealed flaw. What is a flaw? It is the actual defect in the workmanship or design . . .’

But when is a concealed flaw in workmanship or design (and for that matter materials) to be regarded as observable even though not actually observed? Sanderson confirms that answering this question is an exercise that must be approached objectively. For example, in Riverstone Meat Pty Ltd v. Lancashire Shipping Company Ltd (1961) – a case that concerned the carriage of goods by sea – it was decided that defects were not latent if discoverable by the exercise of due diligence. Similarly, in Prudent Tankers Ltd SA v. The Dominion Insurance Co Ltd (The Caribbean Sea) (1981) – a case that concerned the terms of a marine insurance policy – the same conclusion was reached. Subsequently, in Rotherham MBC v. Frank Haslam Milan & Co Ltd and M. J. Gleeson (Northern) Ltd (1996) – a building case concerning the suitability of materials – the term latent defect was described as meaning ‘in its widest sense a . . . failure in work or materials to conform to contract in a respect not apparent on reasonable examination’. In this case it was not appreciated by the specifier or builder at
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the time of specification or supply – and could not have been ascertained by the customary examination available – that the specified materials suffered from an inherent characteristic that rendered them unsuitable for the purpose for which they had been specified. The defect was therefore truly latent.

1.4 Reasonable examination

In Baxall it was decided that: ‘a defect is not latent if it is discoverable by the exercise of due diligence whether or not due diligence was in fact exercised.’ This approach, while consistent with the earlier authorities, gave rise to a curious result when applied to the facts of Baxall – where the Court of Appeal had to decide whether an architect who had designed a warehouse was liable in the tort of negligence (see Chapter 6) to a subsequent owner of the warehouse for loss caused by flooding when the warehouse drainage system was overwhelmed during a storm.

The defect that caused the flood in Baxall was found to have been discoverable upon a competent inspection by a third party surveyor advising a subsequent owner prior to purchase of the warehouse. The defect was found to have been patent because it could, with reasonable care, have been discovered by the surveyor before the flood occurred. In these circumstances the court decided that the architect was not liable to the subsequent owner, who could and should have discovered the defect and therefore have done something about it before the storm occurred.

Some caution must be exercised, however, about the Baxall decision, which has been called into question by the subsequent decision of the Court of Appeal in Pearson Education Ltd v. Charter Partnership Ltd (2007). This latter decision exposes the limited applicability of the ‘reasonable examination’ aspect of the definition.

In Pearson the court of appeal carefully examined the underlying basis of Baxall, and concluded that it could be justified only on one of two possible bases either: (a) that no duty of care arose; or (b) the chain of causation was broken, in respect of those defects that a reasonable examination would reveal if it was reasonable to expect a prospective occupier to inspect the premises before going into occupation. However, the court, in Pearson, declined to adopt either justification. It is important to note, in this respect, that the Pearson court could not overturn Baxall (as the Court of Appeal cannot overturn its own decisions), so it distinguished it on its facts instead. Nevertheless, in so doing the court commented that it did not regard it as fair, just or reasonable that an architect charged with producing a safe design should be absolved from his failure to do so on the ground that someone else could reasonably be expected to discover the shortcomings in his design (but didn’t). Further,
the court in *Pearson* was unable to extract any rational justification for the failure to carry out a proper inspection doing any more than amounting to contributory negligence rather than breaking the chain of causation. The conclusion in *Pearson* was that there was no reason for the architect to expect that an inspection would be carried out by a prospective occupier that would reveal the design defect, and there was no reason why the prospective occupier should have investigated the adequacy of the rainwater system in the absence of knowledge that it had failed before.

The attack on the correctness of *Baxall* does not undermine the definition of patent defects that it enunciated. Rather it shows that the mere fact that a defect may be patent to a third party does not of itself absolve the wrongdoer architect or builder from liability for failing to detect it before completion. In these circumstances the *Baxall* definition is right for the purpose of deciding whether a defect is patent or latent, but not necessarily for the purpose of deciding whether an inspection should be undertaken.

The *Baxall* case also makes the point that it is sometimes necessary to make a distinction between defects in workmanship or design (and, presumably, materials) and the danger they present. This distinction may, however, mean little more than that, if a reasonable investigation does not reveal the true nature of a defect, then the danger it presents remains latent. This is what occurred in *Nitrigin Eireann Teoranta v. Inco Alloys Ltd* (1992), where cracking to recently installed pipework was discovered and repaired in 1983. Unfortunately, despite reasonable investigation the true nature of the cause of cracking – and the danger it presented – went undiscovered, so that the real defect was not rectified. The defect subsequently caused an explosion that damaged adjacent property. By the time proceedings were issued the contractual limitation period had expired, thus barring a claim under the contract, so a claim was pursued in tort. The defendant insisted that the cause of action accrued when the cracking first appeared, so that the tort claim was also barred. The injured party contended that the cause of action accrued when the explosion occurred, and that the proceedings were therefore issued within the limitation period. The court concluded that although the injured party ‘may have known that there was damage in 1983 . . . they were unaware of the cause . . . despite reasonable investigation and accordingly were not aware of the defect.’ So in this instance the mere discovery of some damage was not enough to alert the purchaser as to the true nature of the problem, and therefore did not start time running – or indeed break the chain of causation – for the purposes of a claim in tort (see Chapter 6).

What constitutes reasonable examination and when it should take place – where these are relevant issues – depends on the circumstances, but it is not necessarily limited to visual inspection. It may include