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The ‘Maintenance’ Period

Fixing defects and minor omissions during the *Maintenance Period*, also known as the ***Defects liability period***, and the *Defects Notification Period* \* [**NZS 3910**\* terminology] is a common practice.

The original reasoning for inserting such a period into a construction contract as an express term is possibly forgotten in much of the industry. It originated in the UK where large numbers of projects employ ‘wet’ trades including brickwork, blockwork, internal plastering, external rendering, and concrete poured on site. Such work contains ‘free water’ being added to improve workability rather than to allow the necessary chemical reactions to take place so when a cement based mixture dries out it shrinks and cracks. Timber also dries out and shrinks as it adapts to a controlled occupied environment. Various mechanical devices such as door locks and other hardware also ‘bed in’ and may require adjustment or replacement.

The concept developed of specifying a period following completion of the Contract Works during which this ‘adjustment’ process could occur, and at the end of the period the work would be inspected and any shrinkage cracks or defective equipment could be attended to.

If this had happened without an express term that allowed the contractor reasonable access to attend to the various minor defects and omissions, they would be interpreted as breaches of contract, and any disturbance that rectifying them caused the occupants of the building would allow a claim for damages as compensation. As it is, the contractor cannot insist on having access to the buildings to rectify the work during normal working hours, but must expect to be flexible to fit in with the occupants normal activities and may have to carry out rectification at night time or week-ends for example.

The period itself is usually three months for building work but 12 months for mechanical installations especially air conditioning which needs to be balanced to suit both summer and winter conditions. The express term in the contract is usually written to the effect that at the end of the specified period the Contract Works are inspected by the building owner’s representative, usually an architect, and the contractor has to attend to whatever needs attention, as quickly as possible. In practice work is attended to during the period but the full term is allowed to run to let defects particularly shrinkage cracks, develop.

This process does not alter the contractual position that Practical/Substantial Completion means just that, everything is complete. As set out In **NZS 3910**:

***NZS 3910 10.4 Practical Completion Certificate***

***10.4.1***

*Practical Completion is that stage in the execution of the work under the Contract when the* ***Contract Works*** *or any Separable Portion* ***are complete except for minor omissions and minor defects****:*

1. *Which in the opinion of the Engineer* ***the Contractor has reasonable grounds for not promptly correcting****;*
2. *Which do not prevent the Contract Works or Separable Portion from being used for their intended purpose; and*
3. *Rectification of which will not prejudice the convenient use of the Contract Works or any Separable Portion.*

As highlighted above the Contractor requires *“reasonable grounds* *for not promptly correcting”* anything that can be left over for later attention, which would not include items that had been overlooked or items that had been missed and not ordered in good time for example.

Many contractors suffer from a misconception that if something is not complete but it does not stop the Principal occupying the Contract Works, then it has a right to deal with it later. This is incorrect.

What typically happens is that the Contractor is unable to complete on whatever day is agreed for Practical Completion to occur, the Principal is anxious to move in, so it does, and a list of incomplete work is prepared.

A ‘**snagging’** list is therefore prepared at the start of the maintenance period and a second one at the end of the period showing what is still left to complete and shrinkage cracks and the like which manifested *during* the period. The Contractor should analyse the list and collect together work that is the responsibility of subcontractors, separate out work that is the individual responsibility of each one, and forward it to them for their attention.

A systematic approach to dealing with such issues is needed, and sometimes it goes well beyond what is “*minor*” **[[1]](#footnote-1)**. I ‘inherited’ a building in Bloomsbury after its completion for occupation by the University of London, its School of Oriental and African Studies – SOAS [photo below], which took nearly two years to build and took me as long to arrange the ‘maintenance’ work on it, so as to be able to finally hand it over complete. Admittedly it was not my primary concern, I just happened to have other work in Central London and ‘drew the short straw’ for this one. The problems on the project were major and unique to the extent that I have never come across anything quite like that job since, nor would want to. The blame for the problems was laid at the feet of the site supervisory staff who were all dismissed, too late to avert the problems they left behind them unfortunately.



On the typical project at least a month before Practical Completion a list needs to be drawn up to itemise what needs to be completed or rectified, subcontractors notified accordingly, and more pertinently, progress toward final completion closely monitored and ‘chased up’. The telephone is more effective at getting action and restricting emails to ‘follow up’ confirmation. Text messages are a definite no-no.

The Site Manager

The key to quality on construction work is in the hands of the site supervisory staff, especially the person acting as agent for the company with the contract to build the Contract Works, known as the Site Manager [the title varies between companies] but who more properly in law is the Site Agent under the agent – principal legal relationship. The person who administers the contract from ‘head office’ also shares responsibility for not monitoring the situation on site more closely, and perhaps placing too much reliance on what the site ‘agent’ says about the work being done on site. A typical problem is a failure to physically monitor the work of subcontractors and being over-reliant on a contractual relationship which makes any departure from the specification the subcontractor’s problem when in fact it is the main contractor’s problem because the main contractor is responsible for everything that happens on site.

Two issues that are major contributors to widespread shoddy work currently being produced in New Zealand, especially related to timber frame constructed ‘leaky’ buildings are: **[1]** lack of effective communication; and **[2]** inadequateattention to the work being done on site by so called ‘supervisory’ staff.

Operation of **NZS 3910** **Defects Notification Period**:

***G Section 11 Defects Liability***

***G11.1 Defects Notification Period***

*The Defects Notification Period establishes the date by which the Engineer may notify the Contractor …of…defects…to be remedied to allow…issue of the Final Completion Certificate…The default three Months Defects Notification Period may be amended…the Defects Notification Period for building services is commonly 12 Months to allow operation through a full range of climatic conditions. Upon expiry of the Defects Notification Period the Engineer is required…to certify…the release of all… retention monies.*

***G11.2 Remedying of defects***

*The Engineer may notify the Contractor of defects…during, but not later than, 5 Working Days after the end of the Defects Notification Period. The Contractor shall remedy any such defects within 5 Working Days of receipt of the Engineer’s notice…If the Contractor does not remedy the defects… the Engineer may arrange…others to* [do] *the work at the Contractor’s Cost…remedial work includes:*

***(a)*** *Loss or damage caused by the Contractor after Practical Completion…****(b)*** *Any outstanding as-built drawings and operation and maintenance manuals…and* ***(c)*** *Minor omissions and minor defects notified by the Engineer…for later completion* [when] *certifying Practical Completion…*

***G11.3 Final Completion Certificate***

*…The Engineer shall issue the Final Completion Certificate after the Defects Notification Period has expired and when…:* ***(a)*** *The Contractor has remedied all defects…the Engineer notified…;* ***(b)****…any… minor omissions or minor defects…the Engineer authorised for later completion…;* ***(c)*** *The Contractor has submitted all Producer Statements required by the Special Conditions; and…****(d)****…in final form the as-built drawings and operation and maintenance manuals… The Final Completion Certificate triggers…release* [of] *any remaining defects liability retention monies; and…one Month for the Contractor to submit its final payment claim.*

***G11.4 Effect of Final Completion Certificate***

*…issue of the Final Completion Certificate does not…affect the Contractor’s liability in respect of any work which has not been carried out by the Contractor in accordance with the Contract.*

For full details refer to **NZS 3910**

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# Defects liability period [DLP] [legal implications]

# <http://www.out-law.com/en/topics/projects--construction/construction-claims/defects-liability-periods/>

Definition: A **defects liability period** is a set period of time after a construction project has been completed during which a contractor has the right to return to the site to remedy defects. A **typical defects liability period** lasts for 12 months [when mechanical and electrical services are a significant part of the Contract Works, when air conditioning needs balancing for both summer and winter periods for example, otherwise three months is common].

Purpose**: Defects liability period**s - also known as *rectification provisions* - can benefit both parties.

For the contractor, it is likely to be more economical and efficient for it to carry out remedial works itself than to pay the costs of another contractor hired by the employer. From the employer's perspective, it will not need to hire an alternative contractor to carry out the work, or to carry out the work itself and reclaim the cost. The employer will also not run the risk that any warranties provided by the original contractor may be affected by a third party carrying out works on the site.

If there is a contractual right for the contractor to rectify defects, and the employer either does not notify the contractor that rectification is needed or refuses access to the site, then the employer may be in breach of contract. Case law illustrates, however, that the contractor will not normally be *'let off the hook*' if this happens. The employer will still have a claim for the cost of rectifying the defects, but the claim is likely to be limited to the amount it would have cost the original contractor to carry out the works. It will not be able to claim for remedial works or working methods found not to be strictly necessary.

Employers should therefore give careful consideration to the provisions in the contract before hiring a new contractor to carry out remedial works. This is especially important if the contract stipulates that the employer must notify the original contractor that remedial works are needed before it can make a claim for recovery of any costs of rectification.

**What if there is no contractual provision for defects rectification?**

If there is no contractual provision, the contractor does not have the right to return to the site to rectify defects. However, the employer's general duty to mitigate its losses before making a claim by taking reasonable steps to avoid or reduce them means that its damages may be limited if it refuses to allow the contractor to rectify defects – especially where the defects are relatively minor. The relevant test is whether the employer has failed to act reasonably. If the contractor's original work was of a low standard then the employer can argue it was reasonable to refuse to let the same contractor return to site. In deciding whether it is reasonable to refuse to let the contractor return to the site the court can take into account a breakdown in the relationship between the two parties.

**Are defects liability provisions exclusive?** Defects liability provisions are not an exclusive remedy. Unless the contract clearly states there are no other remedies available under the contract, the contractor remains liable for breach of contract.

**Conclusion**

**Defects liability period**s will only arise if they are included in the contract. Contractors therefore need to be aware that they do not have the automatic right to return to the site to fix any defects. Employers should give careful consideration to the wording and requirements of defects rectification provisions when considering hiring another contractor to fix the original contractor's mistakes.

1. See **G10.4 Practical Completion Certificate** for dealing with incomplete items not of a “*minor*” nature under

 **NZS 3910** [↑](#footnote-ref-1)