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Contractual liabilities post completion

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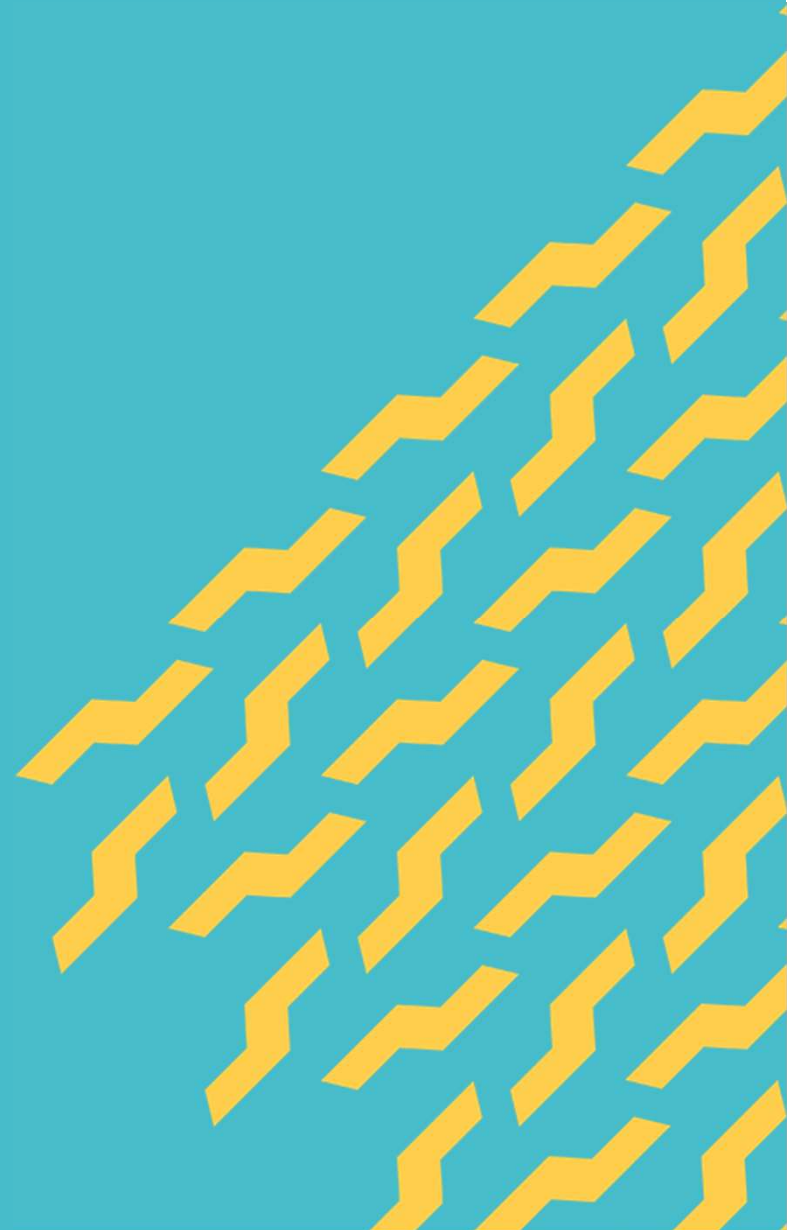
Structure of Session

- Contractual liabilities
- The lifespan of contractual liabilities
- Significance of Practical Completion/Take Over
- Defects – patent and latent
- Contractual certificates – the implications
- The standard forms: JCT; NEC4; FIDIC and IChemE
- Limitations of liability
- Q&A

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Contractual Liabilities



Contractual Liabilities

- Express contractual obligations
- Implied contractual obligations
- Statutory Requirements
- Common law / Civil law
- Tort

Timeline of contractual liability

Subject To Contract



Pre contract negotiations

Contract

Snagging / Punch List

Final Certificate

Design life requirements?

Letter of intent

Completion / Take Over

Defects Notification Period

Statutory limitations of liability
6 / 12 years



Limitation Act 1980

Practical Completion / Take Over



Significance of Practical Completion

- Employer takes possession of the site / works
- Contractor's insurance of the works ends / the risk of loss or damage to the works transfers to the Employer
- Contractor's exposure to delay damages ends
- Contractor's obligation to undertake variations ends - *TFW Printers Ltd v Interserve Project Services Ltd* [2006] EWCA Civ 875
- 1st instalment of retention monies release
- Performance bond can release
- Triggers the defects rectification period
- Can commence the final account
- Snagging/punch list issued alongside the practical completion certificate

Practical Completion

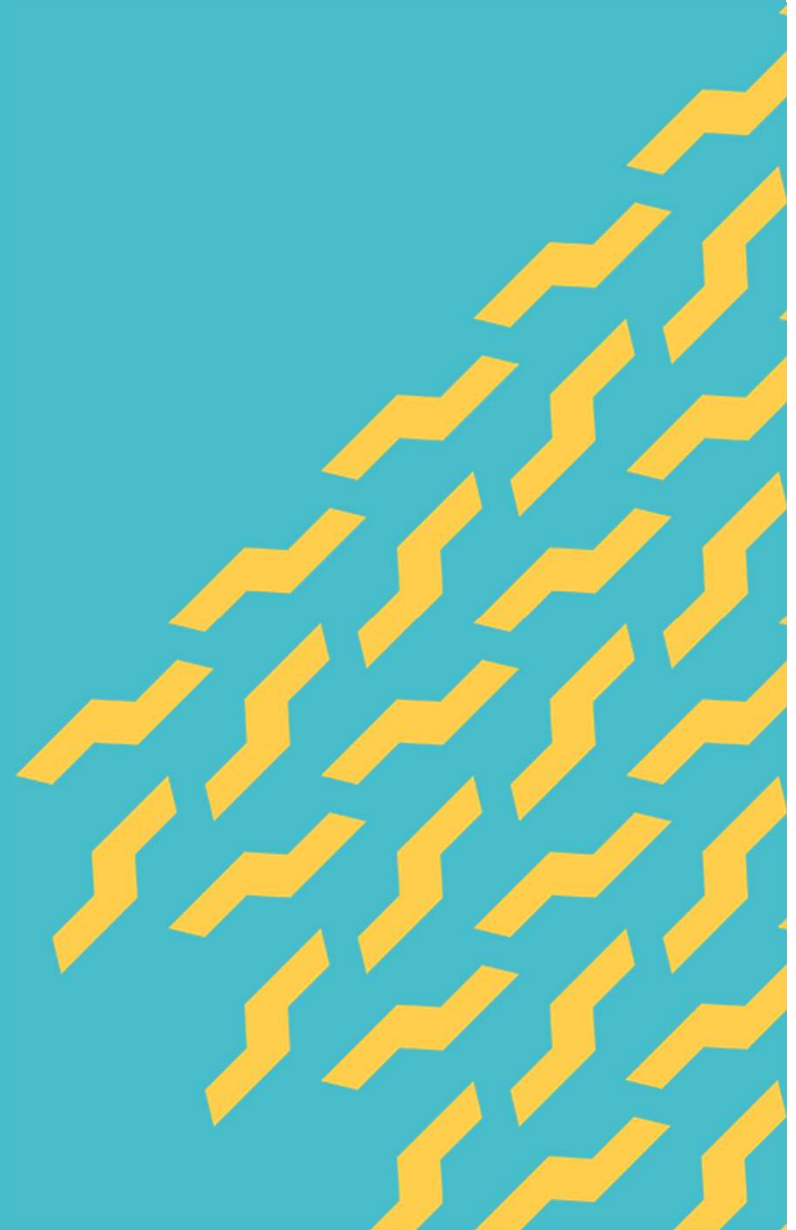
- What is Practical Completion
- *Mears Ltd v Costplan Services (South East) Ltd* [2019] EWCA Civ 502
 - practical completion is easier to recognise than define
 - the existence of latent defects cannot prevent practical completion
 - the works are completed and free from patent defects, other than ones to be ignored as “trifling”
 - ‘trifling’ – is a matter of fact and degree, measured against the purpose of allowing the Employer to take possession of the works and to use them as intended
 - for patent defects there is no difference between work not completed and defective work which needs to be remedied
 - the fact a defect is irremediable does not necessarily mean that the works are not practically complete (*Mears Ltd v Costplan Services (South East) Ltd* [2019] EWCA Civ 502)
- Preconditions to ‘Practical Completion’ express requirements: collateral warranties, as-builts, O&M manuals, health & safety file
- Watch out for ‘deemed’ completion/take over

FIDIC 2017 (Red/Yellow/Silver)	JCT 2016 Design & Build	NEC4 (ECC)	IChemE Red Book
<ul style="list-style-type: none"> • Taking Over, not defined. • Clause 10.1 (i) the Works are completed in accordance with the Contract (including Tests on Completion), (ii) as-builts / training/ O&M Manuals • Minor outstanding work and defects allowed which do not substantially affect the safe use of the Works for their intended purpose • Yellow/Silver Books, Contractor must complete any work that is necessary to fulfil the ER • Taking-Over Certificate issued by the Engineer • Clause 10.1 contains a deemed Take Over provision. 	<ul style="list-style-type: none"> • 'Practical completion' not defined. • Clause 2.27 requires practical completion of the works and delivery of as-builts and CDM obligations in relation to the health and safety file • No snagging mechanism provided for • Practical Completion Statement issued by the Employer 	<ul style="list-style-type: none"> • Uses the expression 'Completion' • (i) Contractor has done all the work which the Scope states it is to do by the Completion Date; and (ii) has corrected notified defects which would prevent the Client from using the Works or others from doing their work • Clause 32.1 Project Manager certifies Completion within 1 week 	<ul style="list-style-type: none"> • Taking Over, not defined • Clause 32 – when substantial completion of construction is achieved (including the passing of any tests) completion is certified by the PM • Clause 33 – Contractor starts the takeover tests witnessed by the PM. • PM certifies takeover when all tests are satisfied and issues the Take Over Certificate.

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Defects



Defects

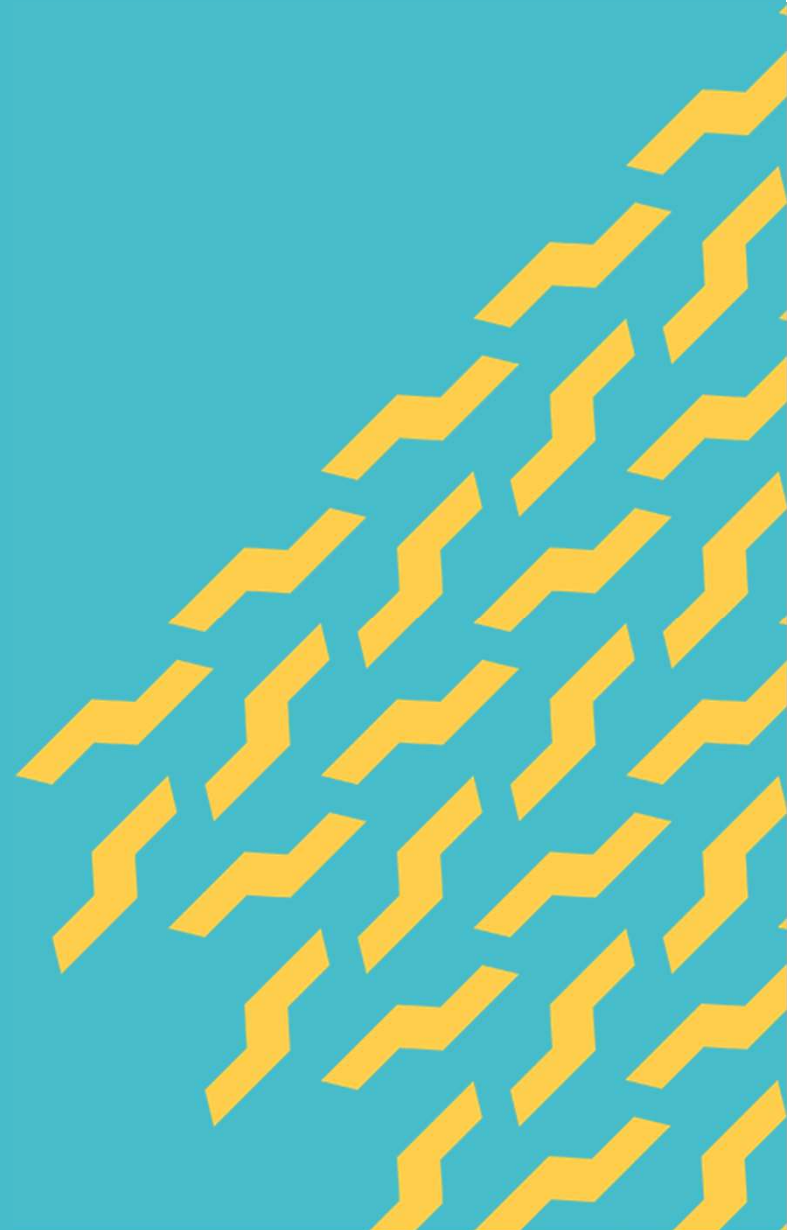
- What is the definition of a defect?
- Patent defects
 - defects apparent or discoverable upon reasonable inspection.
 - just because a defect is not discovered, this does not mean it is latent.
- Latent defects
 - defects concealed which may not manifest for many years
- Defect liability period - 6/12 months from completion or take over. Contractual requirement for the Contractor to remedy notified defects.
- Defects liability periods are not, unless clearly stated to be, an exclusive remedy for defects. The Contractor will remain liable for breaches of contract both during and after the defects liability period

FIDIC 2017 (Red/Yellow/Silver)	JCT 2016 Design & Build	NEC4 (ECC)	IChemE Red Book
<ul style="list-style-type: none"> Defect not defined Defects Notification Period (DNP), in which Employer is entitled to notify the Contractor of defects or damage to the works. Contractor is obliged to rectify all defects or damage notified—even if not caused by the Contractor. Treated as a variation and additional payment (Clause 11.2), including for any additional testing of the (Clause 11.6). If defect is not Contractor's responsibility, under the 2017 Red Book it must give prompt notice to the engineer. Contractor should make good a notified defect within a reasonable time Performance Certificate 	<ul style="list-style-type: none"> Defect not defined? Contractor is to make good any defect, shrinkage or other faults in the Works which appear within the Rectification Period due to any failure of the Contractor to comply with its obligations under the Contract. Contractor only obliged to do so if instructed. Once instructed must do so in a reasonable time. Once all defects have been rectified, the Employer issues a Notice of Completion of Making Good. Final Statement becomes payable. Clause 1.8 - The Final Statement does not absolve the Contractor from its ongoing (general) liability for defects. 	<ul style="list-style-type: none"> Defect is "(i) part of the works not in accordance with the Scope or (ii) works designed by the Contractor which are not in accordance with the applicable law or the Contractor's design accepted by PM. The Supervisor may notify the Contractor of a defect as soon as it finds it. The Contractor must also correct a defect even if it is not notified by the supervisor (Clause 44.1). Contractor must correct a defect before the end of the 'defects correction period' – Contract Data Part 1. If no defects notified, the Supervisor issues a Defects Certificate. Otherwise at the earlier of the last defects correction period or the date or when all notified defects have been corrected (Clause 44.3). 	<ul style="list-style-type: none"> Defect is "any work done or any Materials or the Plant or any part of it which does not comply with the Contract". Final Certificate is issued by the PM once the Contractor has made good all defects or the defects liability period for the plant has expired whichever is the later. Following the Final Certificate the Contractor has no right or obligation to do any further work to any part of the plant and the Final Certificate shall "constitute conclusive evidence in any proceedings whatsoever" that the Contractor has completed all plant and made good all Defects in accordance with his obligations under the contract. (Clause 38.4).

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Limitations



Limitations

- Limitation Act 1980 (as amended by the Latent Damage Act 1986) governs the time limits for bringing different types of legal claims
- Contractual Claims
 - Simple contract / signed underhand – 6 years from the cause of action (date of breach)
 - Deed – 12 years from cause of action (date of breach)
 - The cause of action for defects claims typically accrues at practical completion
- Tort Claims
 - 6 years from the cause of action (when damage suffered)
 - Latent defects: 3 years from the date the defect was discovered or discoverable, with a 15 year longstop from the date the negligent act occurred

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Any questions?



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Thank you

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