A construction contractor is usually liable to remedy defects in materials and/or workmanship which are apparent or patent for a limited period once a project has reached substantial or practical completion. This period is commonly known as the 'defects liability' or 'defects notification' period and will be stated in the contract. During this period, a construction contractor typically completes snagging. However, despite the expiry of the defects liability period under a contract, an employer's common law rights with respect to latent defects continue to apply. 'Latent defects' are defined as those defects which are not readily apparent or discoverable upon a standard inspection of the completed works. In other words, latent defects are concealed flaws; defects that exist, but are hidden at the time of completion.

Construction contracts commonly used in Ireland do not normally include any express reference to latent defects or state the period for which a contractor shall be liable for latent defects. In the absence of express contractual provisions, the common law regulates claims for latent defects. When a party suffers loss or damage arising from a latent defect to a building or structure, it may pursue damages by either suing in contract or tort (otherwise known as negligence), or pursuing claims under both the law of contract and negligence (known as 'concurrent liability').

Negligence

Either a builder or a designer may be found to owe another party a duty of care under negligence law, which allows a plaintiff to pursue an action in negligence in circumstances where it has no direct contractual relationship with a builder or designer. In Ireland, the time periods for commencing an action in either negligence or contract are set out in the Statute of Limitations, 1957. For an action in negligence, the time period is six years from the date that the cause of action arises.

A cause of action in negligence arises at the time when actual physical damage occurs or becomes manifest. If, as is usually the case with latent defects, there is a time lag between the negligent act which causes the defect and the damage resulting from the defect occurring, the cause of action will arise at the later date. Irish courts have held that the date at which the defect ought to have been reasonably discovered, or when the fact of the defect actually becomes known, is irrelevant for the purpose of determining when time begins to run. It is the time at which some manifestation of damage arises, and not the time at which damage is actually discovered, that time begins to run.(1) The position in Ireland can be contrasted with that in England and Wales, when the limitation period begins to run from the time that the defect is reasonably discoverable.

The Irish courts have distinguished between those properties which, due to the use of unsuitable materials, are predisposed to defects from completion and those properties in which manifest damage or defects come into existence at a certain point in time. In O'Donnell v Kilsaran Concrete the High Court held that although a structure may be predisposed to damage from the outset, due to the unsuitable use of materials during construction (pyrite in this particular case), such damage may in fact never occur. Time should be calculated as running from the date in which the unsuitable materials cause actual damage, rather than the date from which the unsuitable (and potentially defective) materials are incorporated into the structure.

In addition to damages which arise from the cost of making good defects in a structure, under Irish law a builder may also be liable to the subsequent purchaser of a dwelling house for damages where defects caused by the builder's negligence cause a
diminuation in the value of the house (ie, ‘pure economic loss’). In Ward v McMaster,(2) the High Court held that the builder of a house owed a duty of care to a subsequent purchaser to take reasonable care to avoid reasonably foreseeable decreases in the market value of the house due to latent defects caused by poor workmanship. Ward v McMaster demonstrates a broader approach by the Irish courts in relation to a builder’s duty of care in respect of pure economic loss than that of English decisions on the subject.

Contract

Liability for latent defects may also arise under contract law where a party has a direct contract with a builder or designer, such as a design appointment, a construction contract or a collateral warranty. A designer or contractor will be liable for latent defects under a contract for the period of time that it is liable for breach of contract (ie, either six years or 12 years, depending on whether the contract was executed as a deed).

Depending on the particular facts relevant to a claim for defects, a plaintiff may prefer to pursue a contractual claim instead of a negligence claim in order to take advantage of a longer liability period. This is particularly so where the contract was executed as a deed.

Pursuant to the Statute of Limitations, 1957, unless a contract expressly provides otherwise, time is deemed to run from the date of the breach of contract and not the date of occurrence of the damage. In most actions for breach of contract against a contractor, the date of the breach is held to be the date of practical completion under the contract, as it is at this point that a contractor is obliged to deliver a completed structure to the employer, free of defects (save for trivial ones to be rectified during snagging) and built in accordance with the contract (including the specification and contract drawings, among other things).

Contractual damages for defects will usually be calculated by reference to the cost of reinstatement, so as to put a plaintiff in the position it should have been had the defendant properly performed the contract in accordance with its terms from the outset. In contrast, damages for negligence are supposed to put a plaintiff in a position equal to that in which it would have been had the negligence giving rise to the defect not occurred. Courts, however, will take a sensible approach to awarding contractual damages; for example, courts will not order rectification where a defect is incapable of repair or the cost involved would outstrip the cost of the plaintiff purchasing an equivalent property or demolishing and rebuilding.

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Endnotes


(2) [1985] IR 29 (HC).

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