

# THE BUILDER'S LIABILITY BEYOND THE DEFECTS LIABILITY

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## ABSTRACT

This paper reviews the obligations of a builder after the expiration of the contracted defects liability period using relevant decided cases. The common areas identified as forming the bedrock of litigation pertain to structural and dimensional stability, freedom from damp, durability, adequate drainage, good waste disposal works, and effective service installations. Particular reference is made to walls, roofs, and services, which from the pilot study account for about 46%, 23%, and 17% respectively of the total defects attributable to the builder. It is concluded that the builder is responsible for defects arising from his product till the effluxion of reasonable time, except he establishes an element of contributory negligence.

Keywords:

## INTRODUCTION

Investors not only expect that their architectural dreams be translated to the letters of the contract, but also that the structure performs satisfactorily and without extra burden during the theoretical sixty-year life span. These aspirations draw sustenance from the legal relationships created with the builders.

A building contract arises when a builder tenders or offers to execute a specific project for a price that is accepted by the client. This agreement may be oral, but the English legal system requires that all transactions bordering on land be made in writing except if where there is consideration, percuniary or otherwise [1].

In the simplest form, a builder may contract to execute a project subject to the dictates of the client from time to time till completion. Here reimbursement will cover the cost and also include a fixed, a percentage, or a fluctuating fee. At the extreme end, the contract may be as elaborate as is spelt out by the JCT conditions. This will embrace the written agreement, the conditions of the contract, the specifications, the bills of quantities, and the drawings. In this ideal situation, the client, the architect, the engineer, the quantity surveyor, and the builder (including the sub-contractor(s), clerk of works, and site agent or foreman) may all be involved in the contract though the agreement is between the client and the contractor.

During the contract period, defects may arise due to poor design or workmanship particularly when supervision is questionable. These are often identified and rectified as the work progresses. However, of greater concern are the defects that manifest after the certificate of practical completion, marking the end of the defects liability period, has been issued. These defects may result in substantial economic loss to the client or the occupier of the property.

The fundamental issue at this juncture is whether the issuance of a certificate of practical completion after the defects liability period indemnifies the builder against future defects in its entirety. It may appear that the position of the law is not universal in this regard, but Tutesigensi and Moodley [2] observed that wherever common law applies such as in England and the United States, some conceptual generalizations on responsibility might be identified.

This paper focuses on those universally recognized duties or obligations of builders with respect to eventual defects. It identifies the common defects in the life of certified buildings and also examines the extent of the builder's liability. Decided cases are used to establish when the builder may be absolved, and for how long he may be held answerable for defects emanating from the structure he erected.

## FAILURE AGENCIES: A Review

Generally, building failure denotes a deviation from the as-built state or the attainment of a standard lower than currently acceptable or less than statutory provisions. The agencies responsible for failure may be broadly classified into three categories. The first category consists of defects that stem from bad

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workmanship from the design through the construction processes. Defects emanating from this group manifest as major cracks (dry shrinkage, plastic, settlement cracks etc.), uneven settlement, dampness, and deformation of elements or components such as sagging of roofs and slabs. These in extreme cases lead to collapse of entire structures or parts thereof [3].

The second class cover defects that may be due to the effects of unavoidable environmental agencies such as rainfall, solar radiation, wind, ground water, induced vibration, changing soil conditions etc. on building elements and components. Typical examples of failures arising from the listed environmental agencies include the fading and flaking of paintwork, dry and wet rot on timber members, carbonation of metallic roofing sheets, and the oxidation of ferrous metallic elements. It is important to note that good practice demands that the designer hence builder eliminates or as far as practicable mitigates the effect of these agencies. The dividing line between defects ascribable to poor design and those resulting from unavoidable exposure may be a subjective affair.

Aside poor workmanship and environmental agencies, the user is a third agency that influences deterioration. Defects arising from use may be construed in two perspectives. The first relates to those arising as positive or negative acts from the user, which compound or initiate deterioration. The second embraces all normal usage that would modestly result in fair wear and tear. Examples of defects that may not be seen as fair wear are broken components such as water closet bowls or cisterns and louver blades, damaged door locks, charred electrical sockets, and graffiti.

In a survey of residential buildings in South Western Nigeria (Figure 1), it was observed that 18% of the defects catalogued had to do with environmental agencies (Env.Agns.)

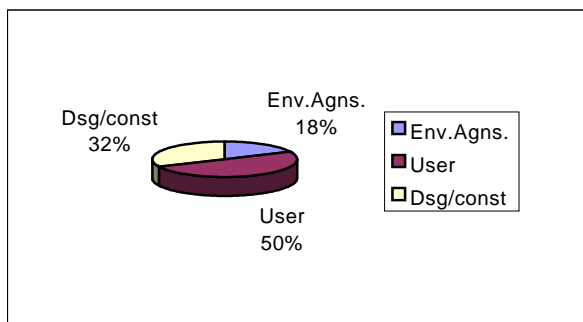


Figure 1. Pie-chart showing contribution of design/construction flaws to total future defects.

The users accounted for approximately 50% of the defects while 32% were associated with design and construction flaws [4].

In a recent pilot study in Lagos state (South Western Nigeria) a total of 135 buildings were randomly surveyed. This was based on stratified sampling designed to cover Victoria Island, and achieved by first dividing the neighborhood into five geographical wards. Using the layout map, central areas were marked from which point the first 27 buildings in each ward were drawn. Out of this number, 91 were with defects that the occupiers blamed on the builders in their response to the administered questionnaires. Table 1 gives the breakdown of the contribution of the different building elements to the total failure.

Table 1. Defects distribution in 135 buildings

Element	Observed Defects Frequency	Probability of Failure (Frequency/135)	Percentage Contribution To Total Defects (Frequency/99)
Foundation	6	0.0444	0.061
Floor	9	0.0667	0.091
Wall	45	0.333	0.455
Roof	23	0.170	0.232
Services	17	0.126	0.172
Total	99	0.733	1.000

Source: Field survey, Victoria Island, Lagos (2002)

It is pertinent from both the table and figure that the probability of defects arising from the builder and to some extent the architect is significant. The JCT and other standard forms of contract expressly protect clients in this regard by allowing 5% retention till the issuance of the final certificate. This protection does not seem to go beyond the defects liability period (DLP) because upon completion, the standard contract document compels a builder to make good any defect within three to six months period only.

### THE BUILDER AND THE LAW

Though it may seem that the issuance of a certificate of making good all the defects within the DLP concludes the contractual duties of the builder, yet, in the words of Bell [5], he remains liable for the work during his entire career. This liability stretches to the builder who delves into designs and specifications. He is held accountable for engineering and architectural services if by his training, the builder provides similar services. A builder's liability may be contractual (referring to the agreement) or tortious. Contractual liability is limited to parties privy to the contract whereas the

latter focuses on the element of negligence on the part of the builder, which injures another party.

In Schmauch v. Johnston (1976) it was laid down that a builder, in the execution of his duty, should do so in a good and workmanlike manner. Subjective as this may sound, there are statutory parameters which cut across all the activities of a builder and which may be used to determine the standard of his product. They may be summed up as implied warranties of fitness and habitability and usually form the basis of building regulations, codes, and bylaws. Builders are prima facie answerable for defects and injuries, hence damages, arising there from as they fall within their exclusive jurisdiction. These parameters include structural and dimensional stability, durability, freedom from damp, adequate drainage, service installations such as electrical mechanical, sanitary fitments and waste disposal installations.

### **Structural stability**

Builders are generally responsible for structural defects as indicated in Bolkrum v. Stabb (1975). This applies even to cases of defects occurring after the property has changed hands. In Barnes v. Mac Brown & Co. (1976), the plaintiff in 1971 bought a home built in 1967 from the original owners. On moving in, large cracks among other defects were observed around the basement walls. The plaintiff's suit against the builders for breach of an implied warranty of habitability which was earlier dismissed by a lower court was upheld on appeal notwithstanding the absence of privity between the builder and the subsequent vendee. The builder would however be relieved if the vendor makes himself the principal contractor behind the construction and disposition of the property as in the case of Le Blanc v. Ellerbee Builders Inc. (1975).

Where there is an expressed or implied warrantee as to fitness, a builder will be held liable for structural defects created even by a sub-contractor. In Overcast v. Baldwin (1976), the plaintiff recovered from the general contractor the cost of hiring a third party to underpin the foundation and fix the seriously cracked walls initially erected by a sub-contractor. The builder's liability is strict particularly where the defect in question is latent, except a plaintiff acquiesces beyond the prescriptive date after discovery. Thus, in the case of Austen v. Keck (1976), an architect, joined with the vendors, were sued in respect of a ceiling that collapsed twelve years after construction. The action was dismissed at first instance on the ground of having exceeded the five-year prescription of the statute of limitation. On appeal, the decision was reversed because the

statute could only run from when the plaintiff had knowledge or could have known of the defect. Punitive damages may also be awarded against a builder, who fraudulently conceals the existence of structural defects well known to him before handing over. This was illustrated in Mitchell Homes Inc. v. Tew (1975), though the onus of proof was on the plaintiff.

### **Dimensional and non-structural stability**

Builders have been held liable for defects involving dimensional changes and physical distortion of components such as floorboards even when the blame could have gone on the quality of the material or environmental agencies (Woods v. Langenbeck (1975)). In this case, discolored cement, a warped door, and uneven floorboards were charged against a builder. It is however important to note that courts are rather reluctant to grant damages in situations where the defects could have been detected before the issuance of the final certificate by the architect.

### **Durability**

In the construction parlance, this jargon is of relative import particularly because multiple processed materials form the basis of the final product. Of recent, attempts have been made to statistically determine the mean life span of the various components and elements that make up a building [6,7].

The position of the law in this regard is that failure may take place only after a reasonable period. What then is this reasonable period? Referring to the case of Tavares v. Horstman (1975), a developer was held liable for damages with respect to a septic tank that backed up a little after one year of construction- the intensity of use being reasonable. The decision of the court was that the septic tank system failed before the minimum life expectancy had been reached. This minimum life span was however not stated.

### **Freedom from damp**

The presence or ingress of moisture is as undesirable as any of the defects so far mentioned and has also been a source of litigation. Even where sub-structural elements are concerned, there is an implied warranty that the structure be free from dampness. The builder was held responsible for faulty construction of the basement in Elmore v. Blume (1975) (also Garcia v. Hynes & Howes Real Estate Inc. (1975)). Liability for damp extends to where rains cause the lower levels to flood (Green v. Green Acre Construction Co. (1975)).

The liability is as strict as that of structural stability even when the property has changed hands. Thus in Kentucky, a contractor disposed of a building through an estate agent upon completion. Several months later, rainwater seeped through the walls, collected in the basement, and would not drain out. Judgment was given in favor of the plaintiff (Crawley v. Tarhune (1969)). The defendant (the builder) appealed in a bid to draw the distinction between a contract to build and that for a sale to which the *caveat emptor* principle would apply. The court of appeal in dismissing the case of the majority rule stated that: "...Because the caveat emptor (let the buyer beware) rule is unrealistic and inequitable as applied in the case of the ordinarily inexperienced buyer of a new house from the professional builder-seller, and because a contract by the builder to sell a new house is not much distinguishable from a contract to build a house for another, we are disposed to adopt the minority view to the extent that in the sale of a new dwelling by the builder, there is an implied warranty that in its major structural features, the dwelling was constructed in a workmanlike manner..." [1].

#### **Drainage and adequate sanitary works**

There is also an implied warranty as to satisfactory standard of workmanship in the design and construction of sanitary works. The defendant in Norton v. Burleaud (1975), was held liable for a defective septic tank and drainage system when substantial evidence was given to support poor construction. Similarly, in Schmauch v. Johnston (1976), poor installation and absence of basic fittings gave rise to damages.

#### **Satisfactory installation of electro-mechanical services**

Apart from the construction of the fabric, there are many other functions that builders integrate alongside their practice. Notable among such are the production of small-scale architectural drawings, design and installation of lighting, heating, ventilation, transportation and water supply systems. Bell [5] reasoned that builders could be substituted for any of these allied professionals (architects and service engineers in this case) if they furnish similar services; citing the unreported case of Drexel Institute v. Boulware. The approval of defective designs was not considered as good grounds for the builder's relieve from liability.

In the same vein, defective installation of a service unit gave rise to damages in Bermes v. Facell (1976). Here, the defendant contracted to install an air-conditioning unit with a 20-degree indoor-outdoor temperature differential. It was held that

the installed 12-degree differential constituted a defect. Also in the case of Lyon v. Ward (1976) the builder erected a well within the premises as part of the contract. The supply was never adequate, not even for car wash or watering of the lawn and garden. Worse still the water contained particles and tasted bitter. It was remarked that an adequate supply of usable water should be seen as "...an absolutely essential utility to a dwelling house and there exist an implied warranty that there be an adequate supply." The adoptive byelaws of the various regions of the country, which is still in use, remain silent on this issue of water supply even though it is cited as "Public health laws".

### **THE TORTUOUS ELEMENT OF CONTRIBUTORY NEGLIGENCE**

Apart from contractual issues, it has been indicated that a builder may be caught in the web of torts, statutory provisions, criminal violations and equity. The law requires that he exhibit reasonable skill and care to match the level of technology he finds himself. The courts have always laid emphasis on hidden, concealed, or latent defects vis-à-vis the doctrine of contributory negligence.

Enshassi [8] while explaining the common features of the various standard forms of contract identified the significant contract clauses. Commenting on one such clause, the exculpatory language clause, he noted "...No claim for damages or any claim...shall be made against the cause beyond the control and without the fault or negligence of the contractor."

The decision in Inman v. Binghamton Housing Authority (1957) buttresses this assertion. Here, a two-year-old child was held guilty of contributory negligence in falling off an unprotected porch. The situation gets more complex where as is common in Nigeria, the client provides neither plans nor specifications but gets along with the site inspection, issuing instructions as work progresses. The case of Trader v. Grampp Builders Inc. (1970) is pertinent in this regard. Here, a client refused to make the final payment to a contractor he had been dictating to because of defects observed after a year's problem free period. Though the contractor was allowed by a superior court to recover, a value on the damages caused by poor workmanship was deducted from the final payment.

Where the defect is not of a permanent nature, liquidated damages are awarded to the tune of the repair or replacement cost (Bolkum v. Stabb (1975)). It may otherwise be the difference in value between the defective building and what it would have been

had it been constructed to specifications (Foeller v. Heintz (1908)).

### SUMMARY AND CONCLUSION

It has been shown that a builder's input to defects after the DLP is appreciable, with an estimated probability of occurrence of 0.733. Within this 73% bracket, the two major elements that should bother a builder are the walls and the roof structures and finishes since they have the highest contributory percentages of 45.5% and 23.2% respectively.

It is paradoxical that these two elements constitute the major features that enhance the physical value (aesthetics) of buildings hence the city. Builders may therefore be significantly responsible for urban blight if the quality of their product cannot be guaranteed over the expected time frame. This will manifest when the rate of decay due to early failures is more than the occupier can contain.

Notwithstanding the issuance of a certificate for final payment, the subsisting contractual relationship inures beyond the three to six months' defects liability period. In the eyes of the law, it stretches through the life of the builder or the period in which any composite element or component erected by him would reasonably be expected to last, which ever is shorter.

The builder's position becomes precarious because his liability is not only contractual. Other parties having to do with the building (trespassers, licencees, visitors, etc.) may institute an action against him based on torts as in the recorded cases except where he can successfully establish prima facie the elements of contributory negligence, or plead an "Act of God" or take refuge under the statutes of limitation.

Although in the pilot survey only two cases had been taken to court, this seemingly customary waiver may be short lived due to the rising cost of maintenance. It is envisaged that in future builders may have to contend with claims arising from defective construction. To address this untidy situation, it is suggested that further studies be carried out to determine the mean life expectancy of all elements, components, and materials in their used forms. These could be made an integral part of the contract in the form of manuals. The most vulnerable trades within the industry could also be ascertained, as this would greatly enhance site management procedures and practice.

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