



Technical

## Can an Employer Refuse Access to a Contractor for it to Complete Defects?

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### Introduction

1. Employers and contractors sometimes have a strained relationship during a project. At practical completion the employer may be glad to see the back of the contractor, whilst the contractor breathes a sigh of relief and looks forward to moving on to the next project.
2. However the relationship between the employer and contractor is rarely over at completion. It is usual on any substantial project for defects to become apparent after completion.
3. If the relationship has been difficult then the employer may not want the contractor to come back, especially if the employer thinks that the contractor did not get it right in the first place and is now responsible for a defect that is disrupting the employer's business. The employer may prefer to employ a third party to remedy the defects and pass the costs on to the contractor. Can the employer do this?

### Can the Employer Engage a Third Party to Remedy the Defects?

4. When a defect occurs after completion it means that there has been a breach of the contract by the contractor. The employer has a right to recover damages for the breach from the contractor. The main standard

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forms of contract include clauses that set out procedures for the correction or rectification of defects and allow the opportunity for the contractor to return to carry out the work. The Court of Appeal explained the benefit that the contractor gains from this right in *Pearce & High Limited v Baxter* (1999) 66 Con LR 111:

*“The cost of employing a third party repairer is likely to be higher than the cost to the contractor of doing the work himself would have been. So the contractual right of the contractor to return in order to repair the defect is valuable to him”.*

5. The contractor would be unfairly disadvantaged if it is not given the opportunity to carry out the repairs. In *Woodlands Oak Limited v Conwell* [2011] BLR 365, when considering a simple contract with no express provision for the rectification, the Court of Appeal stated that:

*“Where the employer fails to give the contractor an opportunity to rectify defects in the work that may amount to a failure to mitigate the losses”.*

6. By not giving the contractor any opportunity to carry out the work the employer had failed to mitigate its losses and as a consequence the employer should not recover from the contractor more than it would cost the contractor to carry out the repairs, along with any consequential damages to which the employer has entitlement.

## Standard Forms of Contract

7. Broadly NEC3 and JCT contracts provide that the supervisor/employer notify the contractor of the defect and the contractor has an opportunity to correct the defect at its own expense.
8. The JCT suite of contracts generally allows for “*appropriate deductions*” if the employer instructs something other than for the contractor to carry out the works (i.e. the employer instructs for the defects not to be corrected or for a third party to correct the work). The meaning of “*appropriate deductions*” was recently considered by Mr Justice Akenhead in *Mul v Hutton Construction Limited* [2014] EWHC 1797 (TCC):

*“If the Employer acted unreasonably in not giving the Contractor a fair opportunity to put right the defects for which it was culpably responsible, she will probably have failed to mitigate her loss. If there has here been an “otherwise” instruction...I do not see a peculiar difficulty in the CA doing the independent exercise of valuing the “appropriate deduction”...by reference to fairly well known rules about mitigation of damage.”*

9. Mr Justice Akenhead’s judgment continues at paragraph 30:

*“A deduction which is reasonable in all the circumstances and can be calculated by reference to one or more of the following, amongst possibly other factors:*

- a. The Contract rates/priced schedule of works/Specification; or*
- b. The cost to the Contractor of remedying the defect (including the sums to be paid to third party sub-contractors engaged by the Contractor); or*
- c. The reasonable cost to the Employer of engaging another contractor to remedy the defect; or*
- d. The particular factual circumstances and/or expert evidence relating to each defect and/or the proposed remedial works.”*

10. The NEC3 suite of contracts sets out the procedure for circumstances where the contractor is not given an opportunity to correct the work. Clause 45.2 says

*“The Project Manager assesses the cost to the contractor of correcting the Defect and the contractor pays this amount.”*

## Contractor’s Rights

11. After the defect rectification or correction period has expired and when any express contractual provisions for rectification no longer apply, then arguably, the contractor may still have a right to an opportunity to carry

out the remedial work at its own expense as in *Woodlands Oak Limited v Conwell* [2011] BLR 365.

## Summary of Key Issues

12. The contractor is disadvantaged if the employer refuses access to the contractor for him to complete defects and then employs a third party to carry out the works. By failing to mitigate its losses the employer risks only recovering from the contractor what it would have cost the contractor to carry out the repairs.

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