Defective Defects
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Osborne Clarke

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Rob Horne
Partner
United Kingdom
T +44 207 105 7671
rob.horne@osborneclarke.com

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1 Contractor's Obligations

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Primary Definition

- Clause 20.1

  "The *Contractor* Provides the Works in accordance with the Scope".

- The Scope is defined as

  "… information which either

  - specifies and describes the *works or*
  - states any constraints on how the *Contractor* Provides the Works

  and is either

  - in the documents which the Contract Data states it is in or
  - in an instruction given in accordance with this contract."

- "To Provide the Works means to do the work necessary to complete the *works* in accordance with the contract and all incidental work, services and actions which the contract requires."
- What happens if the *Contractor* fails to Provide the Works in accordance with the Scope?

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Time for the magnifying glass…

20.1 The *Contractor* Provides the Works in accordance with the Scope

The ***Contractor*** Provides the Works in accordance with

The Contractor accordance with

The Contractor with **the Scope**

26.1 If the Contractor subcontracts work, it is responsible for Providing the Works as if it had not subcontracted. The contract applies as if a Subcontractor's employees and equipment were the Contractor's.

Contractor - Defined in Contract Data Part Two as a specific legal entity (name and address). No actual requirement to say who acts with the authority of the legal entity (*key person,* directors, ostensible

ery specific, but
d as stated, not in a

tant defined term with a very precise meaning

A very simple clause, of fundamental importance, with important defined terms that are often misunderstood or misapplied

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Time for the magnifying glass…

11.2(16) Scope is information which either

- specifies and describes the *works* *or*
- states any **constraints** on how the *Contractor* Provides the Works

and is either

specifies and describes – interestingly, there must be a element of specifying, a description alone is not Scope, somewhat more oddly a specification with no description is also not Scope

works – this is explained in Contract Data Part One, it is therefore for the Client to provide. It is a brief explanation of the purpose of the contract

constraint – could be phrased negatively or positively as long as it limits or restricts choice. Importantly, the constraint must be on **how** not when or anything else

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Time for the magnifying glass…

and is either

- in the documents which the Contract Data states it is in or
- in an instruction given in accordance with this contract

and – both halves of the requirement must be present, so a location and the above, a specification and description or constraint in the wrong place is not Scope, information in the right place which does not specify and describe or constrain is not Scope

in the documents – what about a document referenced in those documents?

in an instruction – no formal requirement for an instruction to be in any particular form, unlike a notice

in accordance with – only an instruction properly issued under the contract (complying with clause 13 and for which the PM has authority…)

So you have a what (specify, describe) a how (constrain) and a where requirement, all 3 must align

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Time for the Magnifying glass…

11.2(15) To Provide the Works means to do the work necessary to complete the *works* in accordance with the contract and all incidental work, services and actions which the contract requires

the work – this is the third use of the same word in different context, *works*, Works and work and all in this single definition

complete – in order to complete the work there will be lots of intermediary steps and could be temporary only, but would still be within the definition. Interestingly it is "complete" rather than achieve Completion, is there a difference there?

incidental work – when is work incidental? Perhaps things like setting out.

requires – there must be some form of obligation generated by the contract. That obligation could be implied but cannot be purely in the discretion of the contractor ("anti graffiti paint may be applied…")

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2 What is a Defect?

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Definition

Clause 11.2(6):

"A Defect is

- a part of the *works* which is not in accordance with the Scope or
- a part of the *works* designed by the *Contractor* which is not in accordance with the applicable law or the *Contractor's* design which the *Project Manager* has accepted."

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Time for the Magnifying glass…

A Defect is

- a part of the *works* which is not in accordance with the Scope or

works – general overarching purpose of the contract but note this is not tied to Provide the Works

in accordance – pretty definitive? Yes but only if the Scope itself is. Where the Scope doesn't provide absolutes so it becomes difficult if not impossible to determine if work is in accordance with it.

Scope – The Scope gives an end product, specifies and describes or provides constraints.

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Time for the Magnifying glass…

or

- a part of the *works* designed by the *Contractor* which is not in accordance with the applicable law or the *Contractor's* design which the *Project Manager* has accepted."

works – this is an overarching definition of the end product not the process…spot any problems with that? Temporary or sacrificial work?

designed – what is design? Rebar layouts? Manufacturing process?

Contractor – importantly only Contractor design is caught not design by a consultant

applicable law – why is this not defined? Take care on assessing what the applicable law is, not always as simple as the one you choose

Project Manager – not the supervisor or the client. Feels like a really important step but no notification requirement as there is with the Accepted Programme

accepted – what if there is design which has not been accepted by the Project Manager. 21.3 but also 21.1 and what if, the PM doesn't do what it is supposed to

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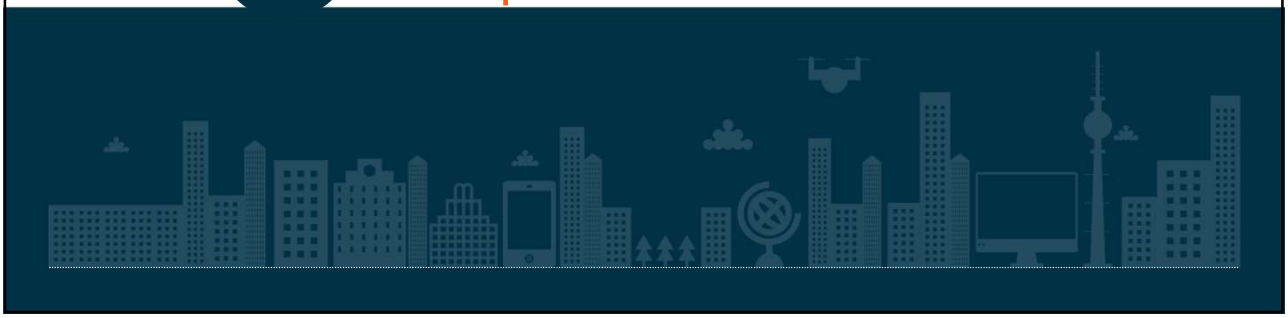
3 Examples



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When is a defect not a Defect?

The Scope says

"Paint all doors blue and window frames white"

The Contractor paints garage door aqua marine, front door royal blue, a cat flap petrol and French doors white.

Which are right and which are wrong?

Are any of them Defect?

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When is a defect not a Defect?

A Contractor, is required by the Scope to apply spray concrete slope stabilisation close to the site boundary. In error, the Contractor sprays concrete over the boundary line into the adjacent property.

Are these works defective?

Was the setting out error a defect?

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When is a defect not a Defect?

The works were designed by a consultant to the Client. At the time of design and at the time of entering into the construction contract the design complied with the applicable law. Since then there has a change in law requiring additional work and a redesign

Is any work carried out on the existing design defective?

Does it make a difference if X2 (change in law) has been included

What about if the change in law was after design and tender submission but before the contract date?

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When is a defect not a Defect?

The requirements set out in the Scope are practically impossible to achieve. There is no ambiguity or inconsistency, but the practical impossibility was not apparent until the Contractor came to construct the relevant element.

The Contractor gets as close to the Scope requirement as is practically possible.

Is the work defective?

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When is a defect not a Defect?

During the course of off-site manufacture of a unit to be installed as a complete item, an inadequate sacrificial component is used. Within Volume A of what was stated to be the Scope there were comments about how manufacture should take place.

Is the component defective?

Does it matter if the unit meets the Scope requirements?

Does it make a difference if the inadequacy of the component was in its use or in its selection. What if it was adjusted from a standard component?

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When is a defect not a Defect?

The Contractor designs and constructs precisely in accordance with the Scope. However, having done so the building is not as the Client envisaged and cannot be used for its intended purpose. The Client declares the work carried out by the Contractor to be deficient and therefore defective.

Does this unexpected outcome amount to a Defect?

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When is a defect not a Defect?

Halfway through a 12 month programme of works the contractor is a month in delay. £1m of work which should have been completed at this stage has not been. The Project Manager writes to the Contractor saying that the work that has not been carried out is a defect. The Project Manager therefore intends to make a deduction against the next application to reflect a substantial defect.

What issues arise here?

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When is a defect not a Defect?

During the course of construction several areas of the project are left as grass covered. The grass has grown and the Supervisor considers it is overly long. The Supervisor notifies a defect.

The Scope does contain a requirement that grass should be at a certain height.

Is there a defect here?

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Thank you

Questions?

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