How Final is the Final Certificate?

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It is clear that a contractor is liable for all defects that appear in the works during the defects liability or maintenance period specified in the contract.

However a question that often arises is what happens when defects come to light beyond such periods, i.e. after the Architect or Engineer has issued the Final Certificate. In such a situation does the contractor still have a liability or can he argue that once the certificate has been issued the Employer loses his rights?

Looking at the matter from basics, defective work constitutes a breach of contract, and the time limits for bringing an action for breach of contract are set out in Section 4 of the Limitation Ordinance (Cap. 347) that provides:

- An action founded on a simple contract (i.e. not under seal) shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.
- An action founded on a specialty (i.e. a contract under seal) shall not be brought after the expiration of 12 years from the date on which the cause of action accrued.

On a construction contract these periods usually begin to run from the date of practical completion.

A contractor would therefore appear to remain liable for defective works for a period of either six or twelve years from the date of the practical completion certificate, depending upon whether the contract is under seal or not.

This may lead one to question what the purpose of the defects liability or maintenance period is, if the contractor remains liable for defective works for the six or twelve year limitation periods in any event.

Well, the answer to this is that the defects liability or maintenance period is a period set by the contract in which, if a defect occurs, the contractor has the right to rectify the defects himself (a significant benefit) and the employer has the right to request the contractor to rectify defects for which he is not culpable, such as caused by defective design although the employer must pay for such works. Outside the defects liability or maintenance period, if a defect arises, the employer will generally engage others to rectify the work, and bring an action against the original contractor for the costs thereof.

However, I digress, in general therefore a contractor is liable for defective works for either six or twelve years from practical completion depending upon whether or not the contract is under seal.

But the matter is not quite as simple as this because it is argued that the wording of certain contracts, and in particular the wording of the Final Certificate provisions are such as to restrict the contractor's liability for defects to up to the Final Certificate only, thus denying the employer the chance to claim for defects that arise beyond such certificate into the limitation periods. Put simply, does the Final Certificate overrule the periods of limitation set down by the Limitation Ordinance?

The matter has been looked at by the courts on a number of occasions and with regard to a number of different forms of contract.

In Crown Estate Commissioners v. John Mowlem and Co Ltd (1994) the court considered this question with regard to the JCT 1980 form of contract, and held that the wording of Clause 30.9.1:

"*..... the Final Certificate shall have effect in any proceedings arising out of or in connection with this Contract (whether by arbitration under article 5 or otherwise) as conclusive evidence that where and to the extent that the quality of materials or the standard of workmanship is to be of the reasonable satisfaction of the Architect the same is to such satisfaction*."

made the Final Certificate conclusive evidence that the works have been completed in accordance with the contract and that effectively once the Final Certificate has been issued the employer loses his right to take action against the contractor for defects that may subsequently appear.

The courts reached the same conclusion in Matthew Hall Ortech Ltd v. Tarmac Roadstone Ltd (1997) with regard to the Institute of Chemical Engineer's Model Conditions of Process Plant 1981 Edition, Clause 38.5 that provides:

"*The issue of the Final Certificate for the Plant as a whole or, where for any reason more than one Final Certificate is issued in accordance with this Clause, the issue of the last Final Certificate in respect of the Works, shall constitute conclusive evidence for all purposes and in any proceedings whatsoever between the Purchaser and the contractor that the contractor has completed the Works and made good all defects therein in all respects in accordance with his obligations under the contract ...*"

The only exception to this rule is where fraud is alleged, such as where defects have been deliberately hidden. In such circumstances action can still be brought after the Final Certificate: Gray v. TP Benntt (1987)

So, where does this leave us in Hong Kong? Well, the local HKIA/RICS Private form Clause 30(7) contains very similar provisions to that of JCT 1980, and therefore following the Crown Estates case, the Final Certificate would be considered conclusive that the works have been completed in accordance with the contract, thus denying the employer the opportunity of claiming for defects that arise in the limitation periods.

The Government General Conditions, on the other hand, are written specifically to protect the Employer's rights and make it clear at Clause 80(3) that:

"*The issue of any certificate including the maintenance certificate shall not be taken as relieving either the Contractor or the Employer from any liability ... arising out of ... the contract*"

thus making the contractor liable for defective works for the full six or twelve years after practical completion.

Therefore, to answer the question, under the local private form the Final Certificate is final (unless fraud is alleged which is an exception to this rule: Gray v. T P Benett (1987)) whereas under the Government form it is not.

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