

Conclusiveness of the Final Certificate

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A year ago I wrote an article in the Newsletter entitled 'How Final is the Final Certificate?' which considered the effect of the issue of the Final Certificate upon claims for defective works and looked at the important case of Crown Estate Commissioners v. John Mowlem and Co Ltd (1994).

Well the matter has recently come before the courts in the United Kingdom in the case of London Borough of Barking & Dagenham v Terrepin Construction Limited (July 2000) where further interesting comments and clarifications were made.

You will recall that the case of Crown Estate Commissioners v. John Mowlem and Co Ltd considered Clause 30.9.1 of the JCT 1980 form of contract:

".... 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 to the reasonable satisfaction of the Architect the same is to such satisfaction."

and held that the wording 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 be present but not noticed, i.e. patent defects or defects that may subsequently appear, i.e. latent defects. The only exception to this rule being where there has been fraud.

This was a controversial decision because the intention of this clause was that where in the contract the architect was required to be satisfied with particular works the Final Certificate indicated that he was so satisfied. It was certainly not the intention of the draftsman that upon issue of the Final Certificate the employer would no longer be able to pursue a claim against the contractor for defective works.

The decision did not have any relevance to Hong Kong Government conditions of contract that provide 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"

However it has relevance in part to the Private Form of Contract that provides at Clause 30(7):

".... the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under clause 35 of the Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract except"

(a) Fraud, dishonesty.....

(b) Any defect in the Works which reasonable inspection or examination at any reasonable time during the carrying out of the Works or before the issue of the said certificate would not have disclosed...."

The decision in the Crown Estates case is therefore relevant to the local Private Form (and will continue to be relevant in the soon to be published updated version) in respect of patent defects, i.e. defects that are visible at the time of the issue of the Final Certificate, but not latent defects that subsequently arise.

Thus, in the local form, the Architect must be vigilant and ensure that his final inspection is very thorough.

Similar issues have now come before the courts in the United Kingdom in July 2000 in the case of London Borough of Barking & Dagenham v Terrepin Construction Limited, again concerning the JCT forms of contract, but this time the JCT Design and Build Contract (1981 Edition).

The Contractor, Terrepin Construction entered into a contract with the Borough in 1991 whereby they were to design and build new and refurbished works at a school in Dagenham, a suburb of London. Work started in December 1991 and Practical Completion was achieved in November 1992 with the defects liability period expiring one year later.

Subsequently, substantial defects appeared and the Employer brought an action for damages for breach of contract, breach of statutory duty and negligence in respect of the alleged defects in design workmanship and materials.

The Contractor argued that all the Employer's claims were barred by Clause 30.8.1 that provided:

"the Final Account and Final Statement when they are agreed.....have the 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 it is stated in the Employer's Requirements that the quality of materials or the standard of workmanship are to be to the reasonable satisfaction of the Employer the same are to such satisfaction..."

In the initial proceedings the judge held that all the Employer's claims were barred by this 'conclusive evidence' clause save for those claims based upon a failure to meet statutory requirements which (under Clause 6 of the Contract) was the Contractor's responsibility.

Neither party was satisfied with this decision. The Employer did not agree that it was correct that it should not be able to claim in respect of patent and latent defects, and defects in design, and the Contractor considered it incorrect that it should be liable for materials that failed to meet statutory requirements. Both parties appealed to the Court of Appeal where the following decision was reached:

1. The term Employer's requirements referred to the requirements of the contract as a whole and did not have to be to any separate document expressly defining the said requirements. This was important in construing what yardstick the design, materials and workmanship had to comply with.
2. Clause 30.8.1 should be construed in the same way as the Court of Appeal construed the clause in the Crown Estates case.
3. Clause 30.8.1 did not relate to or include design defects. Therefore, the Contractor could not avoid a claim relating to defects in its design of the works.
4. Clause 30.8.1 made no distinction between patent and latent defects, and accordingly, the agreement of the final account and the final

statement provided conclusive evidence of the employer's satisfaction as to the quality and standard of all materials and workmanship.

5. This conclusiveness of quality of materials and standard of workmanship extended to compliance with statutory requirements.

This case has therefore confirmed the previous decision in the Crown Estates

case, and further confirmed that whilst the Final Certificate (or in this case the Final Account) was conclusive proof that the materials were compliant with statutory requirements, this did not extend to the Contractor's design responsibilities in a design and build contract.

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