Defect Liability Period: Employer’s Right and Contractor’s Liabilities Examined

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ABSTRACT

Almost all standard forms of contract contain a provision that deals with defective works. Defective works during construction is easily admissible to contractor and those that occur during defect liability period are within the tune of contractors’ normal music. After this defect liability period, most contractors believe that the ball has been passed to the employer or the buyer. Can this always be true? It is a supposed truth that the final certificate will discharge the contractor’s liability for the defective works and the cost of remedying same. This has been proved wrong times without number by the court. The court generally does not regard a certificate as being final except where very clear words are used in the contract. This paper examines the legal position of the construction contract in relation to their rights and whose liabilities are the defects after issuance of final certificates. A careful examination and documentary analysis of the law journals and law reports was carried out with final consideration of the position of Housing Finance Management on large low-cost housing projects. The result shows the circumstances to be considered when determining the liability of defects after issuance of final certificate, these are the conclusiveness evidence, consequential extent of the damages/loss, patent defects, fraud and concealment of defects.

INTRODUCTION

Construction cut across a wide spectrum of activities stretching from simple renovation works for private homes to massive construction projects and all the various building activity creates its own unique set of requirements and circumstance. The unique and sometime complex nature of the construction sector with different professionals and group with their different interests pose a sort of different requirements which compete with one another. Most formal building or engineering contracts contain an initial express obligation of the contractor to carry out and complete the works in accordance with the contract. This is, in fact a dual obligation that is, both to carry out and to complete the works (Wallace, 1995). The contractor’s basic obligation, so far as the standard of work is concerned, is to comply with the terms of the contract.
Ficken (2006) acknowledge that the contractor is required to perform construction fully in accordance with the contract documents, usually consisting of at least plans, specifications and the building code within required time. Similarly according to Chan (2002), contractor’s obligation in a traditional contract to carry out and complete the works would require him to provide the workmanship and materials as required by the specifications given by the architect and engineers. The contractor’s basic obligation in any construction projects, so far as the standard of work is concerned is to comply with the terms of the contract. This includes both express terms (such as the requirement of contract that work shall be of the standards described in the bills) and implied terms (such as the principle that all materials shall be of ‘satisfactory quality’) (Murdoch and Hughes, 2000).

In a construction contract, a contractor undertaking to do work and supply materials impliedly undertakes

a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;

b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind and free from defects. (In the case of goods not described, or not described in sufficient detail, there will be reliance on the contractor to that extent, and the warranty (c) below will apply);

c) that both the workmanship and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is additional to that in (a) and (b), and will only become relevant, for practical purposes in any dispute, if the contractor has fulfilled his obligations under (a) and (b)). (Wallace, 1995)

Issuance of Certificate of Practical Completion brings the contractor’s obligation to an end and only defects due to workmanship and materials not in accordance with the contract are required to be made good at the contractor’s cost.

At various times, contractors often believe that liability is limited to what is written in the contract. This is a false impression that does not stand the test of contractual obligation. Simon (1979) noted that there are many areas of contractual liability which are implied and not expressed. This implied contractual liability might be the contractor’s obligation to perform its work in a good workmanlike manner.

Frank and James (1988) show that liability, obligations and responsibilities do not stop with the contract they are broader and more inclusive. Frankel (2005) noted that the construction defects can arise from improper soil analysis / preparation, site selection and planning, architectural design, civil
and structural engineering, negligent construction or defective building materials. Frankel (2005) further stated that the recent explosion in new construction has spawned, increased construction defect litigation. Construction defect litigation involves all types and sizes of building projects, but homes are its current focus, with the intensity of the concern growing rapidly. The study focus on the increase number of litigation as a result of unresolved defects and its effect in construction industry particularly housing projects.

CONSTRUCTION DEFECTS

In general terms defects or defective works is where the standard and quality of workmanship and materials as specified in the contract is deficient. Defects can be classified into two main categories, Patent Defects and Latent Defects. Patent defects are defects that can be discovered by normal examination or testing whereas Latent Defects are defects that are not discoverable by normal examination or testing which manifests itself after a period of time (Anon 1, 2007).

Atkinson defines defects as breaches of terms and conditions of contract by the contractors (Atkinson, 1999). Defects can take place in any part of a construction project and at any stage of construction. Cama (2004) defines defect in the context of a building contract as “a failure of the completed project to satisfy the express or implied quality or quantity obligations of the construction contract.” Sweet (1993) acknowledge that the construction defects is defined by the law as failure of the building or any building component to be erected in a reasonably workmanlike manner and Marianne (2005), define construction defect as a failure of a building component to be erected in the appropriate manner. Summerlin and Ogborn acknowledge that construction defects can be the result of design error by the architect, a manufacturing flaw, defective materials, improper use or installation of materials, lack of adherence to the blueprint by the contractor, or any combination thereof (Summerlin and Ogborn, 2006).

Construction defects are inevitable in construction projects delivery and are usually contentious between the employer and the contractor or subcontractors. Construction defects are the unacceptable quality of a project which can be identified and remedied. Defective construction works can be defined as works which fell short of complying with the express descriptions or requirements of the contract, especially any drawings or specifications, together with any implied terms and conditions as to its quality, workmanship, durability, aesthetic, performance or design. Most modern buildings and civil structures are complex undertakings and involve the use of a great variety of engineering methods and processes. Therefore most projects face the possibility of defects and defective work, which generally result in structures that cannot perform their originally intended roles (Atkinson, 1999; Cho et al, 2006)

*Types and Causes of Construction Defects*
Defects in construction projects particularly building projects are attributable to various reasons for example, improper fixing of water pipe, poor quality of materials supplied by building merchants or by combination of poor quality of materials and poor workmanship. Irrespective the causes of the defects, they diminish the quality of construction works and sometime the value.

It is generally believe that there are two major types of defects in building projects. According to Cama (2004) defects are often referred to as patent defects and the latent defects. Where the Latent defects are the opposite of patent defects.

i. Patent defects are discoverable upon examination or shortcoming in a structure that is apparent to reasonable inspection for example a roof leak or a foundation crack. Normally, defects are readily apparent to the naked eye and are therefore capable of being assessed and measured relatively easily and then, if necessary, rectified.

ii. Latent defects are those hidden or concealed defects that would not be discovered in the course of a reasonable inspection. A latent defect is by definition something that is not easily discoverable. Normally, defects only become apparent at some later date or upon an investigation of some consequential effects caused by the defect.

Patent defects are plain to see, or at least, that is the theory. Whether the engineer could or should have seen defects on site during site visits has exercised more than one judicial mind. (Nigel, 1996)

As to the second category of defects, i.e. ‘Latent’ defects, the same two references ascribe the following definitions/meanings (Harbans, 2003): “A defect which is not discoverable during the course of ordinary and reasonable examination but which manifests itself after a period of time. In building and civil engineering work the most common application is defects becoming apparent after the maintenance period expired.” Robinson and Lavers describe a ‘latent’ defect in the following words (Nigel, 1996): “… a defect that cannot be discovered by normal examination and testing…”

Most often to clearly differentiate the patent from latent defects depend on the direction of examination and the expertise of the judge in the court of law. According to Cama the decision to classify a defect as a patent defect or latent defect is up to the judge and the outcome sometimes surprising (Cama, 2004). However, as stated by Chan (2002) that by its nature, a latent defect cannot be discovered until it becomes patent and yet it may not be discovered immediately since there may be no immediately apparent signs to indicate the presence of the defects.

According to Kenneth (2002), common types of construction defects include: structural defects resulting in cracks or collapse; defective or faulty electrical wiring and/or lighting; defective or faulty plumbing; inadequate or faulty drainage systems; inadequate or faulty ventilation, cooling or heating systems; inadequate insulation or sound proofing; and inadequate fire protection/suppression systems.
According to Marianne (2005) all types of defects can typically be grouped into the following four major categories: Design deficiencies, material deficiencies, construction deficiencies and subsurface/geotechnical Problems.

According to the records of Housing Finance Corporation the defects reported from 1997 to 2006 has been related to design deficiencies, construction deficiencies and subsurface problems. Table 1 shows the percentage records of reported defects within the period.

Table 1: Defects Reported by Occupiers – 1997 to 2006

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<tr>
<td>Design Deficiencies</td>
<td>16%</td>
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<td>22%</td>
<td>18%</td>
<td>21%</td>
<td>15%</td>
<td>28%</td>
<td>22%</td>
<td>32%</td>
<td>16%</td>
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<tr>
<td>Material Deficiencies</td>
<td>32%</td>
<td>19%</td>
<td>22%</td>
<td>37%</td>
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<td>24%</td>
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<td>9%</td>
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<tr>
<td>Construction Deficiencies</td>
<td>45%</td>
<td>36%</td>
<td>44%</td>
<td>41%</td>
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<td>48%</td>
<td>51%</td>
<td>28%</td>
<td>12%</td>
<td>26%</td>
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<tr>
<td>Subsurface/Geotechnical Problems</td>
<td>7%</td>
<td>32%</td>
<td>12%</td>
<td>4%</td>
<td>12%</td>
<td>13%</td>
<td>9%</td>
<td>42%</td>
<td>47%</td>
<td>52%</td>
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Table 1 above shows the types of defects experienced in most of the housing projects managed by HFC from 1997 to 2006. On the average, the report shows design deficiencies, material deficiencies, construction deficiencies and geotechnical problems to be 20.3%, 19.7%, 37% and 23% respectively over the period.

**Liability for Defects**

Liability as stated in Osborne Concise Law Dictionary is ‘an amount owed; or subject to legal obligation; or the obligation itself, he who commits a wrong or break on a contract or trust is said to be liable or responsible for it’. Similarly as indicated in Dictionary of English Law, liability is potentially subject to obligation, either generally as including every kind of obligation or in more special sense to denote inchoate, future unascertained or imperfect obligation, as opposed to debt, to essence of which is that they are ascertained and certain. While Burton’s Legal Thesaurus defined liability as accountability, accountable, amenability and answerability. According to Borja and Stevens (2002) a liability is a present obligation of the enterprise arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits, while, Frankel (2005) in any legal responsibility, duty or obligation, the state of one who is bound in law and justice to do something which may be enforced by action.

Frank and James (1988) noted that in law, a person may owe a duty to another person by his own free will in a Contract or by the operation of common law of Tort. The failure to perform or negligently perform these duties or responsibilities constitute a breach, therefore he or she will be answerable or accountable to the other party who may have suffered as a result of his/her wrongful act. In Greaves &
Co. v Bayham Meikle\textsuperscript{1}, Lord Denning M.R. stated: “Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win case.”

Liability must, of course, be established on balance of probabilities. In Bater v Bater [1951] P. 35\textsuperscript{2} Denning L.J. said: “So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter… The degree of probability which a reasonable and just man would require to come to a conclusion”

As Oliver J. pointed out in Midland Bank v Hett, Stubs & Kemp\textsuperscript{3}, the obligation to exercise reasonable skill and care is not the only contractual term which ought to be considered in a professional negligence action, there are implied terms that he will draw up the option agreement and effects registration.

The contractor is expected to be liable for any defects in building project according to standard form of contract, these standard forms usually contain detailed provisions in respect of the employer’s remedies in respect of defective works for example according to Ong(2005):

i. Defective work to be remedied by contractor

ii. Defective work to be remedied by employer if contractor fails to do so

iii. Employer may agree to a reduction of contract price instead of remedying the defect

iv. Employer may deduct the cost of remedial works from the contract price until the remedial works are carried out

v. Employer to withhold retention monies, to be released upon issuance of the Certificate of Practical Completion and/or Certificate of Making Good Defects.

The houses managed by HFC are being constructed by another sector of government saddled with the responsibilities of housing provision. Ministry of National Development initiate the project, contracted it out, monitored and supervised both the financial and construction issues before handing over to HFC for allocation and managing the mortgaging processes. As the defects are reported to HFC, during the defect liability period, the Employer (MND) attends to all reported cases and makes good same defects.

\textsuperscript{1}[1975] 1 WLR 1095
\textsuperscript{2}[1951] P. 35
\textsuperscript{3}[1979] Ch. 384
HFC as the mortgagee on behalf of government sold each flat on a long lease under the corporation lease agreement for a period of 25 years. During the 25 years, any defects both latent and patent are taking care by HFC but the litigation has been between HFC and the contractor and this has lingered for a long time due to claims that HFC and the occupant of the constructed houses are categorised as third party, thus contractor has no obligation to them. The house of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[^4] the court held that the recovery of damages for breach on a contract was not dependent or conditional on the plaintiff having a proprietary interest in the subject matter of the contract at the date of the breach. It was stated that the present owner could recover damages for defective work even though the owner suffered no actual damage as the building had been sold for full value before the damage was discovered. A similar case in the Supreme Court of Queensland, Sir Harry Gibbs in the case of *Director of War Service Home v Harris*[^5] said “If the owner subsequently sold the building, or gave it away, to a third person, that would not affect his accrued right against the builder of damages.” In this case the defective works carried out by the defendant for the plaintiff were not discovered until after the houses were sold. By the verdict of learned judge and agreed with by Stable and Hart JJ, that the owner is entitled to recover damages for the cost of rectification of the defective works.

**Liability of Contractor to Employer**

The contractor is expected to carry out the construction work in workmanlike manner so as to meet the requirement and specification for the project. The condition of the contract may be such that the period of making good defects in construction can be divided into three during construction, during defects liability period and post defects liability period.

During the construction, it is generally believed that the contractor is entitled or has a contractual right to remedy any patent defect or latent defect becoming patent, at anytime up to the date of handing over of the works to the employer. He is expected to be informed of any defective works by the employer’s representative of the defects and make good at contractor’s cost. Should he fail to rectify such defects either on his own or upon instruction of the contract administrator, he is culpable of breach of contract.

Sometimes contractor seem to capitalize on non-receiving such directives, notwithstanding the failure of the employer’s representative to give notice or investigate defects is not sufficient ground to construe the engineer or the contract administrator has accepted the works. In *Miller v Krupp, NSW*[^6], Giles J. said: “Krupp’s [defendant contractor] submission requires that Miller’s [plaintiff employer] agent for the purpose of supervising Krupp’s performance of the contract owed a duty to take care to prevent Krupp from falling properly to perform: a duty to save it from breach of the very contract it

[^4]: [1993] 3 All E.R. 417
had to perform to Miller’s satisfaction. In my view there was not the requisite proximity, a view
confirmed by notions of what is fair and reasonable.”

In *William Tomkinson & Sons v Parochial Church Council of St Michael*⁷, it was held that the
employer was entitled to recover damages for the defective work as it was still a breach of contract,
despite occurring during the construction period.

During the defects liability period, which commences on the completion of the works, standard forms
of contract generally give the contractor a licence to return to the site for the purpose of remediying
defects. In effect, such condition of contract confers upon the contractor a right to repair or make good
its defective works, which can (usually) be carried out more cheaply and (possibly) more efficiently
than by some outside contractor bought in by the employer (Harbans, 2003)

Lord Diplock, commenting on RIBA/JCT defects liability clause in the case of *P&M Kaye Ltd v
Hosier & Dickson Ltd*⁸, said: “Condition 15 imposes upon the contractor a liability to mitigate the
damage caused by his breach by making good the defects of construction at his own expense. It
confers upon him the corresponding right to do so. It’s a necessary implication from this that the
employer cannot, as he otherwise could, recover from the contractor the difference between the value
of the works if they had been constructed in conformity with the contract and their value in their
defective condition, without first giving the contractor the opportunity of making good the defects.”

Defects after defect liability period can still be treated by contractor depending on the standard form of
contract. It is the contractor’s obligation under the contract to rectify the defects that appears during
DLP. According to Lord Diplock in *P&M Kaye Ltd v Hosier & Dickinson Ltd*, the DLP’s clause is
included in the contract with an intention of giving opportunity to the contractor to make good the
defects appear during that period.

**Liability to Third Party**

Most of the defects experienced in housing project are being experienced after handing over of the
houses to individual either through mortgaging, buying or renting for a long time. Housing Finance
Corporation relies mostly on the information from the occupant to know the level of defect in the
completed housing projects. The situation is fully third party liability between the contractor and
Housing Finance Corporation, because another ministry handling housing provision handover the
completed project to HFC who in turn gives out to the individuals. The increasing number of cases
coming up due as a result of liability to third party has been either pure economic loss or injury to
person as a result of the defects. The general argument within contractors and concerned professionals

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⁷ [1990] 6 Const. LJ 319
⁸ [1972] 1 W.L.R. 146, at p.166
⁹ [1972] 1 W.L.R. 146, at p.166
has been: should a contractor be liable to third party or only to the client. But in cases involving third party and contractor according to Jackson and Powell (1987), following the Anns’ case *Anns v Merton London Borough Council*\(^{10}\), the proposition that a professional person owes a duty to no one other than his client is clearly untenable. Also Barros (1989) asserted that a contractor owe a duty of care to an increasingly wide range of persons who are not his clients. As stated by Lord Wilberforce, in the case of *Anns v Merton London Borough Council*\(^{11}\) that the contractor owed a duty of care to subsequent purchaser to ensure that the building was safe for occupation and use, and owed a duty of care could result in liability for damage to the building itself.

*Cost Effects of Construction Defect*

The increasing number of construction defect cases has been linked to the increasing demand for houses at avoidable prices. As the number of house demand increases, many general contractors both inexperienced and experienced are bidding in a competitive ways. Summerlin and Ogborn supported this fact as stated in their research that many builders respond to the competition with low bids for contracts, then cut corners, and frequently employ unskilled or overworked subcontractors and poorly supervise subcontracted work (Summerlin and Ogborn, 2006).

The cost of rectifying the defects has been one of the long contentious issues between HFC, MND and Contractors. Till date there is no litigation outcome in Seychelles to determine who bear the cost of defects but the High Court’s decision of *Bellgrove v Eldridge*\(^{12}\) is the leading authority on the measure of damages for defective and incomplete work. The High Court affirmed that the general rules was that the measure of damages was the difference between the contract price of the work and the cost of making the work conform to contract.

*Problems Associated with Defective Works in Seychelles*

Unlike other developing countries, there is no law from government that governs how to treat defectives works and its effects generally, but the Contract Condition has been the only available documents made use to settle any dispute regarding defects. Clause 15 of the Contract Condition (East African Condition of Contract 1998 Edition) stipulates the process of dealing with defects and where the liability lies.

\[(1)\text{ When in the opinion of the Project Officer the Works are practically completed, he shall forthwith issue a certificate to that effect and Practical Completion of the Works shall be}\]

\(^{10}\) [1978] AC 728  
\(^{11}\) [1978] AC 728  
\(^{12}\) [1954] 90 CLR 613
deemed for all the purposes of this Contract to have taken place on the day named in such certificate.

(2) Any defects, shrinkage's or other faults which shall appear within the Defects liability period stated in the appendix to these Conditions and which are due to materials or workmanship not in accordance with the Contract shall be specified by the Project Officer in a Schedule of defects which he shall deliver to the Contractor not later than 14 days after the expiration of the said Defects Liability period, and within a reasonable time after receipt of such Schedule, the defects, shrinkage's and other faults therein specified shall be made good by the Contractor and (unless the Project Officer shall otherwise instruct, in which case the Contract Sum shall be adjusted accordingly) entirely at his own cost.

(3) Notwithstanding sub-clause (2) of this Condition the Project Officer may whenever he considers it necessary to do so, issue instructions requiring any defect, shrinkage or other fault which shall appear within the Defects Liability Period named in the appendix to these Conditions and which is due to materials or workmanship not in accordance with this Contract to be made good, and the Contractor shall within a reasonable time after receipt of such instructions comply with the same and unless the Project Officer shall otherwise instruct, in which case the Contract Sum shall be adjusted accordingly) entirely at his own cost. Provided that no such instruction shall be issued after delivery of a Schedule of defects or after 14 days from the expiration of the said defects Liability period.

(4) When in the opinion of the Project Officer any defects, shrinkage's or other faults which he may have required to be made good under sub-clauses (2) and (3) of this Condition shall have been made good he shall issue a certificate to that effect, and completion of making good defects shall be deemed for all the purposes of this Contract to have taken place on the day named in such certificate.

Clause 15(1) deals with issuing of certificate of practical completion opening the starting of Defect Liability Period for the project, but the problem has been implementation of Clause 15(2) which involves informing the contractor of any defects on the project so as to enable the contractor to make good of the defects within the reasonable time.

Despite this clause, the problem of responsibility is still there and the effects of defects are clearly seeing to be scaring. The occupant sometimes not aware of the condition of contract tends to go ahead of HFC and called another contractor to do the rectification without minding who bear the cost. Most
often, occupants want HFC to refund the cost of making good any defects carried out by another contractor; this has always been contentious issues till date.

It is to be noted also that non availability of legislative rule on matters related to building defects affects both the buyer of the house and the sellers. However, due to non-issuance of notice or schedule of defects according to Clause 15(2) sometimes brings confusion. Looking at the decision of the judge in one of the case whereby the Employer did not send the notice to Contractor to make good the defects discovered. The decision had been held in the Court of Appeal in the case of *Pearce & High Limited v Baxter* Evans LJ pointed out clear that “In my judgment, the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects. Thus, the employer’s failure to comply with clause 2.5 (the clause relating to rectification of defects), whether by refusing to allow the contractor to carry out the repair or by failing to give notice of defects, limits the amount of damages which he is entitled to recover. The result is achieved as a matter of legal analysis by permitting the contractor to set off against the employer’s damages the amount by which he, the contractor, has been disadvantaged by not being able or permitted to carry out the repairs himself, or more simply, by reference to the employer’s duty to mitigate his loss.”

The rectification costs by the occupant sometimes were high contrary to the expectation of HFC and the main contractor refuses to pay back the charges by the other second contractor and this eventually leads to litigation.

**FINAL CERTIFICATE**

Approved final certificate issued to a contractor signify both the satisfaction of the employer with the works according to the terms and condition of the contract and discharge of the contractor from any obligation for any other works. Completion of the contract is clearly evidenced by the issuing of final certificate except for concealment, fraud, dishonesty, and after the issuing of certificate and thereafter the employer is unlikely to have any recourse against the contractor for any breach of contract and the employer may only proceed to rectify the works at its own cost. (Willis, 2006). According to Harbans Singh (2003) the final certificate signifies the contract administrator’s satisfaction. The final certificate at the end of the construction signifies also completion of the works but issuing of final certificate has been a contentious issue over the years for HFC for the period under consideration (1997-2008). Most of the contractors are reluctant to engage in any reparation of defective works due to ambiguity on the

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13 [1999] 66 Con LR 110
problem associated with issuing of final certificate. A cause of action for rectification of defects is generating a huge cost both to the contractor and HFC. The cost effect of litigation between HFC and the contractor has been estimated to be in the range of 200,000.00 – 250,000.00SR (18,000.00 – 20,000.00USD) per annum which is a huge cost.

**Finality of Final Certificate**

The question has been asked by various researchers, how final is the final certificate in construction projects. It is evidenced from many courts cases that issuing the final certificate relieve the contractor from any obligation from employer and transfer all other responsibility to the employer to make good any ‘discoverable’ defects on the works. Various court case has proved that final certificate issued signify end of liability of the contractor such as in the case of Shen Yuan Pai v Dato Wee Hood Teck & Ors.\(^{14}\) It was held that as the architect in this case had issued his final certificate, thereby showing his satisfaction with the works carried out by the plaintiff, the plaintiff was entitled to the amount claimed. The certificate issued by the architect in this case was conclusive. On conclusiveness of a final certificate, Lee J said that "The first question is whether, on the true construction of the conditions, a final certificate issued by the architect is conclusive evidence as to the sufficiency of the works subject only to the exceptions mentioned in clause 24(f) of the contract. Melford Stevenson, J., came to the conclusion that it was not, but thought that it was only conclusive evidence as between the building owner and the builder until power to re-open it vested in an arbitrator appointed pursuant to clause 27. In the Court of Appeal, reversing Melford Stevenson, J., on this point, it was unanimously decided that a final certificate was final and conclusive save as to the exceptions stated in the sub-clause." The Final Certificate shall be conclusive evidence as to the sufficiency of the said works and materials. It prevented any further legal action, including legal proceedings started before the certificate was issued. The certificate is not reviewable by the arbitrator because it is ‘conclusive evidence that any necessary effect has been given to all the terms of this Contract which require an adjustment to the Contract Sum’.

Many more cases had proved that final certificates has an effect of finality to a contract as shown in the cases of James Png Construction Pte Ltd v Tsu Chin Kwan Peter\(^{15}\), Sa Shee (Sarawak) Sdn Bhd v Sejadu Sdn Bhd\(^{16}\), University Fixed Assets Limited v Architects Design Partnership\(^{17}\), and Crown Estate Commissioners v John Mowlem and Co Ltd\(^{18}\).

**The Way Forward**

\(^{14}\) [1976] 1 MLJ 16  
\(^{15}\) [1991] 1 MLJ 449  
\(^{16}\) [2000] 5 MLJ 414  
\(^{17}\) [1999] 64 Con LR 12  
\(^{18}\) [1994] 70 BLR 1
As it could be derived from various cases, the Project Officer of MND should not issue the final certificate until after the end of the defects liability period because any defects that occur thereafter becomes the liability of MND and passed over to HFC. It is an assume risk of the conclusiveness of the final certificate both as to completion and quality of the workmanship.

However the employer through the representative should ensure that defects and defective works are properly checked before issuing the final certificate since, final certificate was irrelevant to any claims for consequential damages in respect of defects which had been found after the employer had taken possession. It is the right of the employer to claims for consequential loss.

Logically, contractors take relieve from a final certificate and assume that no new or further claims can be made against them for defective or incomplete works under the final certificate, other than latent defects, if latent defects are discovered during defects liability period, it is hereby advisable that the period be extended until the contractor has made them good and the MND has so certified.

If defective work or workmanship or design have been knowingly covered up or concealed so as to constitute fraud, the commencement of the limitation period may be delayed. The decided period may be delayed until discovery actually occurs; or at least the defect could have been discovered with reasonable diligence, whichever is earlier.

There should be clear demarcation between latent and patent defects in the condition of contract so as to avoid concealment till end of defect liability period which generally takes care of the patent defective works.

Notification is of high importance before taking over any building either by MND or HFC; furthermore, the buyer of the house must notify HFC as early as possible. The owner must notify latent defects to the MND within 14 days of becoming aware of them and MND must ensure that the contractor acknowledge the receipt of such notice since the contractor's acknowledgement of a defect amounts to notification of the same.

HFC must not accept any works without a proper checking irrespective of time constraints, because if the owner accepts the works without reservation in such cases, he will no longer be entitled to avail of the remedies against defects set out in the contract except in the case of malice. Legal doctrine is of the opinion that if the constructor has concealed the defect with malice, no notification is required.

In the case of the existence of defects, the owner must exercise his rights in respect of the same within period stipulated in the contract and part of the rights are but not limited to these ones: the right to demand repair of the defects; the right to the performance of new works; the right to a reduction in price; the right to termination of the contract; and the right to claim an indemnity.
CONCLUSION

It has been observed from the study that where there is a defects clause and at the end of the defects liability period a binding and conclusive final certificate of satisfaction is given by the project officer, the contractor’s liability in contract for any defects lapsed. The employer is not entitled contractually to pursue any defect arising and/or reported after the said date. If the final certificate is not conclusive, it does not derogate in any way the contractor’s liability for defective work at law. The contractor continues to be liable for such defects for the duration of the applicable statutory period of limitation.

Issuance of final certificate under the contract, prevent the employer from bringing claims for defects in the works arising from a breach of contract and/or tort irrespective of whether those defects may be said to be latent or patent. In the circumstances where defective work or workmanship have been knowingly covered up or concealed so as to constitute fraud, the commencement of the limitation period may be delayed until discovery actually occurs. This research can be said not to be all-inclusive; but the study hopes to provide assistance to both contractor and employers to comprehend their rights and liabilities in relation to defects which appear after issue of the Final Certificate.

REFERENCES

Anon, 2007: “What Are The Obligations Of The Contractor During Defect Liability Period?” The Entrusty Group, Master Builders, 1st quarter 2007


