Clause 11

Summary

Clause 11 requires that the Works shall be in the condition required by the Contract at the end of the Defects Notification Period. Where the Contractor carries out work in the Defects Notification Period, it is not entitled to receive payment if the work was a result of a defect in the design for which the Contractor was responsible. Similarly, if the Plant, Materials or workmanship are not in accordance with the Contract or there is a failure by the Contractor to comply with any other obligation then it is required to remedy the problem without payment.

The Employer may obtain an extension of the Defects Notification Period if the Works, a Section or a major piece of Plant cannot be used during the Defects Notification Period. The Contractor is required to remedy any defect during the Defect Notification Period and, if it does not, the Employer may claim against the Contractor. Rights are given to the Contractor to undertake this work subject to the Employer's reasonable security restrictions. Once the Defects Notification Period has expired the Engineer is required within 28 days, subject to receipt of the Contractor's Documents and the completion of any tests, to issue a Performance Certificate. It is the Performance Certificate that is deemed to constitute acceptance of the Works. Sub-Clause 11.10 provides that after the Performance Certificate has been issued, each Party will remain liable for the fulfillment of any obligation which remains unperformed at the time. The extent and meaning of this clause is open to debate.

Origin of clause

The equivalent clauses within FIDIC Red Book 3rd and 4th editions were found in various places.

- Sub-Clause 11.1 to 11.4 – remedying defects and costs - was found at Clause 49 of FIDIC 3rd edn and was entitled "Period of Maintenance" and at Clause 49 of FIDIC 4th edn and was entitled "Defects Liability Period."
- Sub-Clause 11.8 – Contractor to Search - was found at Clause 50 of both the 3rd and 4th edn Red Books.
- Sub-Clause 11.9 – Performance Certificate - was found at Clause 62.1 of both the FIDIC 3rd edn and 4th edn and was entitled Defects Liability Certificate.
- Sub-Clause 11.10 - Unfulfilled Obligations - was found at Clause 62.2 of FIDIC 4th edn.

There are substantial differences between Clause 11 and FIDIC 4th edn.

Cross-references

Reference to Clause 11 is found in the following clauses:-

- Sub-Clause 1.1.3.7 (Definitions – Defects Notification Period);
- Sub-Clause 1.1.3.8 (Definitions – Performance Certificate**);**
- Sub-Clause 2.5 (Employer's Claims);
- Sub-Clause 9.4 (Failure to Pass Tests on Completion);
- Sub-Clause 14.9 (Payment of Retention Money); and
- Sub-Clause 18.2 (Insurance for Works and Contractor's Equipment).

The Purpose of the Clause

A significant change in procedure occurs during the Defects Notification Period. The Engineer's role is reduced and the Employer takes over direct responsibility for the notification of defects. The reason for this is that the Employer will now have possession of the Works and it is the Employer who will be aware of defects. The Contractor will also need to liaise with the Employer in order to gain access to remedy these defects.

During the Defects Notification Period the Engineer no longer has the power to issue Variations to the Contract. Clause 13.1 expressly states that: "Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate." However, there is an obligation on the Contractor to remedy all defects or damage notified by the Employer.[1] This includes work for which the Contractor is not responsible and in such cases the Contractor is paid for such work as if it was a Variation.[2]

The phrase "Defects Notification Period" is new to FIDIC 1999. Previously it was referred to as a defects liability period (FIDIC 4th) or maintenance period (FIDIC 3rd). The new terminology recognises the most significant aspect of this period, namely that the Contractor is notified of defects. It is anticipated that the Defects Notification Period will be 365 days, however, this period may be extended by the Employer. The Defects Notification Period is a defined term:

"1.1.3.7 "**Defects Notification Period**" means the period for notifying defects in the Works or a Section (as the case may be) under Sub-Clause 11.1 [*Completion of Outstanding Work and Remedying Defects*], as stated in the Appendix to Tender (with any extension under Sub-Clause 11.3 [*Extension of Defects Notification Period*]), calculated from the date on which the Works or Section is completed as certified under Sub-Clause 10.1 [*Taking Over of the Works and Sections*]."

[1] Sub-Clause 11.1(b)
[2] Sub-Clause 11.2

Where the Works are taken over in Sections then it is possible for the Defects Notification Period to expire for one Section before another Section has been completed. Therefore, Sub-Clause 11.9 (Performance Certificate) refers to "the latest of the expiry dates of the Defects Notification Periods".

Sub-Clause 11.1 Completion of Outstanding Work and Remedying Defects

The obligation on the Contractor is to ensure that the Works, Contractor's Documents and each Section shall be in a condition as required by the Contract (fair wear and tear excepted) at the end of the Defects Notification Period or as soon as practicable thereafter. Sub-paragraph (a) places a responsibility on the Contractor to complete all work which is outstanding at the date of the Taking-Over Certificate within such reasonable time as instructed by the Engineer. Sub-paragraph (b) requires the Contractor to execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period. The expression "Defects Notification Period" recognizes that the Contractor's obligation is to remedy defects which are notified to it or instructed under this Sub-Clause.

However, not all damage or defects will be at the Contractor's risk and cost – so, for example, defects in the Engineer's design will need to be remedied but this will not be to the Contractor's account.

The expression "fair wear and tear excepted" is an English legal term which is used, primarily, when considering landlord and tenant law or hire purchase contracts. It requires a tenant/hirer to return the property in the same state it was when it was let/hired apart from "fair wear and tear" which resulted from the normal use of the goods/property.

In the context of landlord and tenant law, "fair wear and tear" has been defined by the English House of Lords as meaning "reasonable use of the premises by the tenant and the ordinary operation of natural forces (i.e. the passage of time)". By analogy, the Contractor has no obligation to re-paint chipped paintwork or replace a scratched plate if such 'defect' resulted from the reasonable use of the Works. Difficulties may, however, arise where a defect occurs but is one which the Contractor argues is as a result of fair wear and tear. Robert Knutson provides the following example:[3]

> *"[T]he engineer specified and the Contractor built a tarmacadam (asphalt) parking lot with a specified thickness of asphalt of only 50mm on top of hardcore. It was probably a northern hemisphere specification because under the hot tropical suns of the site, the tarmacadam was torn up the first and*

[3] An English Lawyer's View of the New FIDIC Rainbow – where is the pot of gold? Robert Knutson, http://www.robertknutson.com/downloads/Analysis_of_English_construction_law.pdf

every subsequent time a truck did a tight turn on the lot. Given the Engineer's deficient specification, was this "fair wear and tear"? Under FIDIC 2nd which was the relevant Contract at the time this was not at all clear. The provisions of Sub-Clause 11.2 would have been of much assistance because the "opinion of the Engineer" has happily been removed from this provision and it simply states "if and to the extent that such work is attributable to any other cause … the variation procedure shall apply."

The obligation on the Contractor to remedy defects is set out in sub-paragraphs (a) and (b) of Sub-Clause 11.1. Under Sub-Clause 10.1, the Contractor is entitled to a Taking-Over Certificate notwithstanding that some work may still be incomplete. Sub-Clause 11.1(a) therefore states that the Contractor is required to complete this outstanding work within an instructed time which must be reasonable. If no reasonable time is so instructed, this work must be completed "by the expiry date of the relevant Defects Notification Period" or (if that was impractical) as soon as practicable thereafter.

Under Sub-Clause 11.1(b), the Contractor is required to remedy defects or damage which have been notified by the Employer, or (on his behalf) by the Engineer. Having been notified under Sub-Clause 11.1(b), the Contractor is both obliged and entitled to carry out the remedial work, including to the right of access under Sub-Clause 11.7. The Employer should not remedy the defects or damage himself, unless and until he is entitled to do so under Sub-Clause 11.4.

If the Employer refrains from notifying a defect or damage, because he prefers to remedy the defect himself, then the Employer will be in breach of the last sentence of Sub-Clause 11.1. The effects of this are uncertain. It may be argued that where the Employer does not allow the Contractor to rectify a defect then any claim that the Employer has will be limited to that which it would have cost that Contractor to remedy the defects[4]. The failure to allow the Contractor to remedy the damage or defects would amount to a failure to mitigate a loss.[5] However, in *AMEC Foster Wheeler Group Ltd v Morgan Sindall Professional Services Ltd & Anor,*[6] on wording having similar effect to Clause 11.1(b), the judge indicated that the breach was more fundamental. The judge stated that: "It is clear from the wording of this part of the clause that there can be no liability on [the contractor] in connection with defects unless it was made aware of those defects. In the absence of knowledge of the defects, no liability can arise under this limb of the clause." In *London and SW Railway v Flower*[7] it was also stated: "it would seem to be contrary to natural justice to hold that the plaintiffs can, without giving the defendants notice of the duty which is sought to be cast upon them, take upon themselves to perform that duty for the defendants and

[4] *Pearce and High v Baxter and Baxter* [1999] BLR 101 CA and *Mul v Hutton Construction Ltd* [2014] EWHC 1797
[5] Woodlands Oak Ltd v Conwell [2011] BLR 365
[6] [2016] EWHC 902
[7] (1875) 1 CPD 77

charge them with the expense."

However, the Employer may under the applicable law to refuse to allow the Contractor to remedy defects if it has demonstrable grounds for believing that the Contractor would fail to carry out the work with the necessary skill and care.

After the Defects Notification Period has expired then the Employer may engage any third party to rectify defects instead of allowing the original Contractor to return. In such circumstances the Employer may be criticized for acting unreasonably and failing to mitigate its loss. However, the Employer would not be in breach of contract for refusing the original Contractor access to the site.

Sub-Clause 11.2 Cost of Remedying Defects

Any defect or damage, as defined within sub-paragraphs (a) to (c), and notified during the Defects Notification Period, has to be remedied by and at the cost of the Contractor. This Sub-Clause states that the defects for which the Contractor is responsible for are:

(a) any design for which the Contractor is responsible,

(b) Plant, Materials or workmanship not being in accordance with the Contract, or

(c) failure by the Contractor to comply with any other obligation.

Other defects that are notified to the Contractor under Sub-Clause 11.1(b) are subject to the Variation Procedure under Sub-Clause 13.3. However, there is an inconsistency in the wording of these two Sub-Clauses. Sub-Clause 11.1 sets out a mandatory requirement that the Contractor remedy the defect notified, irrespective of cause. Sub-Clause 11.2 however requires that where the Contractor is not responsible for the defect then the Sub-Clause 13.3 procedure applies. This requires the Contractor to set out in writing a programme for the works and an evaluation for the Variation.[8]

Sub-Clause 11.3 Extension of Defects Notification Period

This is an interesting new provision within the FIDIC 1999 contract which allows the Defects Notification Period to be extended if a defect or damage prevents the Works, Section or a major item of Plant being operated. The FIDIC Guide states that if the Works, Section or a major item of Plant cannot be operated for a certain number of days, the Employer is entitled (subject to Sub-Clause 2.5) to require the Defects Notification Period to be extended by that number of days. What this clause does not state, and what might cause concern to a Contractor, is that the defect or damage has

[8] Sub-Clause 13.3(b) cannot be applicable as the Sub-Clause 8.3 programme setting out the Time for Completion has passed.

to have been caused by any breach of obligation by the Contractor. It would appear that if the Works cannot be used by reason of a defect in the design, or because the Employer has prevented the Test on Completion,[9] the Employer would still be entitled to an extension of the Defects Notification Period. It seems that the FIDIC Guide supports the above interpretation as it refers to the extension of the Defects Notification Period being caused (or not caused) by the shortcomings of the Contractor.

Sub-Clause 2.5 states that a notice relating to the Defects Notification Period has to be given before the expiry of that period. It also states that the Employer must give particulars specifying the basis of the claim and the amount of time required. The Engineer then makes his Determination.

Where, however, the defect or damage which prevents the operation of the Works, Section or major item of Plant is caused by an event for which the Contractor is not responsible then it would be entitled to its associated costs. If the Contractor is not responsible for the defect or damage, the remedial work would constitute a Variation and entitle the Contractor to additional payment, including compensation for the extension to the Defects Notification Period.

The Defects Notification Period cannot be extended by more than 2 years. This again is a welcome inclusion as it has relevance to the call dates for the Bonds and Guarantees issued by the Contractor.

11.4 Failure to Remedy Defects

The Contractor has a reasonable time to remedy any effect or damage. What constitutes "reasonable" will be a question of fact in each case. In Go *West Ltd. v Spigarolo & Anor*[10], the English Court of Appeal stated that what is a reasonable time had "to be assessed … having regard to all the circumstances of the particular case." Matters which will be relevant to what is a reasonable time include the delivery periods for replacement Plant and the operational status of the Works.

If the Contractor fails to remedy the defects within a reasonable time then the Employer may fix a date when the works are to be carried out. In default of undertaking the remedial work by the fixed date, the Employer has a number of options available.

Sub-paragraph (a)

Here the Employer can elect to carry out the work himself but at the Contractor's cost.

[9] See Sub-Clause 10.3 which states that the Tests on Completion are to be carried out before expiry of the Defects Notification Period. Sub-Clause 10.3 applies where the Employer prevents the Tests on Completion being carried out.

[10] [2003] EWCA Civ 17 (31 January 2003)

The Employer is however responsible for the remedial work. The Employer's best interests therefore lie in having the Contractor carry out the remedial works, in order to avoid subsequent disputes as to whether any element of under-performance of the Works is due to the Employer's own rectification works.

Sub-paragraph (b)

Here the Employer can ask the Engineer to determine a reduction to the Contract Price. How that reduction should be determined is left unclear – it could be measured as against the cost of the remedial works, an abatement for failing to complete the works or a diminution in value of the Works itself. It is also unclear whether the Engineer would be able to take account of any losses incurred by the Employer in arriving at its Determination.

Sub-paragraph (c)

This sub-paragraph envisages the defect or damage being so serious as to deprive the Employer of substantially the whole benefit of the Works or a major part of the Works. In such a situation the Employer may terminate the contract in whole or in part. Under English law a breach of contract, which deprives a party of substantially the whole benefit of the Contract, would give rise to a right to treat the contract as rescinded. Lord Diplock in *Lep Air Services v. Rolloswin Limited*[11] stated:

> *"The debtor failed to perform voluntarily many of his obligations under the contract - both the obligation of which performance was guaranteed and other obligations. The cumulative effect of these failures by December 22 1967 was to deprive the creditor of substantially the whole benefit of which it was the intention of the parties that he should obtain from the contract. The creditor accordingly became entitled although not bound to treat the contract as rescinded."*

However, a breach or even a number of breaches will not, on their own, be sufficient to show that the Employer has had substantially no benefit. In *Shawton Engineering Ltd v DGP International Ltd (t/a Design Group Partnership) & Anor*[12] the Court of Appeal stated: *"But what has to be shown is, not mere breach, but a breach of such gravity as to deprive the other party of substantially the whole benefit which it was the intention of the parties that they should obtain from the contract."*

Where there has been no performance at all then it will be clear that there has been a repudiation of the contract. However, this will not be the case as Sub-Clause 11.4 only comes into play where the Works are substantially complete and have been so certified by the Engineer. It will therefore be rare that this provision can be relied upon and the Employer should exercise extreme caution before considering

11 [1972] AC 331, 349

12 [2005] EWCA Civ 1359

termination under Sub-Clause 11.4(c). In *Astea (UK) Ltd. v Time Group Ltd*[13] Judge Seymour warned about the risks of repudiation where performance of some of the works had taken place. He stated:

> *"The application of the test of repudiation formulated by Diplock LJ in Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. is most straightforward in a case in which no performance at all of the obligations of one of the contracting parties has taken place and there is a straightforward refusal of performance. In any case in which there has been any degree of performance before the alleged repudiation the application of the test requires a qualitative judgment of whether failure to perform the remainder of the obligations of the relevant party will deprive the other party of substantially the whole benefit of the contract judged against the commercial purpose of the contract. It is likely to be necessary to consider not only what has been done, but also the value of that to the other party if nothing else is done. However, a flat refusal to continue performance will probably amount to a repudiation however much work has been done. On the other hand, if considerable work has been done in performance of a party's contractual obligations and what is alleged to amount to a repudiation is not a flat refusal to perform, but an indication of an intention to continue to perform at a speed considered by the other party to be unreasonably slow, it may be very difficult to conclude that in those circumstances what is being offered will deprive the other party of substantially the whole benefit of the contract. On the contrary, it may appear that the innocent party will eventually gain exactly the benefit contemplated. The question will be whether, by reason of the time which will need to elapse before that happens, in commercial terms the party entitled to performance will be deprived of substantially the whole of the benefit which it was intended he should derive from the contract."*

In addition to the right to terminate the Employer shall then be entitled to "recover all sums paid for the Works … plus financing costs and the costs of dismantling the same, clearing the site and returning the plant and materials to the Contractor." Robert Knutson has described this as "some sort of nuclear weapon newly granted to the Employer in relation to alleged defects"[14] and has argued that:

> *"Sub-Clause 11(4)c seems to me to be an unsuitable new addition to these Contracts and one which would be difficult to apply on its literal terms under English law. The tricky area for employers may well lie in successfully arguing that they have been deprived of "substantially the whole benefit" of the plant/Works. Such situations are bound in truth to be both rare and highly arguable."*

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13 [2003] EWHC 725 (TCC)

14 An English Lawyer's View of the New FIDIC Rainbow – where is the pot of gold? Robert Knutson, http://www.robertknutson.com/downloads/Analysis_of_English_construction_law.pdf

11.5 Removal of Defective Work

Where the Contractor cannot remedy the defect or damage expeditiously on Site then it may be necessary for the remedial work to be carried out off the Site. The consent of the Employer must be given. Consent is a term dealt with in Sub-Clause 1.3 and "shall not be unreasonably withheld or delayed." The Employer may require the Contractor either to increase the amount of the Performance Security or provide another form of security. The FIDIC Guide suggests that this is at the Contractor's option; however, the wording of the clause suggests the opposite.

11.6 Further Tests

If the carrying out of work to any defect or damage affects the performance of the Works, the Engineer may require the repetition of the test described in the Contract. The Engineer is required to give notice that these tests will be required within 28 days after the defect or damage has been rectified. This clause applies to both defects and damage for which the Contractor is responsible and for which it is not responsible. If the Contractor is not responsible for the defect and damage it is entitled to payment as the work is carried out at the risk and cost of the Party liable.

If the Contractor considers that it is entitled to an additional payment for the Further Tests then it should promptly give notice and detailed particulars of its claim in accordance with the procedure specified in Sub-Clause 20.1.

11.7 Right of Access.

The Contractor is entitled to "such right of access to the Works as is reasonably required" in order to remedy any defect or damage until the issue of the Performance Certificate (see Sub-Clause 11.9 below). The FIDIC Guide states that: "The Employer must grant a right of access for the Contractor to remedy defects and damage, or Sub-Clause 11.4 may be inapplicable."

11.8 Contractor to Search

If there is a defect in the Works the Engineer may instruct the Contractor to search for the cause of it. It is unclear whether this provision could be used by the Engineer for defects that arise before Taking-Over of the Works. Its position in the Contract (in the section entitled Defects Liability) suggests that this provision should only be used when Taking-Over has occurred. However, Sub-Clause 1.2 states that: "The marginal words and other headings shall not be taken into consideration in the interpretation of these Conditions." The Sub-Clause states that: "Unless the defect is to be remedied at the cost of the Contractor under Sub-Clause 11.2 …" Sub-Clause 11.2 refers to Sub-Clause 11.1 and therefore the natural reading of this clause suggests that this is a defect discovered in the Defects Notification Period and therefore the Engineer may

only instruct under this Sub-Clause after Taking-Over of the Works.

Where a defect is discovered within the Defects Notification Period, for which the Contractor is responsible, Sub-Clause 11.2 is stated to apply. However, the remedy of rejection of the Plant, Materials and workmanship following testing, as set out in Sub-Clause 7.6, could also be used by an Employer. Once again there is a tension created by the fact that headings and marginal notes should not be used for interpretation purposes. Sub-Clause 7.6 is applicable following any examination, inspection, measurement, or testing. However, it is doubted that the FIDIC draftsmen intended that the Employer should be able to reject Plant, Materials or workmanship a year after Taking-Over of the Works. A right to reject Plant, Materials and workmanship a year after being taken into use goes well beyond remedies that are provided by English common law. In *Kwei Tek Chao v British Traders and Shippers*[15] Devlin J stated that in cases where goods have passed to the buyer, the buyer must not act inconsistently with the reversionary interest of the seller. If he does so then the buyer loses the right to reject the goods.

11.9 Performance Certificate.

The Performance Certificate provides written confirmation that the Engineer has completed his obligations and this document constitutes "acceptance of the Works."

The definition of Performance Certificate at Sub-Clause 1.1.3.8 is singularly unhelpful. It defines the Performance Certificate as follows: "Performance Certificate" means the certificate issued under Sub-Clause 11.9 [*Performance Certificate*]."

The Performance Certificate is important in that it is linked to the Employer's obligation to return the Performance Security within 21 days after receiving the Performance Certificate (Sub-Clause 4.2). It is also linked to the Contractor's right of access to the Site (Sub-Clause 11.7), the obligation on the Contractor to issue the draft final statement (Sub-Clause 14.11), and some of the Contractor's insurance obligations (Sub-Clauses 18.2 and 18.3).

The Performance Certificate should be issued within 28 days after the latest of the expiry dates of the Defects Notification Periods or as soon thereafter as the Contractor:

(1) has supplied all the Contractor's Documents;
(2) completed and tested all the Works; and/or
(3) remedied any defects.

It should be noted that under Sub-Clause 11.3 the Defects Notification Period shall not be extended by more than two years. Sub-Clause 11.3 was included to prevent an Employer from indefinitely extending the Defects Notification Period and thereby preventing the issue of a Performance Certificate.

[15] [1954] 2 QB 459, 487

Robert Knutson[16] raises the interesting question of whether under English law the issuing of this Certificate is final and conclusive as to the Contractor's satisfactory performance of the Contract and thus stops the Employer from subsequently alleging that the work was defective. He states that there is a line of English authorities on different forms of Contract and arbitral decisions in international contracts to this effect and that the FIDIC language found here allows such arguments to be made, although their efficacy may be tempered by Sub-Clause 11.10. In *Matthew Hall Ortech Ltd v Tarmac Roadstone Ltd*[17] the court had to consider whether the Final Certificate issued under an IChemE Red Book was conclusive evidence that the works had been completed in accordance with the contract. The court held that it was. However, the contract stated that the Final Certificate was "conclusive evidence ... that the Contractor had completed the Works and made good all defects." The wording under Sub-Clause 11.9 is substantially different.

The alternative view is that there is nothing within the Performance Certificate that indicates that it is intended to be conclusive evidence of the facts certified. Without such a clear statement the Performance Certificate does not become final and conclusive. In *AG v Wang Chong Construction Co Ltd*[18] the Hong Kong Court of Appeal stated that if the parties to a contract intended the completion certificate to be final and conclusive such that an employer would be left without a remedy even for latent defects of a very serious nature, the certificate would have to set out in the clearest possible terms that this was what was intended. Similarly, Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*[19] stated:

> *"So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law …To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract."*

11.10 Unfulfilled Obligations

It is submitted that the Performance Certificate does not relieve the Contractor of its liability for any defect discovered after the issue of that Certificate. The Performance Certificate is not final and conclusive and the Contractor retains responsibility for the work it has carried. Judge To in *Wong Chuk Kin v Millennium Engineering Ltd*[20] held that:

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16 An English Lawyer's View of the New FIDIC Rainbow – where is the pot of gold? Robert Knutson, http://www.robertknutson.com/downloads/Analysis_of_English_construction_law.pdf

17 (1997) 87 BLR 96

18 [1991] 2 HKC 30

19 [1974] 1 AC 689, 718

20 (2004) HCA 876/2004

> *"The provision in a building contract of a defect liability period, without more, does not have the effect of an exemption clause exempting a contractor from liability for defective work discovered after expiry of the defect liability period. It only imposes on the contractor a contractual duty to rectify any defect discovered during the defect liability period … Nor do I consider the certification by the Defendant's project manager conclusive that the work was of the required standard."*

It has been a common misapprehension by some lawyers in some jurisdictions that the issue of the Performance Certificate in some way replaces the limitation period under the proper law of the contract.[21] Contractors ought to be aware that their liability will continue until claims against them become time barred. Under the law of England and Wales, claims in contract will be barred after 6 years from the date of the cause of action or 15 years for latent defects. In many civil law countries there is decennial liability, which makes the Contractor liable for defects for 10 years following the issue of the Performance Certificate.[22] Contractors ought also to be aware that decennial liability may arise irrespective of the proper law of the contract as a mandatory rule of law of the place where the Works were constructed.

Although a contractor may still have a liability after the Defects Notification Period and after the Performance Certificate is issued, that liability is usually one to pay damages and not to remedy defects. The issue was considered in *AMEC Foster Wheeler Group Ltd v Morgan Sindall Professional Services Ltd & Anor.*[23] Here the judge stated:

> 65. *"For the reasons that I have already given, under this form of Building Contract a contractor is under no obligation under clause 16 to make good a defect which appears after the expiry of the Defects Liability Period. He may have a duty to pay damages for breach of contract in carrying out non-compliant work in the first place, but that is a general secondary obligation arising as a consequence of a failure to fulfil a primary obligation under the Building Contract. So the contractor's omission to act upon being made aware of a defect which has appeared after expiry of the Defects Liability Period is not likely to be a legally relevant omission, unless the contractor is still carrying out the Works at the time (in which case the obligations under clause*

[21] An English Lawyer's View of the New FIDIC Rainbow – where is the pot of gold? Robert Knutson, http://www.robertknutson.com/downloads/Analysis_of_English_construction_law.pdf; and Civil Law decennial liability under FIDIC Contracts, Dr Götz-Sebastian Hök, http://www.dr-hoek.de

[22] See also FIDIC, An Analysis of International Construction Contracts, edited by Robert Knutson (2005) Kluwer at p.27 (liability under Egyptian law); p.60 (liability under English law); p.108 (liability under German law); p.163 (liability under Indian law); p. 201 (liability under Japanese law); and p.272 (liability under Saudi Arabian law).

[23] [2016] EWHC 902 at paras 65-67

8.7 may come into play). That is because, in general, there is no duty on the contractor in those circumstances to do anything.

66. *The qualification to these general statements is that circumstances may exist which do impose a duty on the contractor to do something upon being made aware of a defect. For example, suppose that whilst the contractor is on site after the expiry of the Defects Liability Period at an inspection to see whether or not notified defects have been made good, he is told by the window cleaners that a cladding panel appears to be loose. A senior employee of the contractor then inspects the panel in question using the window cleaners' hoist. He discovers at once that there is a problem with the adequacy of the fixings and a distinct possibility that, if left unremedied, the panel may become loose and fall.*

67. *In those circumstances a court might need a great deal of persuasion to be satisfied that in such a situation the contractor did not owe a duty to someone to do something: in this case a duty owed to the building owner and, perhaps, to the public at large, to report the defect. However, the contractor would be under no duty to repair the defect: indeed, he would have no right to do so in the absence of the consent of the building owner. Accordingly, in this hypothetical situation the contractor would probably discharge any duty of care by reporting the existence of the defect to the building owner (or, perhaps, to a proper authority).”*

Both Employers and Contractors should take note that many forms of standard insurance, such as the Contractors’ All Risk or Professional Indemnity Insurance will not cover the Contractor after the works have been completed. The Works will therefore often be uninsured unless particular cover has been obtained. In other countries the Contractor will be obliged to take out decennial insurance. The cost of such insurance policies is large and therefore the Contractor must allow provision in his tender for this.

While this clause refers to “each Party” remaining liable to the other the reality is that only in rare circumstances will an Employer remain liable to the Contractor because of other provisions of the Contract. Reference should be had to Sub-Clause 14.14 of the Contract, which is entitled “Cessation of Employer’s Liability” and Sub-Clause 14.12, which is entitled “Discharge.”

11.11 Clearance of Site

This Sub-Clause requires the Contractor to remove its Equipment, materials, wreckage, rubbish and Temporary Works. In the event that the Contractor fails to do this the Employer may sell these items and will then account to the Contractor for the proceeds, minus any costs incurred.

The Employer should ascertain whether the local law prohibits this action. In some countries such an action would be illegal and the Employer may find himself on a substantial claim from the Contractor, where he has dealt with the Contractor's goods or equipment without a court order.

By: Andrew Tweeddale