

Singapore High Court Clarifies the Legal Effect of a Defects Liability Clause

The High Court has clarified the law on defects liability clauses in Singapore: *Thio Keng Thay v Sandy Island Pte Ltd* [2019] SGHC 175.

Our Comments

This case is a significant decision as it clarifies the obligations and rights of parties to a construction contract under a defects liability clause.

The case also clarifies the scope of the earlier decision of *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2008] 1 SLR(R) 285 (“**Sonny Yap case**”), in which the High Court had found that the plaintiff property owner had breached the defects liability clause by preventing the defendant contractor from rectifying the defects. In the *Sonny Yap case*, the High Court held that the plaintiff property owner was not allowed to recover the costs of rectifying defects that the defendant contractor had intended to rectify.

This update takes a look at the High Court’s decision.

Background

The key facts relevant to the issues discussed in this update are as follows.

The plaintiff (“**Mr Thio**”) purchased a property developed by the defendant (“**SIPL**”). The sale and purchase agreement (“**SPA**”) between the parties was in the standard form prescribed by the Housing Developers’ Rules.

Mr Thio alleged that SIPL had built a property with significant defects and that constituted a breach of contract by SIPL to construct the building in a good and workmanlike manner.

In relation to the defects, Mr Thio asserted that he had fulfilled the requirements of the defects liability clause as he had, among other things, notified SIPL of the defects and engaged in correspondence with SIPL to explore the possibility of SIPL carrying out the rectification works.

The salient portions of the defects liability clause in the SPA are set out below:

- Clause 17.1: SIPL must make good at its own cost and expense any defect which becomes apparent within the defects liability period.
- Clause 17.2: SIPL must make good any defect within one month of receiving a notice from Mr Thio, failing which Mr Thio may:

“(a) notify [SIPL] of his intention to cause rectification works to be done and the estimated cost of carrying out those works; and

(b) give [SIPL] an opportunity to carry out the proposed rectification works within 14 days after the date of the notice in paragraph (a), failing which he may proceed to rectify the defect by his own employees or workmen.”

- Clause 17.3: If SIPL, after having been notified under clause 17.2, fails to make good the defect within the specified time, [Mr Thio] has the right to cause the rectification works to be carried out and to recover from SIPL the cost of those rectification works.

As such, Mr Thio brought a claim for damages for the costs of rectification works.

On the other hand, SIPL argued that Mr Thio had breached the defects liability clause by imposing unreasonable conditions on them. SIPL therefore argued that as a result of Mr Thio's breach of the defects liability clause, he could not claim for the defects which he had prevented SIPL from rectifying.

The High Court's Decision

The defects liability clause had been breached

First, the High Court found that Mr Thio had breached the defects liability clause. It was found that Mr Thio, through his unreasonable actions, had failed to give SIPL an opportunity to rectify defects that it had agreed to rectify.

In this connection, the High Court considered that the following actions of Mr Thio, viewed holistically, were unreasonable:

1. Refusal to send photographs of the defects to SIPL;
2. Requests for method statements for the rectification works, even before allowing SIPL an opportunity to inspect the property;
3. Persistent rejection of SIPL's method statements without the provision of reasons, coupled with unwillingness to allow SIPL access to carry out rectification works until he received a method statement he was satisfied with; and

4. "Blowing hot and cold" towards SIPL – stating that he was past having SIPL perform the rectification works but simultaneously asking SIPL how it planned to rectify the works.

As a result of the foregoing actions, the High Court found that Mr Thio had effectively closed the door on allowing SIPL to perform the rectifications.

Further to the above, the High Court reiterated its previous holding in the Sonny Yap case, that even if property owners are dissatisfied and disagreements exist between parties, they are still obliged pursuant to a defects liability clause to give contractors the opportunity to rectify the undisputed defects.

Breach of the defects liability clause does not remove a property owner's right to claim common law damages

Next, the High Court held that:

1. Unless there is express language to the contrary in a contract, a defects liability clause does not extinguish a property owner's right to recover damages under common law; and
2. A property owner's breach of a defects liability clause will only affect the quantum of damages that he is entitled to recover (under the principle of duty to mitigate), rather than exclude his right to claim damages altogether.

The High Court clarified that while the Sonny Yap case found that such breaches removed the property owner's right to recover the costs of rectifying the defects which the contractor intended to rectify, it did not go so far as to remove the right to claim damages at common law. Instead, the remedy was merely not explored in that case because it was not argued before the court then. The High Court further emphasised

that a common law right to recover damages cannot be abrogated unless by express wording.

In coming to such a decision, the High Court explained that even if the requirements of the defects liability clause are not fulfilled by the property owner, it does not detract from the fact that there were defective works which gave the property owner a right to claim damages in the first place.

The High Court therefore struck a balance between the rights of the property owner and that

of a contractor / a developer, by holding that in such situations, the contractor's / the developer's right to make good the defects at its own cost is recognised through a calibration of the quantum of damages awarded to the property owner.

The High Court therefore found that notwithstanding Mr Thio's breach of the defects liability clause, his right to claim for damages at common law against SIPL for the defects in the property was not abrogated. The quantum of such damages payable to Mr Thio is to be determined during the second tranche of hearing.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the partner at WongPartnership that you normally work with or the following partner:



Lesley FU

Partner – Infrastructure, Construction & Engineering Practice

d: +65 6517 3786

e: lesley.fu@wongpartnership.com

Click [here](#) to view Lesley's CV.

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-

WongPartnership LLP
Beijing Representative Office
Unit 3111 China World Office 2
1 Jianguomenwai Avenue, Chaoyang District
Beijing 100004, PRC
t +86 10 6505 6900
f +86 10 6505 2562

-

WongPartnership LLP
Shanghai Representative Office
Unit 1015 Corporate Avenue 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

MYANMAR

-

WongPartnership Myanmar Ltd.
Junction City Tower, #09-03
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
t +95 1 925 3737
f +95 1 925 3742

INDONESIA

-

Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

wongpartnership.com

MALAYSIA

-

Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-

Al Aidarous International Legal Practice
Abdullah Al Mulla Building, Mezzanine Suite
02
39 Hameem Street (side street of Al Murroor
Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com

-

Al Aidarous International Legal Practice
Zalfa Building, Suite 101 - 102
Sh. Rashid Road
Garhoud
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-

ZGLaw
27/F 88 Corporate Center
141 Sedeño Street, Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w zglaw.com/~zglaw