



DREW & NAPIER

Taking a close look at defects liability clauses

*Sandy Island Pte Ltd v Thio
Keng Thay [2020] SGCA 86*

4 September 2020

**LEGAL
UPDATE**

In this Update

The Court of Appeal has dismissed an appeal by the developer of a \$14 million Sentosa Cove waterfront bungalow (“**Property**”), and upheld the High Court’s finding that the developer is liable for defects in the Property. The Court of Appeal’s decision provides important guidance on how defects liability clauses operate.

Senior Counsel Cavinder Bull, Director Daniel Cai and Associate Director Kelly Lua of Drew & Napier LLC successfully represented the homeowner both in the High Court and in the Court of Appeal.

03
INTRODUCTION

03
BACKGROUND

04
THE COURT OF APPEAL’S
DECISION

05
COMMENTS

INTRODUCTION

The Developer's key argument was that it should not be liable for the cost of rectifying any defects in the Property, because the homeowner ("**Homeowner**") had prevented the Developer from carrying out any rectification works, in breach of the sale and purchase agreement.

In rejecting the Developer's arguments and dismissing the Developer's appeal, the Court of Appeal carried out a detailed analysis of the nature of defects liability clauses and held that a homeowner's common law right to sue for defects is not abrogated, even if the homeowner "departe[d] from the requirements of a defects liability clause".

BACKGROUND

The Homeowner discovered that the new bungalow that he had purchased was full of defects.

The sale and purchase agreement between the Developer and the Homeowner was in a standard form prescribed by r 12(1) of the Housing Developers Rules (Cap 130, R1, 2008 Rev Ed), and it contained the usual defects liability clause requiring the Developer to make good any defects which become apparent during a period of 12 months.

The Homeowner notified the Developer of more than 400 defects. The Developer only admitted to about 200 defects. Despite protracted exchanges between the parties, there was no agreement on the defects to be fixed and the method of rectification.

Having lost confidence in the Developer, the Homeowner called a tender for the rectification works and engaged his own contractor to rectify the defects. The Homeowner then commenced proceedings in the High Court to recover, amongst other things, the costs of rectification from the Developer.

The High Court found that the Developer had breached its obligation to construct the Property in a good and workmanlike manner. The High Court also held that even though the Homeowner did not comply with the contractual requirements of the defects liability clause, he is still entitled to bring a claim under common law against the Developer for the defective works.

The Developer appealed to the Court of Appeal, arguing that the Homeowner's refusal to allow them to rectify the defects was a breach of the defects liability clause and that this disqualified the Homeowner from suing under the defects liability clause and under the common law.

COURT OF APPEAL'S DECISION

The Court of Appeal dismissed the Developer's appeal, and ordered the Developer to pay costs of S\$50,000 to the Homeowner in respect of the failed appeal.

In its Judgment, the Court of Appeal stated that there "is no suggestion that the [defects liability provision] would replace the homeowners' rights at common law".

KEYPOINT

The defects liability clause in the sale and purchase agreement did not preclude the Homeowner from commencing a common law claim for damages against the Developer.

The Court of Appeal held that the common law right of an owner to recover damages is separate and independent of the contractual right contained in a defects liability clause. An owner's recourse to a defects liability clause does not remove his common law right to claim damages for defects. In coming to this conclusion, the Court of Appeal relied on its previous decision in *Management Corporation Strata Title Plan No 1993 v Liang Huat Aluminium* [2001] 2 SLR(R) 91 ("**Liang Huat Aluminium**").

The Court of Appeal acknowledged that the High Court decision in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2008] 1 SLR(R) 285 ("**Sonny Yap**") was authority for the Developer's suggested approach. In *Sonny Yap*, the High Court disallowed a homeowner's claim for damages on the basis that the homeowner prevented the contractor from rectifying defects and was acting unreasonably and in breach of contract. In its decision, the High Court referred to authorities which suggested that a defects liability clause is in substitution for the employer's right to recover damages for rectification works carried out by another contractor.

The Court of Appeal expressly rejected the approach in *Sonny Yap* and affirmed the principles set out in *Liang Huat Aluminium* and *Pearce and High Ltd v Baxter and Baxter* [1999] BLR 101 ("**Pearce**"). The Court of Appeal noted that *Liang Huat Aluminium* and *Pearce* were not cited to the learned Judge in *Sonny Yap* and counsel for the contractor in *Sonny Yap* instead relied on authorities which pre-dated *Liang Huat Aluminium*. The Court of Appeal overturned *Sonny Yap*, stating that "[*Sonny Yap*] was wrong and should not be followed on this point".

The Court of Appeal also rejected the Developer's argument that a defects liability clause is a complete code that excludes common law rights and governs parties' behaviour once the clause is invoked.

During the oral hearing of the appeal, the Court of Appeal tested the Developer's argument with the following hypothetical: An owner produces a defects list comprising 100 defects to a developer, pursuant to a defects liability clause. The developer only agrees to repair 2 of the 100 defects. Is the owner prevented from pursuing a common law claim against the developer in respect of the remaining 98 defects?

The Developer's answer to the Court of Appeal was inconsistent with its case in the High Court. [37] and [38] of the Court of Appeal's Judgment states:

"The [Developer's] concession and shift in stance demonstrates, with respect, the flaws in its case. During oral argument, counsel for the [Developer], Mr Davinder Singh SC ("Mr Singh"), was asked to comment on [a hypothetical situation], with facts similar to the present circumstances...

Departing from the [Developer's] case below, Mr Singh agreed that the owner would not be prevented from pursuing a claim against the developer under the common law in respect of the remaining 98 defects. There is little reason why the right to claim under common law cannot exist alongside the rights of the parties under the defects liability clause."

The Court of Appeal also compared the defects liability clause in the present case to other defects liability clauses contained in various standard form construction contracts in Singapore and stated that these standard form contracts have "consistently treated their respective defects liability clauses as merely offering an alternative procedure for rectifying construction defects".

KEYPOINT

"There is little reason why the right to claim under common law cannot exist alongside the rights of the parties under the defects liability clause."

COMMENTS

The Court of Appeal's decision in *Sandy Island Pte Ltd v Thio Keng Thay* [2020] SGCA 86 is significant as it provides a welcome clarification to the state of the law concerning the nature and the effect of defects liability clauses.

Defects liability clauses, such as the one found in parties' sale and purchase agreement are ubiquitous, and as observed by the Court of Appeal, defects are one of the major components of almost all building and construction disputes.

The Court of Appeal's decision makes it clear that an employer or homeowner's common law right to sue for damages for defects is not abrogated by the existence of a contractual defects liability clause. This remains the position, even if the employer or homeowner does not comply with the requirements set out in the defects liability clause, though there may be consequences on the amount of damages recoverable if the Court finds that there has been a failure to mitigate losses.

The Court of Appeal's decision clarifies matters by overruling *Sonny Yap* and establishing the primacy of the analysis in *Liang Huat Aluminium*.

The practical effect of this decision may be to encourage developers to negotiate and reach an agreement with homeowners on the extent of defects and the method of rectification when they are notified of defects pursuant to a defects liability clause, instead of risking a subsequent claim by the homeowner for damages.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances. Copyright in this publication is owned by Drew & Napier LLC. This publication may not be reproduced or transmitted in any form or by any means, in whole or in part, without prior written approval.

If you have any questions or comments on this article, please contact:



Cavinder Bull, SC
Chief Executive Officer

T: +65 6531 2416
E: cavinder.bull@drewnapier.com



Daniel Cai
Director, Dispute Resolution

T: +65 6531 2468
E: daniel.cai@drewnapier.com



Kelly Lua
Associate Director, Dispute Resolution

T: +65 6531 2315
E: kelly.lua@drewnapier.com

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)6535 4906

 **DREW & NAPIER**