

Revisiting the Highland Towers: Has the Judicial Tide Subsided?

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Abstract: This paper aims to look into the treatment of the Malaysian courts in cases of defective works in the construction industry with guidance from the Highland Towers tragedy, specifically the High Court case of *Steven Phoa Cheng Loon v Highland Properties Sdn Bhd*. Through the decisions of the Malaysian courts coupled with industry practice, the analysis might shed some light as to the direction of the Malaysian construction industry. A doctrinal analysis is employed to ascertain the attitude of Malaysian courts towards cases involving defective works. The purpose of this study is to analyse the current trend in Malaysian courts and industry practice in dealing with defective works in the construction industry. Further, the analysis will be utilised to provide guidelines to construction industry players to ensure that possibility of defective works is minimized and how best to deal with defective works appearing in the construction project. This paper concludes with the recommendation for the construction industry players to adopt proper industry practice with guidance as provided by the Malaysian courts in order to reduce the risk of defective works in construction projects.

1 INTRODUCTION

Generally, a defect would mean that the contractor failed to achieve a certain standard of workmanship or failure to comply with requirements as to materials to be used as set out in the construction contract. Nevertheless, each construction contract might differ in detail as to what amount to a defect or defective works. These defining clauses, in whatever form, would be scrutinised by the courts to comprehend whether the situations as alleged by the parties to the contract as being defective works or otherwise a mere rectifiable minor flaw. In both circumstances, it is common in the industry that the contractors are left with generally two choices: whether to offer themselves for rectification works or come to an agreement as to a settlement sum. The trend in other commonwealth countries, especially in Australia is that the contractors prefer to opt for rectification works because then they would have more control over the scope of work and that the situation would be more familiar to them and would potentially involve lesser rectification time and ultimately, lesser cost (Campbell, 2018).

It should be noted on the outset that the contractors have the implied obligation to ensure that the works they carried out is in accordance with the

contract in a reasonable and safe manner while ensuring that the end product is of good and acceptable quality. One of the manner in which this implied obligation would be breached is that if the materials supplied and eventually used is defective (Creman & Ozer, 2018). By extension, this would also mean that the defective works are not just looking into the failure to comply with the standard of workmanship, but goes beyond that by looking at the possibility of using materials that are not suitable for the purpose of the construction project, taking into consideration various factors including the climate condition, geographical location and project costs.

The Malaysian Construction Industry, despite being a multi-billion ringgit industry, is still tainted with the image and an overall fear of the end-user that the completed project will be streamed with defects and if the matter worsen, there will be years of dispute resolution process because the parties to the construction projects will refuse to take responsibility of the defective works. This is not surprising as each construction project has its own unique circumstances, be it design, site conditions, cost and parties involved (Ahmad Rashid, Jamaludin, & Hussin Amin, 2014). This results in the subjective consequence of each particular construction project, be it in a positive or negative manner. Eventually,

when the relationship of the parties turned sour due to the defective works, the dispute resolution mechanism chosen by the parties would have the chance to look into the matter and should the parties were unsatisfied with the decision, ultimately the courts would have to assess these particular consequences in order to come to provide judgements for each case.

The above discussion centred mainly on the fact that the parties to the dispute of the alleged defective works were in fact *parties to the construction contract*, but what if this was not the case all the time? What if the end user of the premise has no contractual relationship with contractors who were involved in the construction of the building in the first place and are somehow directly affected by the defective works prevalent in the completed project? In this situation, tort claims has been held to be allowed in certain jurisdictions (Xavier, 2001). It is understandable that a contractor owes a duty of care to lawful occupiers of the completed building, albeit the latter were not the initial contractual parties. Further, this duty stems from the idea that the contractor must ensure that the completed building has been carefully constructed.

The scope of this study is to look into the basis of claims for defective works by first looking into *Steven Phoa Cheng Loon v Highland Properties* (2000). The study will then proceed to look at the trend of the Courts in dealing with defective works appearing during the Defects Liability Period (DLP) and after Certificate of Practical Completion (CPC) has been issued. There is a vacuum of literary works focusing on the attitude of the Courts towards defective works in Malaysia and the objective of this paper is to address this particular vacuum and analyse the trend to provide guidelines to construction industry players.

2 MATERIALS AND METHODS

This is a legal research paper and the materials are collected through extensive case law and library research. A doctrinal approach is undertaken to identify the key theme in the judgments on Malaysian Courts with regards to cases involving defective works in construction projects. "Defective works" in itself is a wide subject in the construction industry scene, steps are taken to ensure that the emphasis of this paper would be on how the Courts reacted to cases involving defective works and how they analyse each particular case by employing different principles of law. Further, the judgements will be scrutinised to ensure the Courts employ the appropriate principle of law, which might help in shedding some light as to which directions

Malaysian Courts should steer its decision-making process. Data will be collected from court decisions, journal articles, standard form contracts as well as government regulations and policies involving construction and building bodies in Malaysia.

3 RESULTS AND DISCUSSIONS

There is an overall repulse of the Courts to actions of the construction industry players, involving but not limited to, contractors, architects, engineers, and quantity surveyors, which resulted in the defective works in construction projects. Despite this being so, very little has been done to ensure that the cases are not repeated in future situations. It is interesting to note that there are provisions both in current legislations and in the contracts between the parties to the construction project addressing the issue on defective works, provided there are written agreement in the first place. Nevertheless, in reality, there is very little emphasis by the parties to the construction project to the content of the contract with regard to defective works until *after* there are disputes between them. Recourse to the content of the contract and the construction of the various clauses is necessary in most situations in order to ascertain whether there is in fact defect in the construction works. This is particularly so because to ascertaining whether there is actual defect is a technical and difficult question. (Bailey & Bell, 2011)

In *Steven Phoa Cheng Loon v Highland Properties* (2000) or otherwise known as the "Highland Tower" case, the High Court had the opportunity to address the defective construction works, which is considered one of the worse in Malaysian history, while commenting on the conducts of the professionals involved in the project. It involved a development project consisting of three blocks of apartments with a steep hill adjacent to the towers and a stream flowing around the vicinity. On one tragic day of 11 September 1993, Tower 1 collapsed and claimed the lives of 48 occupants. Tower 2 and 3 were then immediately vacated, which caused major monetary losses to the occupants. Several legal issues were raised before the court, among others is with regard to the negligence of the first defendant to completely implement the approved drainage plan that should have been the solution to the flow of stream. This is because the Court found that the root cause of the collapse was the presence of water in the foundational structure, which failed to accommodate the lateral load and leads directly to the destabilization of the slope. Should the first defendant

acted and conducted the project in accordance to the approved drainage plan, the disaster would be able to be avoided. The approved drainage plan was found to be implemented up to only 10% out of the whole plan, despite the defendants reported to the authorities that the approved drainage plan was complied with and implemented entirely.

It is obvious from the case and the judgment of the Court that the defendants, inclusive of the contractor, architect and engineer, failed to achieve the relevant standard of workmanship of the construction project. The sole motivation for the defendant to disregard the approved plan and the subsequent false notice of compliance was for prospective financial gains. In this regard, it prompted the then Justice James Foong to hold as follows:

I have reiterated my strong sentiments against this type of attitude of professionals whose only considerations is to guard and secure their own interest rather than their duties and obligations to those closely affected and the public on which much faith and reliance are placed on them to carry out their professional duties. I need not elaborate further except to remind this defendant that he has to live out the rest of his life knowing truly well that he contributed to the tragedy of Highland Towers (Steven Phoa Cheng Loon v Highland Properties, 2000).

In the Highland Towers, it is important to note that the High Court was very displeased as to the direct involvement of the defendants to the defects in the project. For example, there was evidence that the second defendant, as the engineer, did not exercised care in relation to the design and construct of the foundational structure as to accommodate lateral load while taking steps to guarantee the stability of the slope adjacent to the towers. Failure of the second defendant to do as required as the engineer and to exercise care not only was an obvious breach of duty, but proof of the fact that the defendant failed to achieve a proper standard of workmanship as required by the contract.

Furthermore, in the Highland Towers case, the actions raised mainly from the basis of tort of negligence whereby the plaintiffs sued various parties, which contributed, either directly or indirectly, to the defective works. Contrastingly, in the High Court case of *KC Leong Holdings Sdn Bhd v Datin Moh Lee Bing* (2015), it features a contractual relationship between the parties, and consequently claims under torts, despite were briefly discussed, were dismissed. Damage suffered by the defendant in this case is in the nature of pure economic loss where the building is allegedly built defectively but caused no damage other than to the building itself. The

defendant alleged that the buildings were constructed negligently and were not fit for the purposes of occupation. However, it is to be noted that the High Court has taken the view that the proper cause of action in this case should be premised under breach of contract instead of breach of tortious duty of care as alleged by the defendant. This is also supported by the fact that the defendant's concluding submission featured a claim under s.74 of the Contracts Act and not one under tort of pure economic loss. The trend in this case is that there is an indication in the judgement of the court that it is recommended for claims on defective works to be based on breach of contract despite the convincing nature of tortious duty of care. It is refreshing to have a simple case like this which serves as a reminder that the first avenue of which the Court will scrutinize in the event of construction dispute involving defective work is the duty arisen in the contract between the parties and not the duty which may arise under tort.

KC Leong Holdings Sdn Bhd v Datin Moh Lee Bing (2015) also touched on an important issue with regard to defective works. What happened if the defects are discovered after the defect liability period has lapsed? Firstly, is there a defects liability period clause? If not, then the Court will not ordinarily imply such a clause in the contract between the parties. Secondly, referring to a Court of Appeal case of *Toh Ang Poo (t/a Poo Wah Enterprise) v Jasin Construction Development (M) Sdn Bhd* (2014), the Court ruled that the right to claim under defects liability period clause do not supplant the right to claim for damages. They are, in fact, an *addition* to the right to claim for damages. Hence, *Toh Ang Poo (t/a Poo Wah Enterprise) v Jasin Construction Development (M) Sdn Bhd* (2014) did not generally establish that once defects liability period has lapsed, contractor's liability for defective works would cease, and should there be defective works attributable to the contractor, the principal would still reserve the right to claim for damages within the limitation period prescribed by the Limitation Act 1953.

In *Toh Ang Poo (t/a Poo Wah Enterprise) v Jasin Construction Development (M) Sdn Bhd* (2014), the Plaintiff in this case claimed for rectification costs for defective works which were discovered within the defects liability period. Defendant, on the other hand, claimed that there were no defects and even if there were any, it had been made good during the defects liability period. This is because the Plaintiff had certified all the Defendant's works and made full payment. There were grave discrepancies in the allegation of defective works. For example the Plaintiff alleged in November 2007 that the manholes

were constructed without the cast in-situ concrete surrounds, which if were to be true, it would not be considered as defective works but rather a serious omission, hence an incomplete work. This is bearing in mind that the consultant engineer had issued the Certificate of Practical Completion (CPC) in November 2006, one year prior to the allegation made in November 2007. Since there was no allegation of negligence of consultant engineer in issuing the CPC, such defective works remained as allegation and not proven. This indicates that CPC by the consultant engineer serves as more than just indicating that there is completion of the construction works but also as a proof that should there are defective works, such certification would not be issued.

The Federal Court in *Juara Serata Sdn Bhd v Alpharich Sdn Bhd* (2015) took the chance to remind construction industry players that with regard to the defective works, the parties to the construction contract must firstly refer to the terms of the agreement and should it provided for the procedures to address for the defective works, it must be followed. In this case, the Appellant alleged defective works against the Respondent, and according to the written agreement, the former must provide written instructions to the latter to make good the defects. However, the Appellant engaged a third party contractor to “remedy” the alleged defects and claim the cost of such remedy works from the Respondent. The Federal Court affirm the position held by both the High Court and the Court of Appeal that the first avenue to determine the rights and obligations of the parties is the contract and the construction contract in this case had provided for the procedures in the event of defective works. Principal, or employer in this case, cannot simply straightaway hire a third party contractor to rectify the defects and claim such costs to the original contractor.

4 CONCLUSION

It can be deduced from the words of the then Justice James Foong in *Steven Phoa Cheng Loon v Highland Properties* (2000) about the repulse and the overall inclination of the courts in addressing the unethical conduct of construction professionals of such magnitude, which directly caused the defects in the construction project and eventually lead to the death of the occupants and in most cases, caused the end-product user some serious safety issues.

The judicial tide after the tragedy of the Highland Towers is that there is a growing concern as to the

standards of workmanship and overall safety to the end-product user. Attitude of the courts in shaping the law with regards to defective works in construction projects has been positive in the sense that the courts are ready to read into the contract the obligation of the contractual parties to ensure the project achieve a minimum standard of workmanship, which would ultimately ensure risk of defective works would be minimised.

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