

Turning off auto-correct? Employers' ability to recover costs of correcting contractors' defects

August 2019

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[In *Thio Keng Thay v Sandy Island Pte Ltd* \[2019\] SGHC 175 the High Court of Singapore confirmed that an employer may recover damages for rectifying defects even when it has done so in breach of a contractual defects notification procedure.](#)

If the employer discovers defects after completion of the works, the employer may prefer to engage a new contractor to carry out the repairs, particularly if the severity of the defects causes the employer to lose confidence in the contractor's ability to rectify the works to the required standard. An employer in this position will often seek to recover the costs of the rectification works from the original contractor.

However, a typically-drafted construction contract gives the contractor the right to correct defects during a pre-defined defects notification period after practical completion of the works. A question arises as to the legal consequences if the Employer disregards the defects notification provisions, and sues the original contractor for the cost of rectification by another contractor.

Common law jurisdictions have generally taken the approach that an employer may recover much if not all of the costs of rectification using another contractor, even if it is in breach of the defects notification provisions in the contract. The recent decision of the High Court of Singapore in *Thio Keng Thay v Sandy Island Pte Ltd* has upheld this approach.

Key Facts

The plaintiff purchased a residential property from the defendant. Shortly after taking possession of the property, the plaintiff discovered serious defects in the property, including water damage that had been concealed beneath paint. The plaintiff rectified the defects to his own satisfaction, and sued the defendant for the cost of the rectification works.

The defendant argued that the sale agreement gave it the right to correct defects during a defects notification period, and that the plaintiff had prevented the defendant from accessing the property to carry out the repairs. The defendant asserted that the plaintiff was therefore not entitled to recover the damages for the repairs that the defendant would have carried out but for the plaintiff's intervention.

Decision

The High Court ruled that the plaintiff's disregard of the defects notification period did not prevent it from recovering damages from the defendant for its defective works. The Court:

- focussed on the fact that the defendant's defective works were major breaches of the sale agreement, and that the plaintiff deserved to be compensated for its loss arising out of the defects;

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- found that the plaintiff was in breach of the sale agreement by disregarding the defects notification provisions, but held that this breach did not remove the plaintiff's right to damages for the cost of rectifying the defects;
 - ruled that the only consequence of the plaintiff's breach of the defects notification provisions was a potential reduction in the quantum of its recoverable damages for the defects, noting the possibility that the defendant would have carried out the rectification works at a lower cost than the plaintiff's own contractor, if the plaintiff had given it the opportunity to do so;
 - in doing so, followed the approach taken by the English Court of Appeal in *Pearce and High Ltd v Baxter* [1999] CLC 749 and the Singapore Court of Appeal in *Management Corporation Strata Title Plan No 1993 v Liang Huat Aluminium* [2001] 2 SLR(R) 91.

The exact quantum outcome was reserved to later proceedings.

Comment

Although the conclusion reached by the High Court is not unexpected, the decision will be welcome to both employers and contractors, who are equally invested in the defects notification period. The court has affirmed the right of the contractor to correct defects in preference to other contractors during the defects notification period, and to take the benefit of any costs saved by doing so (by contrast to having to pay damages at the market rate for a second contractor). If the employer disregards the defects notification period, the contractor does not need to pay more as damages than the hypothetical cost of carrying out the repairs itself.

However, the court has also affirmed the employer's right to compensation for rectification of defects, even where it has lost confidence in the contractor and engages a second contractor to carry out the works. All that the employer may sacrifice by doing so is the difference between the cost of repairing the defects on the open market, and the cost of the original contractor doing so (if any).

This Singapore case is therefore consistent with a defects notification period not being a strict 'code' that excludes all other employer remedies for defects except for the procedure stated in the contract itself. Typically (as in this case), a defects notification provision will not state explicitly that an employer is prevented from recovering compensation for defects, if it does not follow the defects notification regime. As the court noted, the decision reflects the fact that courts in common law jurisdictions are reluctant to find that a contract excludes a party's ability to recover damages for breach, if there are no clear words in the contract doing so.

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