Contractors liability for defects caused by supplier's negligence[*]

I. Introduction

1 Picture this: you are a contractor, and the developer of your long completed construction project is suddenly threatening to sue you over some tiles that have fallen out. You find out that the reason behind the tiles falling out is that they required a specific glue, which the supplier failed to tell you to use. However, the supplier is currently nowhere to be found, leaving you to fend off the angry developer by yourself.

2 In a frenzy, you flip through your contract with the developer to see what you might be sued for. You find a clause which prescribes a defects liability period ("DLP") of 12 months for the project. You see a glimmer of hope – does this mean that you will not be liable for defects that arise after those 12 months?

3 Unlike what the name suggests, unfortunately, a contractor's liability for defects does not end with the DLP. Contractors may still be liable for latent defects found years after completion, as they are by definition defects which *are not readily apparent or discoverable*.[1] This article will focus on a contractor's liability in negligence and the defences he can use to escape such liability.

II. What is the DLP?

4 The DLP is a period commonly included in construction contracts, which starts after a construction project has been certified as "substantially completed".[2] It is also known as the "warranty period for defects",[3] as a developer may require a contractor to repair *all defects found during the DLP* without further payment or reimbursement.[4]

5 After the contractor completes all outstanding works and rectifies all defects found during the DLP, he will typically receive retention monies from the developer.

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1 Chow Kok Fong, *Construction Contracts Dictionary* (Thomson Reuters, 2nd Ed, 2014) at p 274.

2 *Id*, at p 128.

3 Home & Decor, "Key Basics of a Renovation Contract", *Home & Decor Singapore* (1 May 2015) <https://www.homeanddecor.com.sg/blogs/key-basics-renovation-contract> (accessed 10 October 2019); Law Insider, "Defects Liability Period Sample Clauses", *Law Insider* <https://www.lawinsider.com/clause/defects-liability-period> (accessed 10 October 2019).

4 Chow, *Construction Contracts Dictionary*, *supra* n 1, at p 128.

Retention monies are a portion of a developer's payments to the contractor for works done, which are withheld by the developer until the contractor fulfills all of his obligations under the contract.[5] They are withheld for the developer to complete or rectify the works himself when the contractor fails to do so.[6]

6 Yet, developers often hold on to the retention monies for years after the DLP, even after the contractor has completed the project and rectified all the defects found during the DLP period[7] When this happens, the contractor should check whether the contract states when the retention monies must be released. If there is a date or event which triggers the release (e.g., at the end of the DLP), the contractor will have a contractual right to the monies after such date or event occurs.[8] If the developer continues to withhold the monies, the contractor can threaten to sue for breach of contract.

7 However, if the contract is unclear about when exactly the retention monies can be released, the contractor's right to the monies is uncertain as well. It might be possible to claim them as part of "progress payments" under the Building and Construction Industry Security of Payment Act ("SOPA"),[9] but this has yet to be tried.[10] Contractors could argue that allowing this would achieve the objective of the SOPA, which is to facilitate their cash flows by giving them an unqualified right to progress payments.[11] Thus, they can try serving a "payment claim" to the developer pursuant to section 10 SOPA.[12]

III. Will I be liable for defects even after the DLP?

8 After the DLP, a contractor may still be liable in negligence. A person is negligent when he fails to take reasonable care to avoid causing damage to those to whom he owes a

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5 *Id,* at p 402–403.

6 *Id*, at p 403.

7 Flint Bishop, "Recovering Retention in Construction and Engineering Projects", *Flint Bishop Solicitors* <https://flintbishop.co.uk/insights/recovering-retention-construction-engineering-projects/> (accessed 10 October 2019).

8 *Ibid.*

9 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) at s 5.

10 Andrew Burr, *International Contractual and Statutory Adjudication* (Routledge, 2017) at [18.7] and note 24.

11 Chow, *Construction Contracts Dictionary*, *supra* n 1, at p 60.

12 *Ibid.*

duty of care ("DOC").[13] He owes a DOC when he can reasonably foresee his action or omission causing another person to suffer loss or injury.[14]

9 A contractor is negligent if he fails to take reasonable care to avoid causing damage to the developer, to whom he owes a DOC.[15] Examples of contractors failing to take reasonable care include: not rectifying defects, not ensuring that structures are installed properly, and not ensuring that the correct materials are used.[16]

A. Is there proof of damage?

10 A contractor can only be negligent if a developer can prove that he suffered actual damage from the contractor's action or omission.[17] In our scenario above, fallen tiles would constitute actual damage.

11 However, the developer might not be able to show that the damage was caused by the contractor. Especially after the DLP, it is difficult for developers to ascertain and prove the root cause of a defect.[18] Thus, contractors could argue that the defects were not caused by them but emerged from wear and tear or maintenance problems.[19]

B. Were the defects caused by my negligence?

12 If the defects were actually caused by an independent subcontractor, the main contractor who appointed the subcontractor would not be liable.[20] This is because a person is generally only liable for his own carelessness and not others'.[21] The only exception to this is in an employer-employee relationship, where an employer might be "vicariously liable" for his employee's negligence.[22]

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13 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at [01.072].
14 Chow, *Construction Contracts Dictionary*, *supra* n 1, at p 153.
15 *Millenia Pte Ltd v Dragages Singapore Pte Ltd* [2018] SGHC 193 at [418]–[419].
16 *Id*, at [433].
17 Chow Kok Fong, *Law and Practice of Construction Contracts* (Thomson Reuters, 5th Ed, 2018) at [16.002].
18 Yunita Ong, "Fault Lines: A Look at Defect Resolution in Condos", *Business Times* (3 August 2019) <https://www.businesstimes.com.sg/brunch/fault-lines-a-look-at-defect-resolution-in-condos> (accessed 19 September 2019).
19 *Ibid.*
20 *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 2 SLR 793 at [88].
21 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [19]–[20].
22 *Id*, at [20].

13 In our scenario, it is unclear whether you, as a contractor, can use this defence for suppliers instead of subcontractors. While suppliers are technically also subcontractors,[23] they are treated differently under the SOPA.[24] However, you could argue that the defence should be extended to suppliers as well, because main contractors also rely on their expertise and cannot control how they work.[25]

14 To prove that the supplier is an independent subcontractor, you must show that he was performing services on his own business' account.[26] Factors that point toward this were laid out in *MCST Plan No 3322 v Mer Vue*:[27]

(a) Whether the subcontractor provides his own equipment;
(b) Whether the subcontractor hires his own helpers;
(c) The degree of financial risk the subcontractor takes;
(d) The degree of responsibility for investment and management the subcontractor has; and
(e) Whether and how much you profit from sound management in the performance of his task.

15 After you establish that the supplier was independent, you have to show that you appointed him with care.[28] If you did not check his competence beforehand, you might still be considered negligent.[29]

16 Therefore, you need not panic even if the supplier has disappeared. As long as you can prove that he was an independent subcontractor and that you appointed him carefully, you will not be liable for his negligence.[30]

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23 Chow, *Construction Contracts Dictionary*, *supra* n 1, at p 437; Stephen Wong, "A Guide to Sub-Contracts in the Building and Construction Industry", *Asia Law Network* (15 August 2018) <https://learn.asialawnetwork.com/2018/08/15/guide-sub-contracts-building-construction-industry/> (accessed 19 September 2019).

24 Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

25 *MCST Plan No 3322 v Mer Vue*, *supra* n 20, at [83].

26 *Id*, at [11]-[12].

27 *Id*, at [13].

28 *Id*, at [15].

29 *Ibid.*

30 Christopher Chuah, "High Court Clarifies the Extent and Scope of Liability of the Developer, Architect and Main Contractor of a Construction Project in a Claim for Building Defects", *WongPartnership* (March 2016) <https://wongpartnership.com/index.php/files/download/2099> (accessed 12 October 2019) at p 5.

C. Is the claim within the time limitation?

17 A developer cannot sue a contractor for negligence causing latent defects if the time limitation in section 24A(3) Limitation Act has passed.[31] The time limitation is the later of:

(a) 6 years from the date "the defects manifest themselves in the form of physical damage";[32] or

(b) 3 years from the date the developer first has the knowledge of and right to sue for the negligent act.

18 Applying this to our scenario, the developer cannot sue:

(a) 6 years after the tiles cracked or fell; or

(b) 3 years after he knew that the tiles cracked or fell due to negligence, whichever is later.

19 Regardless of when the damage was discovered, section 24B states that the maximum limit is 15 years from the date the negligent act was committed.[33] Thus, a contractor cannot be liable in negligence for latent defects 15 years after the project was substantially completed.[34]

IV. Conclusion

20 Liability for defects depends on the specific facts of each case.[35] In our scenario, the main contractor will likely be able to avoid liability for the fallen tiles thanks to the "independent contractor" defence. In another situation where the answer to all of the questions in the subheadings is "yes", the contractor might not be so lucky. In that case, the contractor can try to settle the matter amicably with the developer, which will save the costs and time of going to court.[36]

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31 Limitation Act (Cap 163, 1996 Rev Ed) s 24A(3).

32 *Millenia v Dragages Singapore*, *supra* n 15, at [479]–[480].

33 Limitation Act (Cap 163, 1996 Rev Ed) s 24B.

34 *Millenia v Dragages Singapore*, *supra* n 15, at [470].

35 Chan, *The Law of Torts in Singapore*, *supra* n 13, at [06.003].

36 Ong, "Fault Lines: A Look at Defect Resolution in Condos", *supra* n 18; STProperty, "Buyer's Rights

21 As a way to avoid these issues from even arising, perhaps contractors should aim to exclude their contractual liability for subcontractors' works when negotiating contracts with developers.[37] Although developers may be unwilling to agree to this contractual term, there does not seem to be any harm in proposing it as a clause which will help contractors breathe a little easier.

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in Building Defect Disputes", *STProperty* (29 January 2013) <https://www.stproperty.sg/articles-property/singapore-property-news/buyers-rights-in-building-defect-disputes/a/102830> (accessed 20 September 2019).

[37] Chow, *Law and Practice of Construction Contracts*, *supra* n 17, at [16.191].