

Latent Defects: Approaches in Protecting House Buyers' Right in Malaysia

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Abstract. The aim of this research is to identify suitable approaches in order to create awareness of the house buyers on how to prevent economic loss due to latent defects. Semi-structured interviews with fifteen respondents had been conducted. Findings showed that there are three suitable approaches namely Collateral Warranty, Latent Defect Insurance and Contract Act (Rights of Third Parties) that can be applied. However, the applications of these approaches are significantly low or none exist in Malaysia. Steps that should be taken include create awareness among house buyers regarding their rights and expose them to the benefits of the recommended approaches.

1 Introduction

It had been reported that defective workmanship of housing units had topped the list of complaints received in the year of 2000 to 2005 by the monitoring and enforcement division of the Ministry of Housing and Local Government. According to Olanrewaju et al. [1], design and construction defects are those that are caused due to wrong methods of construction, poor materials and bad labour practices. Defective building means a building that is not performing according to design. Defects liability period of twenty four (24) months is provided under the Sale & Purchase Agreement (SPA) where the developer is required to repair and make good, at his own cost and expenses, any defects that become apparent within the period.

According to Sufian and Ab. Rahman [2], the defects liability period is quite long and this may give quite comfortable protection to purchasers, however there would be a problem of latent defects which may occur only after two years. The deputy president of Federation of Malaysian Consumer Association (FOMCA), N. Marimuthu, most defects are undiscoverable until the defects liability period is over. Cama [3] agreed and pointed out that most construction defects are latent which could only become apparent at some date later. He defines that latent defects are those hidden defects that would not be discoverable until a period of time later. Some defects are caused by the designers (latent defects), while some caused by the constructor (patent defects). Latent and patent defects are often in relation to new buildings [1]. Unfortunately, for latent defects, there would not be any remedies provided for house buyers under SPA unless it involves structural failure. It is certainly unfair for the house buyers to bear the cost suffered, especially in circumstances where the defects appear right after the defects liability period ends or where the defects may be due to the negligent of construction parties, i.e. contractors, architects, engineers etc.

Therefore, in countries such as UK, there are approaches being adopted in protecting the rights of house buyers in respect to latent defects. Among the approaches are Collateral Warranty, Latent Defects Insurance and the Contracts (Rights of Third Parties) Act 1999. Although the approaches are able to protect the rights of house buyers, the application of such method is not apparent in the

Malaysian housing sector, as found by Ng [4]. In Malaysia the rights of house buyers are accompanied by certain limitations and such methods are not effectively adopted, resulting in unguaranteed protection of house buyers. The application of the alternatives is perceptible in other countries, but unapparent in Malaysia. Why is this so? Therefore, this paper seeks to address the following issues:

- a) Are the approaches in protecting house buyers' rights needed in Malaysia?
- b) How do these approaches play their roles in helping house buyers when latent defect is found in a building?
- c) Why are these approaches not adopted in the Malaysian housing sector?
- d) This paper aims to identify suitable approaches that may protect house buyers from economic loss from latent defects. In order to achieve the aim, the following objectives must be accomplished:
- e) To identify approaches in protecting house buyers' rights to recover pure economic loss resulting from latent defects;
- f) To analyse factors which hinder the application of the approaches; and
- g) To recommend avenues to introduce and promote the approaches in Malaysia.

2 House Buyers' Right and Limitations

Current limitations of legal rights available against latent defects to house buyers ought to be fully understood in order to recognise the necessity of the approaches.

2.1 House Buyers' Rights & Limitations under Contract.

Legal rights are created by the acts of agreement between two parties of the contractual arrangement [5]. House buyers who purchase a new premise from the developer will establish a contractual relationship with the developer via the SPA. Hence they will have contractual rights upon the developer in the event of defects within the defects liability period which is generally 24 months as stated in the SPA. Generally, there is no automatic right for house buyers to claim against developer for such latent defects when they are discovered. Nevertheless, as recognised by The Consumer Association of Penang that the developer might still be liable to defects which appear after the liability period due to provisions of clause 14 of SPA which states that "the Building shall be constructed in good and workmanlike manner....".

Hence, if the building is not in a good condition for living in, the developer may still be liable for the defects even though the defects liability period is over. However, such a ground is only convincing if the defects are serious like structural defect. Additionally, it is essential to understand that the rights discussed by The Consumer Association of Penang are contractual rights. Only first-hand house buyers who have contract with the developer are able to enforce the contractual rights.

2.2 House Buyers' Rights & Limitations under the Limitation Act (Act 254)

Another circumstance faced by house buyers relating to latent defects is when the defects liability period is over; consequently, developer will claim that, they are not liable to the defects. Housing developers may assume that they cease to be liable for defects which appear after the defects liability period as per provisions in the SPA. But the truth is Limitation Act (Act 254) provides house buyers with "contractual" and "tortuous" rights to bring their action within six (6) years from the date on which the cause of action accrues [6].

The limitation period may work well in other commercial area, but in the case of housing, the defects or damages may be undetected for years and such limitation period presents potential injustice to house buyers. By the time the defects or damages are discovered, the claim may be statute-barred by the Limitation Act (Act 254). For instance, house buyers may discover a defective foundation long after the date the foundation was laid.

2.3 House Buyers' Rights & Limitations under Tort

Chappel [7] defined tort as a civil wrong act conducted by the wrongdoer which will allow an aggrieved party to obtain remedies through the law of tort. With respect to the housing industry, if defects in buildings happened as a result of a civil wrong or so called negligence by construction professionals in which they ought to have reasonably foreseen that their decisions or actions during or prior to the construction process would have affected the house buyers in the event of the defects, such a defect give rights to the house buyers to obtain remedies through negligence in the law of tort.

However, in order to bring an action in tort, it requires the house buyers to have suffered a recognised damage which was caused by the wrongdoer [8]. Harrison [9] has categorised damage as personal injury, property damage other than the “thing itself” and economic loss.

The pendulum of recoverability of purely economic loss under tort has swung from a position where the law did not permit such recovery in tort for a defective building to a position where it could be allowed and yet back to its original position [10].

3 Research Methodology

The research was conducted in two stages; data collection and data analysis, and has employed two methods namely desk research and fieldwork research for each stages. Semi-structured interview was chosen to collect the primary data in this research. Fifteen respondents were selected from Klang Valley area. The interview session was targeted at four categories of respondent who are the players in the event of defective buildings. Four respondents were representatives from House Buyers Association (HBA), four developers, four lawyers and three architects.

Table 1 : Profiles of Respondents

Respondents	Category
Respondents A, B, C and D	House Buyers Association (HBA)
Respondents E, F, G and H	Developer
Respondents K, L and M	Architect
Respondents N, P, Q and R	Lawyer

The reason for targeting different category of respondents was to obtain diverse views and perspectives from the industry on the subject matter of this research. This interview allowed the respondents to give opinion and views on the position of house buyers against latent defects and at the same time reduced the possibility of non-related information to the research.

The interview questions consisted of four sections which were designed according to the objectives of the research. It was based on three common types of answering method; selective based, open-based and rating based basis. The drawback of using qualitative interview approach was that the research could be relying too much on respondent’s self experiences.

The interview was conducted in four sections; A (Demographic Data), B (Respondents Experience in Defective Building), C (Respondents Experience in the Approaches) and D (Respondents Perception towards the Approaches), with a total of eleven questions. For rating-based question, Likert-type (five-point scale) scales with important anchor – rating 1 represented the Least Important to rating 5 representing the Most Important – was adopted in the research.

Rating-based questions was chosen because of the nature of scalar approaches which can provide interval data that can be used in a variety of ways, such as the calculation of mean scores and standard deviations.

4 Result and Discussion

Undoubtedly HBA, who is familiar with this issue were able to provide more reliable answers in achieving the objectives of this research. The other categories of respondents were selected based on their knowledge on legalities relating to latent defects in order to provide better insights considering this research needed legal knowledge input. The developers were selected based on the availability of legal advisors in a housing corporation; lawyers were selected based on reviewed of local published columns or articles which were relevant to defective buildings; and architects were selected based on the list of arbitrators provided by Board of Architect Malaysia.

Since the research had adopted selective, open and rating-based questions, the analysis for each type of question was different. Selective-based questions was analysed by calculating the percentage. While for open-based question, which had adopted the semi-structured qualitative interview approach, the analysis was on contended and non-measurable data. Sekaran et. al. [11] has identified three categories of methods to analyse such data of qualitative approach. It included language-based method, descriptive or interpretative method and theory-building method.

Descriptive or interpretive method was selected for this research where the method attempts to develop a comprehensive view of the subject matter from the perspective of the respondents [12] which is appropriate for the research.

On the other hand, rating-based questions had been analysed using the ‘mean score’ method to establish the relative importance and relevance of the opinions respectively. When a particular opinion had been given a rate, the following calculation had been used to determine the relative ranking of that opinion among the respondents.

$$MS = \frac{\sum(fxs)}{N}, (1 \leq MS \leq 5)$$

Where s= score given by the respondents ranging from 1 to 5, where 1 represents the least relevant and 5 represents the most relevant.

f = frequency of response to each rating (1-5)

N = total number of respondents

4.1 Adoptable approaches in protecting house buyers’ rights to recover pure economics loss resulting from latent defects.

Collateral warranty, latent defects insurance and the contracts (right of third parties) act has been in practise in Malaysia throughout the respondents’ experience.

4.1.1 Collateral Warranty

HBA, who frequently handle and help house buyers to deal with developers when necessary, did not however come across projects where collateral warranty was adopted in Malaysia. While all respondents from the survey category of developer, who are generally the party demanding for collateral warranty also had never been experienced in the provision of collateral warranty in Malaysian projects. The warrantor, the architect who plays a role to provide warranty as pointed out by all respondents of this category, also had never encountered collateral warranty being applied in Malaysian projects. Finally, the lawyers, party who are involved in preparing the documentation of collateral warranty, expressed the same.

It can be concluded that the documentation of collateral warranty in Malaysia is significantly low or none. However, it was recognized by Respondent Q that a similar form of collateral warranty was drafted by Public Works Department (PWD) which industry players did not realize that it is in nature a collateral warranty. The warranty is in the form of “Letter of Indemnity from Nominated Sub-Contract to the Government”. Yet such collateral warranty agreement binds only the nominated sub-contractor and the government and does not relate to the house buyers.

4.1.2 Latent Defects Insurance

Findings revealed that all respondents had never come upon any Latent Defects Insurance provided in Malaysian projects. There were seven respondents who were concerned about the issue of quality in Malaysian construction which echoed the view of insurance companies in their disinterest to insure latent defects. When insurance companies offer the policy they will certainly want to safeguard their interest in the first place.

Their concern is that by providing Latent Defects insurance the door will open to masses of claims from house buyers considering that the quality of workmanship in Malaysia is questionable. A good example according to respondent R when the Malaysia government once tried to implement the insurance for abandoned project and it's turned out that the insurance companies in Malaysia were not prepared to take the risk yet.

There was an additional view from Respondent B that a list of insured item could be clearly identified in the insurance policy in order to sweep away the concern of the insurance companies. By doing so, the rights of house buyers are being secured while on the other hand, interest of the insurance companies would also be taken care of.

4.1.3 The Contracts (Right Of Third Parties) Act

Results from the survey showed that there was no similar legislation in Malaysia which legislate the rights of house buyers, except in common law. Respondent F and Respondent G viewed that rights of house buyers had already been governed under common law, where in the event of latent defects; house buyers have their tortious rights to issue a claim against potential wrongdoer such as architects, engineers and so forth. Both respondents added that with the presence of the Act, it would legislate the rights more firmly.

But, if the defect does not cause any personal injury or property damage to things other than the premise, the recovery of pure economic loss suffered by house buyers for example rectification cost would be hard to be established in court as opined by nine (9) of the respondents. Respondent F countered this view that such purely economic loss is recoverable in Malaysia court, but subject to proving causation link and reasonable test between house buyers and potential defaulting parties. Respondent C reviewed that Malaysia has the Contract Act 50 to govern the system. However, the act is too general and does not specifically protect rights of the third party house buyer.

Nevertheless, Respondent Q stated that, there are lots of uncertainties within the Act which in turn restrained the application of it. Respondent Q raised a few issues. Firstly, will the Act be subjected to the Malaysian Limitation Act (Act 254) in limiting the period of time a house buyer could bring up their case?

The limitation Act (Act 254) generally provides that both contractual and tortious act should not be brought up after six years from the date on which the cause accrued. The second concern expressed by Respondent Q and Respondent B was that the Act seemed to be open-ended to all third parties concerned which are not practical. The unlimited class of third parties will cause negative response from the industry's players to embrace it into the industry.

One respondent from the category of developer opined that such Act is in fact a good measure to allow house buyers to directly sue against the potential contract breaker without having the needs to go through the developer and it would definitely reduce cost and time. The findings of the interviews are summarised in Table 2.

Table 2: Respondents Experience in the Adoptable approaches in Protecting House Buyers Rights in Malaysia

Approaches	Findings	Further Comments
Collateral Warranty	All the sixteen (16) respondents did not come across with project where collateral warranty being adopted.	Respondent Q recognized similar form of collateral warranty was drafted by Public Works Department (PWD) which generally not being realized by the industry that it is a nature of collateral warranty. The form was the “Letter of Indemnity from Nominated Sub-Contract to the Government”
Latent Defects Insurance	All the sixteen (16) respondents had never come upon any Latent Defects Insurance provided in Malaysian projects.	Respondent B suggested that a list of insured item could be clearly identified in the insurance policy in order to sweep away the concern of the insurance companies. Respondent R was in the opinion that the insurance companies in Malaysia are not prepared to take risk yet.
The Contract (Rights of Third Parties) Act	This act is absent in Malaysia’s legal system. Result from the survey shows that there is no similar legislation in Malaysia which legislating rights of house buyer, except in common law	Respondent F and Respondent G viewed that rights of house buyers have already been governed under common law. Respondent F said that such purely economic loss is recoverable in Malaysia court, but it is subject to causation link and reasonable test between house buyers and potential defaulting parties. Respondent C reviewed that Malaysia has the Contract Act 50 to govern the system. However, the act is too general and does not specifically protect rights of the third party (house buyer). Respondent Q stated that, there are lots of uncertainties possessed by the Contract Act 50 which in turn restrained the application of it.

Table 3: Factors hindered the application

Factors Hindered the Application	Ratings										Total No. of Respondents	Average Response (Mean)	Ranking	Ranking (after testing)
	1		2		3		4		5					
	No	%	No	%	No	%	No	%	No	%				
1. Uneducated house buyers	3	20	1	7	0	0	3	20	8	53	15	3.80	3	3
2. House buyers' reliance on court	3	20	5	33	0	0	5	33	2	13	15	2.87	5	6
3. Limitation of professional's knowledge on the availability	4	27	2	13	4	27	3	20	2	13	15	2.80	6	5
4. Negative response of consultants to bear extra liability	0	0	0	0	3	20	6	40	6	40	15	4.20	1	1
5. Absent of pressure from house buyers	6	40	0	0	2	13	2	13	5	33	15	3.00	4	7
6. Costly	2	13	0	0	3	20	1	7	9	60	15	4.00	2	2
7. Intensive documentations involved	4	27	4	27	4	27	2	13	1	7	15	2.47	7	4

4.2 Factors Hindering the Application

From Table 3, it can be seen that the means obtained were closely related. It is apparent that the “negative response of consultants to bear extra liability” had been perceived as the most important factor in encumbering the application. This is followed by “costly”, “uneducated house buyers” and “intensive documentation involved”. The least contributing factor is the “absent of pressure from house buyers”.

All of the respondents concurred that the mind-set of consultants who do not want to extend their liability is the main contributing factor to the relatively low or none application of the approaches

in Malaysia. Respondent B said “I’m in the opinion that consultants will not be interested in the implementation of the Contract (Rights of Third Parties) Act since it will extend their liability. The implementation is still uncertain.” The statement given by Respondent Q was also in-line with Respondent B.

As being concerned by almost all of the respondents, the “costly” issue in providing these approaches had ranked as second contributing factor which impedes the application. There were total 90% of the respondents rated the factor as the most significant factor with the rate 5. Even though the cost would be borne by the warrantors or developers who demanded for it, nonetheless, the cost will subsequently flow back to house buyers in the chain as mentioned by Respondent L and Respondent M. Respondent P said “Adoption of the approaches will obviously increase the house price due to the increase in the amount of contract. In this country where the consumers are very much sensitive in price, I believe that such an increase in cost will make the house buyers to have second thought without having weight the benefits provided by the approaches.”

Predictably, “uneducated house buyers” had ranked in the top three positions. 53% of the respondents gave a rate of 5 to this factor. Respondent B mentioned several times “Our house buyers don’t have knowledge on their rights; they are naïve, scarce and ignorant in defective issue. For latent defects, the buyers think that they have no rights to issue claim against developer. In fact, they have rights under Limitation Act (Act 254) and also common law.”

The factor of “intensive documentation involved” perceived the lowest average mean of 2.47, yet following the testing of its significance, it was proven that this factor was in fourth position. In other countries where collateral warranty is a norm in the industry, its disadvantage of intensive documentations had always be ground where industry players try to avoid it mentioned by Respondent F.

Next the factor “limitation of professional’s knowledge on the availability was one of the bottom three factor, contributing to the low or none application in Malaysia. An average of 2.80 score had been obtained from survey. Respondent F particularly criticized that it is true if the consultants did not aware of the availability, they may not be able to consider applying it. However, more noteworthy was that albeit the awareness present, yet due to the first factor “negative response of consultants to bear extra liability”, they will not offer to provide the approaches themselves. However, Respondent M reflected that if the practice of the industry had been such a way where the approaches were being commonly adopted in construction projects, consultants would have no choice but adopt the approaches in order to secure their business.

The second less contributing factor hindered the application of approaches as being tested in the “house buyers’ reliance on court”. The hypothesis of this factor is that, when the house buyers relied upon court, subsequently they would think that such alternatives were unnecessary to be adopted. However, Respondents P opined that in Malaysia, the reliance on court was significantly low. Unlike other countries, the people are very defensive on their rights and would likely to bring the matter before court..

Finally the least contributing factor hinders the application of collateral warranty, latent defect insurance and the act in Malaysia was the “absent of pressure from house buyers”. Since there was no initiative from the house buyers themselves to strive for the application of the approaches in Malaysia, developers and consultants certainly will not burden themselves to apply the approaches. In addition, Respondent P expressed that house buyers could actually exert political pressure to the government if they stand together fight for it.

Other factor found from the survey was mentioned by Respondent E which commented that one significant factor was where the related bodies or associations, such as consumer associations, were not functioning well in the industry to rise up the issue concerned. Respondent R who had the same view further expressed that if the issue was silent in the society, there will not be awareness arose concerning the issue. In addition Respondent R added that such association were not exerting pressure to the government to enforce the approaches in Malaysia was also one of the factor hindered its application.

Table 4: Avenues to Promote The Application

Avenues to Promote the Application	Ratings										Total No. of Respondents	Average Response (Mean)	Ranking	Ranking (after testing)
	1		2		3		4		5					
	No	%	No	%	No	%	No	%	No	%				
1. Educated house buyers regarding their rights	0	0	0	0	1	6	4	27	10	67	15	4.60	1	1
2. Expose house buyers to the benefits of the application	1	7	0	0	2	13	5	33	7	47	15	4.13	2	2
3. Provide incentive to encourage application	5	33	1	7	2	13	2	13	5	33	15	3.07	6	6
4. Establish associations to rise up the issue	3	20	2	13	1	7	3	20	6	40	15	3.47	4	4
5. Enforcement by law.	1	7	2	13	2	13	2	13	8	53	15	3.93	3	3
6. Top industry players take the lead.	3	20	3	20	1	7	2	13	6	40	15	3.33	5	5

4.3 Avenues to Promote the Application

The avenue of “educated house buyers regarding their rights” ranked in the highest position where 67% of the respondents considered that in order to promote the application in Malaysia, the industry must first educate the house buyers concerning their rights to recover pure economic loss in the event of latent defects. Respondent L stated “Knowledge is very vital. The problem with house buyers in Malaysia is that they do not know their rights.” Respondent C said “It is essential for the house buyers to understand what rights they hold, specifically for latent defects, instead of being misled by the developer”.

47% of the respondents agreed that one of the most important step to be taken was to “expose house buyers to the benefits of the application”, which ranked in second position. Respondents J and Respondent H believe that the education of house buyers must accompanied with exposing them to the methods adopted in foreign countries so that they would be able to take the lead by enforcing the government or industry to implement the approaches into Malaysia.

The third ranking was “enforcement by law” which gained an average rating of 3.93. Eight (53%) respondents rated it with the rate of 5 as essential step to promote the application in Malaysia. Respondent P and Respondent R opined that with the political pressure from the society, either from the house buyers themselves or perhaps non-government bodies such as HBA or consumer association would be able to exert pressure to the government to consider the enforcement. While Respondent F and Respondent G pointed that if the application of the approaches was made by law, then the developer and consultants would have no choice but to follow it. Nevertheless, Respondent R and Respondent B further criticized that in Malaysia even though the approaches may be successfully enforced in law, however, the issue would always returned to “no one is enforcing it”.

Meanwhile, all respondents in the survey agreed that establishing associations were essential to rise up the awareness of the society on the issue concerned. But, few respondents pointed that there were actually associations present but the role is not being significantly played. For instance, respondents from the category of developer criticized that Real Estate and Housing Developers Association Malaysia (REHDA) should play more significant role to raise the issue as the opined that it was unfair for the developers to pay the consultants. On the other hand, Respondent R opined that it was essential to have associations to raise the issue in newspapers, journals and articles as they were the players who understand the issue better than the house buyers did.

“Top industry players take the lead” score the mean rating of 3.30 where six (40%) respondents gave rating of 5 to its contribution of promoting the application in Malaysia. However few respondents pointed that instead of relying on the top industry players including developer and consultants to take the lead, house buyers should break new ground to demand for the approaches in Malaysian construction industry.

The least important methods in promoting the application was “provide incentive to encourage application”. Respondent F and Respondent G viewed that unless the incentive given is worth of its value, developer or consultant will not be motivated to apply it either.

5 Conclusion and Recommendation

Three significant approaches have been surveyed namely the collateral warranty, latent defects insurance and the Contract Act (Rights of Third Parties). The responses received reflected that the application of these approaches is significantly low or none in Malaysia although they are needed. Alternatively the research has significantly determined several innovative approaches in helping house buyer to recover their pure economic loss in relation to latent defects. Firstly the enforcement of Certification of Compliance and Completion (CCC) would enable the house buyers to obtain their remedies from the Principal Submitting Person (PSP) which is generally the architect or engineers who owe a duty to the house buyers in certifying the premise. A few proactive approaches have been suggested with the intention to improve the quality and standard of workmanship in Malaysia in which will subsequently reduce house buyers’ risk towards latent defective building. Firstly ‘build and sell’ or ‘90:10’ systems must be promoted in the industry system where the quality of premise has to be improved by the developer in order to secure its marketability. Next, there should be regulation or law governing the performance, standard of quality of work and behavior of contractor.

In respect of latent defective premises, albeit the house buyers may suffer only pure economic loss, i.e. cost of rectifying the defects, which does not amount to any personal injury nor property damage other than the building itself, it is still unjustifiable for the innocent house buyers to be burdened with such loss suffered resulting from latent defects which could only become apparent after some time and beyond defects liability period. As the findings revealed that position of house buyers in recovering their pure economic loss in relation to latent defects is unstable is unstable, hence, there must be a insurance and the approaches which adoptable to help the house buyers in such circumstances. The three approaches discussed: collateral warranty, latent defects insurance, and the Contract Act 1999, must be promoted into the industry in Malaysia.

Acknowledgement

The authors would like to thank Teh Poh Chuan as the research assistant for this research.

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