

Defective Work and the Measure of Damages

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Claims in relation to defective work are relatively common in construction projects. Knowing how the courts value these claims and the time limits for parties to raise such claims is essential knowledge for anyone faced with the problem of defective work.

Defective work is work that does not comply with the specifications and standards required by the building contract. Defects are generally classed as either patent or latent. A patent defect is a defect that is capable of being discovered upon inspection by the Architect/Engineer (where appropriate). Whereas, a latent defect is a defect that is not discoverable during the course of an ordinary inspection during the works, and may manifest itself after the Architect/Engineer's examination of the works and indeed after the relevant contract period.

In most circumstances, an Architect will not, and should not, issue a Certificate of Practical Completion if there are any patent defects in the works, other than *de minimis* items. Up to Practical Completion the Contractor may undertake work that does not conform to contract, so long as at Practical Completion these defects have been rectified. This is on the basis however, that work that does not conform at all to the contractual standard, or omitted work, should not merit payment during the course of the work.

If a latent defect is discovered during the defects liability period the Contractor is obliged and entitled to return to the site to rectify the defect. If a latent defect is discovered after this period (i.e. after the issue of the Certificate of Making Good Defects) then the Contractor can only be pursued in damages for breach of contract, though the Employer's duty to mitigate its loss may sometimes require that the Contractor is approached to remedy the defect itself.

Under Scots Law certain time limits apply in relation to when actions can be raised. The time periods in Scotland are different from those in England and Wales. In Scotland this period is 5 years and if a relevant claim is not made

within 5 years from the "appropriate date" or without the substance of the obligation having been relevantly acknowledged the claim will prescribe. This is known as negative prescription and means that the Contractor will no longer be able to be pursued for damages.

The "appropriate date" is the date when the obligation becomes enforceable. Generally, this is taken to be the date of Practical Completion but this is subject to postponement of the date, due to reasonable awareness by the party suffering loss. The party seeking to enforce the obligation would have to show that they had suffered loss, that there was a negligent act and show causation between the act and the loss. It is important to note, an overriding prescriptive period also exists, where no damages claims may be raised 20 years after the date of Practical Completion.

A common issue, which causes concern, is water ingress defects. The recent case of *Albert Bartlett & Sons (Airdrie) Limited v Gilchrist & Lynn Limited and Atlas Ward Structures Limited and Briggs Amasco Limited [2009]* CSOH 125 is a helpful decision in considering the court's treatment of the measure of damages. At issue were two competing solutions for remedying the water ingress.

The Facts

Albert Bartlett & Sons (Airdrie) Limited operated a business as processors, packagers and suppliers of potatoes and other vegetables to the retail, wholesale and food service trade. They operated from four main sites across the United Kingdom, including premises in Airdrie. In about October 2001, Bartlett invited tenders for the design and construction of a major new potato processing and packaging plant and a contract was concluded in December 2001 whereby Gilchrist & Lynn Limited were responsible for the design and construction of the new building. Bartlett took possession of the building on 17 November 2003 but there had been considerable, widespread and persistent ingress of water at many points through the roof.

Bartlett sought damages for the loss and damage they had suffered through Gilchrist & Lynn's breach of contract. Gilchrist & Lynn and others admitted liability and the only issue to be determined by the court was the measure of damages to which Bartlett were entitled.

The Measure of Damages

Traditionally, the proper measure of recoverable damages is said to be that which, in so far as they can, would put the pursuer in the position he would have been in had the breach not been committed. This is subject to the loss being: caused by a breach; not being too remote and the pursuer being under a duty to mitigate his loss.

In building contracts, the loss caused by the breach is usually deemed to be the cost of repair unless the cost of repair is disproportionate to the benefit obtained, in which case the diminution in value occasioned by the breach of contract is awarded. The case of *Ruxley Electronics Limited v Forsyth* [1996] 1 AC 344 considered this. This case concerned defective work in connection with a swimming pool and as the pool did not require to be rebuilt to function as a swimming pool the defect had no effect on the value of the property. It was held in this case that the measure of damages was not the cost of reinstatement but the diminution in value occasioned by the breach. This is known as the Ruxley test.

In the present case the parties were in agreement that the measure of damages was reinstatement and the issue was which of the two alternative reinstatement options should be preferred. The judge was referred to previous authorities that dealt with whether or not a pursuer was entitled to the cost of reinstatement at all, not which of two reinstatement methods were appropriate. The judge identified two principles that should be considered when determining the measure of damages, these were:

1. that a pursuer who is the victim of a breach of contract cannot recover from the party in breach the cost of reinstatement where such a cost is unreasonable and out of all proportion to the benefit that it will achieve, even in a case where the court is satisfied that the pursuer intends to adopt such an expensive scheme if awarded damages on that basis, and
2. that the duty to mitigate his loss may require the pursuer to put in hand the cheaper of two alternative schemes.

The Decision

This decision is a clarification of the existing case law. It emphasises the duty to mitigate and determined that as the cheaper solution was technically appropriate and the difference in the cost of the two systems was so great, the pursuers' damages were therefore to be determined on the basis of the basis of the cheaper system.

CONTACT US

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like further information please contact:

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