

The Proper Ways of Assessing Damages for Defective Building Works

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ABSTRACT

Damages are one of the remedies available for a breach of contract. In these circumstances, defective building works constitute a breach of contract by the contractor. This article discusses the proper ways of assessing damages for defective building works. The article reveals three (3) possible measures of damages for defective building works. Whether to award reinstatement cost, diminution in value or loss of amenity/solatium, the essential requirements for the proper assessment of damages are the intention of the owner to remedy the defects and the reasonableness of the intention, and the reasonableness of the remedial works itself. This article suggests how the 'intention' and 'reasonableness' can be tested by using several questions of facts.

ABSTRAK

Ganti rugi adalah salah satu remedi bagi kemungkiran kontrak. Dalam hal ini, kecacatan kerja bangunan merupakan satu kemungkiran kontrak oleh kontraktor. Rencana ini membincangkan kaedah yang sesuai bagi menaksirkan ganti rugi bagi kecacatan kerja bangunan. Rencana ini mendedahkan tiga (3) kaedah yang berpotensi untuk digunakan dalam menilai kecacatan kerja bangunan. Sama ada award untuk mengembalikan semula kos, pengurangan kos atau kerugian kemudahan/kehilangan ketenangan, keperluan yang penting bagi menaksirkan ganti rugi yang sesuai adalah niat pemilik untuk memperbaiki kecacatan dan kemunasabahan niatnya, dan kemunasabahan kerja pembaikan itu sendiri. Rencana ini mencadangkan bagaimana niat dan kemunasabahan itu dapat diuji dengan mengajukan beberapa soalan berkenaan fakta.

INTRODUCTION

Damages are one of the remedies available for a breach of contract or in tort. Lord Blackburn in *Livingstone v. Rawyards Coal Company*¹ stated that, the general rule for the assessment of damages is to restore the injured party to the position where they would be if the party had not sustained the wrong. Lord Blackburn's proposition has been regarded as an authority by the courts when dealings with the assessment of damages either in tort or a breach of contract. In the Malaysian case of *Industrial & Agricultural Distribution Sdn Bhd v.*

¹ (1880) 5 AC 25 at pg. 39.

Golden Sands Construction Sdn Bhd,² Visu Sinnadurai J. has pointed out that ‘damages are not meant to be punitive in nature but rather compensatory’ and therefore, it is important for the plaintiff to establish that his loss is derived from the defendant’s breach of contract. The Judge further highlighted that ‘...the court, cannot, in the absence of any proof of actual loss by the plaintiff, grant the plaintiff any sum by way of damages’.

Due to that circumstance, in any standard forms of building contract there are provisions dealing with defective building works. In practice, the contractors will be required to remedy all defects caused by them during the execution of the works and during Defects Liability Period at their own cost. Defective building works could be in the forms of design fault, defective materials or bad workmanships. Then, how the courts assess the damages for defective building work? In *Bellgrove v. Eldrige*,³ the Justices of the High Court of Australia, Dixon CJ, Webb and Taylor JJ rejected the view that the measure of damages for defective building works should be the difference in value of the building as built and the value if it has been built in accordance with the contract, but they agreed with the trial Judge’s decision that the owner should be awarded the cost of demolishing and re-erecting the building in accordance with the contracts. The facts of the case show that the house had been constructed with defective foundations and caused the instability of the house. Their Justices stated that:

...her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.⁴

Their Justices also stated that the test of ‘necessary’ and ‘reasonable’ in any particular case is a question of fact, and further determined that in the event if it is unreasonable to adopt reinstatement, the true measure of damages would be the diminution in value.⁵

In another Australian case of *Rentokil Pty Ltd v. Channon*,⁶ the trial Judge has awarded diminution in value for a negligent misstatement of a report regarding the condition of the existing building. Interestingly, the decision of the trial Judge to award diminution in value for the negligent misstatement was not challenged by the plaintiff although the facts of the case showed that the existing building was so infested with termites and required demolition.

² [1993] 3 MLJ 433 at pg. 447.

³ (1954) 90 CLR 613.

⁴ (1954) 90 CLR 613 at pg. 617.

⁵ *Ibid.*, pg. 619.

⁶ (1990) 19 NSWLR 417.

Meanwhile, in *Ruxley Electronics and Construction Ltd v. Forsyth*,⁷ the justices in the House of Lords unanimously decided to reverse the decision in the Court of Appeal and retained the judgment of Diamond QC in the Central London County Court that the owner was only entitled to the loss of amenity. The House of Lords agreed that the diminution in value was not applicable in this case because it was established that whether the depth was 7 feet 6 inches as contracted or 6 feet as it was in the actual construction, it would not decrease the value of the pool.⁸ In this case, it was shown that even though the depth of the pool was not constructed in accordance with the contract, the pool was safe to be used. In other words, the pool was fit for its purpose. Due to these reasons, it was unreasonable to demolish the pool only for reconstructing the pool to the required depth.

OBJECTIVES

Based on the above cases, it shows that the damages for defective building works can be in the forms of reinstatement cost, diminution in value or loss of amenity. However, what are the proper ways of assessing damages for defective building work? This paper aims to justify the appropriate measure of damages for the defective building works, whether it should be reinstatement cost, diminution in value or loss of amenity. The courts need to carefully address this issue with a detailed examination on the facts of the case.

This paper will examine two factors that usually used by the courts in assessing damages. The two factors are 'the test of reasonableness' and 'the intention to remedy the defects'. Having reviewed extensive reported and unreported cases on this subject, it is found that the courts have recognized the test of reasonableness as the overriding requirement when they determined the appropriate award of damages for defective building works. However, the intention of the owner to remedy has not been accepted by some of the judges as the essential requirement in the assessment of damages.

In dealing with the assessment of damages for defective building works, the local case law as well as relevant cases from other jurisdictions, such as Australia and other countries will be analyzed. Foreign case law will be analyzed where appropriate in order to fill in the lacuna left by the local case law. It is hoped that the findings of this paper can assist the judges and arbitrators as well as the Malaysian Tribunal for Homebuyers Claim in assessing proper damages for defective building works.

⁷ [1996] AC 344.

⁸ Ibid.

ASSESSMENT OF DAMAGES

Through the courts' decisions, the assessment of damages for defective building works can be reinstatement, diminution in value or loss of amenity.

REINSTATEMENT COST

Nygh and Butt⁹ defined reinstatement as 'to return to or establish a former state or condition'. The reinstatement might be awarded in the form of repairing, replacing or demolishing and rebuilding the works. So far as the reinstatement work is reasonable to adopt, the basis in the assessment of damages required the court to award the owner with reinstatement cost rather than diminution in value or loss of amenity. The High Court of Australia in *Carosella v. Ginos & Gilbert Pty Ltd*,¹⁰ allowed the appeal by dismissing the Full Court's decision and restored the trial judge's judgment that the owner was entitled to the cost of demolition and rebuilding rather than diminution in value.

DIMINUTION IN VALUE

The High Court of Australia in *Bellgrove v. Eldridge*,¹¹ defined diminution in value as the alternative measure of damages for the defective building works if the court is satisfied that reinstatement could not be awarded. In the case of *Rentokil Pty Ltd v. Channon*,¹² the New South Wales Court of Appeal suggested that diminution in value can be implemented through two different approaches as follow:

- (a) the difference in value between what was paid and what was actually got;¹³
or
- (b) the difference between the market value of a sound building and that of an unsound building.¹⁴

*Rentokil Pty Ltd v. Channon*¹⁵ was a case on negligent misstatement of a report regarding the condition of the existing building. It is anticipated that cases on negligent misstatement occurred when a professional (normally a real estate agent) has negligently advised a buyer who by relying on the statement

⁹ P.E. Nygh, P. Butt, *Butterworths Concise Australian Legal Dictionary*, Butterworth, 1998, pg. 373.

¹⁰ (1982) 57 ALJR 315; 47 ALR 761.

¹¹ (1954) 90 CLR 613 at pg. 619.

¹² (1990) 19 NSWLR 417.

¹³ *Ibid.*, pg. 418.

¹⁴ *Ibid.*, pg. 423.

¹⁵ (1990) 19 NSWLR 417.

given by the professional has bought an existing defective house. Professionals could be liable for negligent misstatement even though there is no privity of contract, based on the House of Lords decision in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*.¹⁶

Even though in England the courts are reluctant to award pure economic loss for such action in tort of negligence, the Malaysian courts have accepted that pure economic loss may be recovered under certain circumstances.¹⁷ However, in the case of *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors And Other Appeals*,¹⁸ the Court of Appeal held that the trial judge in *Dr Abdul Hamid Rashid v. Jurusan Malaysia Consultants*¹⁹ was wrong in holding that as a matter of policy he could award pure economic loss without first 'ask himself the question whether pure economic loss to the plaintiffs was reasonably foreseeable by the fifth defendant'. Nevertheless, on submission of the case to the Court of Appeal, it was held that 'the kind of harm suffered by the plaintiffs was reasonably foreseeable'.²⁰ The Court of Appeal decided that:

The defendants are therefore liable to the full extent of it. And that extent is the loss in value of their apartments in Blocks 2 and 3 in consequence of the collapse of Block 1. The trial judge however went further and made an award for several types of other damage, eg vandalism and theft by unknown third parties that was on any view of the matter, far too remote (see *Smith v Littlewoods Ltd* [1987] 2 WLR 480). We must disallow these losses. They are set out at the end of this judgment. But we affirm the judge's order to direct assessment on the loss in value of the apartments in question.²¹

However, it must be noted that the intention of this paper is to focus on the contractor's failure to carry out the works in accordance with the contract or breach of contract between the contractor and the owner.

LOSS OF AMENITY

Loss of amenity according to Nygh and Butt,²² is also known as 'loss of enjoyment of life' and normally the court awarded the loss of amenity due to the personal injury of the plaintiff. In such circumstances the court was able to award the building owner the loss of amenity resulting from the loss of pleasure for not being able to receive what they had contracted. It is quite similar to 'solatium', which is defined as a sum of money to compensate the plaintiff for 'the loss or inconvenience'.

¹⁶ [1964] AC 465. See also *Esso Petroleum Co. Ltd. v. Mardon* [1976] QB 810.

¹⁷ *Dr Abdul Hamid Rashid v. Jurusan Malaysia Consultants* [1997] 3 MLJ 546.

¹⁸ [2003] 1 MLJ 567 at pg. 585.

¹⁹ [1997] 3 MLJ 546.

²⁰ [2003] 1 MLJ 567 at pg. 586.

²¹ *Ibid.*

²² P.E. Nygh, P. Butt, *Butterworths Concise Australian Legal Dictionary*, pg. 373.

Loss of amenity or solatium can be awarded if the court is satisfied that the damages are nominal. The award of nominal damages does not simply mean the damages suffered are small but it rather to establish and protect the right of the person in law. In the case of *The Owners of The Steamship "Mediana" v. The Owners, Master and Crew of The Lightship "Comet"*,²³ Lord Halsbury remarked the difference between damages and nominal damages as follow:

"Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

The case of *K. E. Hilborne v. Tan Tiang Quee*²⁴ has shown that nominal damages might be awarded if the owner who suffered the damages fails to establish the actual loss occurred flowing from the breach of contract. In a case related to construction, *D Galambos & Son Pty Ltd v. McIntyre*,²⁵ Woodward J decided that the failure to provide the actual ceiling height of the areas beneath the main house would not decrease the value of the future intention of the use of the areas, therefore, the breach of contract would not capable of being remedied at any reasonable cost and the owner is only entitled to be remedied for the inconvenience caused. Similarly, the House of Lords in *Ruxley Electronics and Construction Ltd v. Forsyth*,²⁶ decided that the loss of amenity is the appropriate award of damages and held that the diminution in value was not applicable since the alleged defects would not decrease the value of the pool. Lord Jauncey of Tullichettle agreed with the judgment of Diamond QC that to award a reinstatement cost of removing and rebuilding a new pool in order to comply with the required depth would be unreasonable since the pool as constructed was useable, substantially done and safe to dive into.²⁷

In *Coshott and Anor v. Fewings Joinery Pty Ltd*²⁸ the Supreme Court of New South Wales Court of Appeal upheld the decision of Judge Bell that the plaintiff was entitled to the cost of rectification plus solatium. Solatium was given as a compensation for the disappointment of the building owner for not getting the exact high quality works as contracted. However, in *Sunvara Pty Ltd v. John Thomas Williams*,²⁹ the owner was not entitled to the solatium

²³ [1900] AC 113.

²⁴ [1972] 2 MLJ 94.

²⁵ (1974) 5 ACTR 10.

²⁶ [1996] AC 344.

²⁷ [1996] AC 344, 358-359.

²⁸ Unreported Judgments, Supreme Court of New South Wales Court of Appeal, Gleeson CJ, Priestley and Beazley JJA, 15 July 1996. (online). http://www.butterworthsonline.com/lpBin20/lpext.dll/bw/L2/66/4/5/1014b7/118091?f=templates&fn=bwalmart-main-j.htm&2.0#JD_BC9602971 (6 May 2002).

²⁹ [2001] NSWSC 433, Unreported Judgments, Einstein J, 25 May 2001, [20]-[26]. (online). http://www.butterworthsonline.com/lpBin20/lpext.dll/bw/L2/66/4/5/91b/2a91d?f=templates&fn=bwalmart-main-j.htm&2.0#JD_BC200102973 (26 October 2002).

because the court has awarded the replacement cost of the plasterboard walls with cement render that is reasonable to achieve the intended quality of works. The owner would be entitled for solatium if the court had only awarded repair works that would not be sufficient enough to remedy the defects.

REQUIREMENTS TO ASSESS THE AWARD OF DAMAGES

The main factors in helping the courts to decide which measure is appropriate are the intention of the owner to remedy the defects and the test of reasonableness.

INTENTION OF THE OWNER TO REMEDY THE DEFECTS

In *Bellgrove v. Eldridge*,³⁰ the High Court of Australia regarded an intention of the owner to remedy the defects as not an important factor to be determined by the court. However, it is suggested that the intention of the owner to remedy the defects should be regarded as an important factor for the assessment of damages. However, the intention of the owner to remedy the defects must be reasonable to carry out. In *Rentokil Pty Ltd. v. Channon*,³¹ the assessment of damages was based on the assumption that the owner was intended to own the land, and the court accordingly awarded the diminution in value by giving the owner the loss of value of the land. The intention of the owner to continue to own the land was regarded as one of the factors that lead to the court's reasoning in the assessment of damages.

In *Beatrice Ramanathan & Anor v. Shah Alam Properties Sdn. Bhd. & Another Case*,³² the High Court of Malaya rejected the assessment of diminution in value and awarded the rectification cost on the basis that the plaintiff was intended to occupy the premises and not merely holding on to the premises as an investment. However, there is a distinction between investment that would generate income and investment that would not generate any income. Property for rental purposes is an example of investment that would generate income to the owner. Property that was intended merely for future family growth would not generate any income to the owner. Though, if the property was intended for rental purposes, the court should award the reinstatement cost to avoid owner's loss of income and usage of the property.

In *Westwood v. Cordwell*,³³ McPherson J decided that the owner was entitled to the cost of rebuilding the house, which was demolished by the defendant's truck. McPherson J also awarded the owner with general damages for the loss of use during the period of rebuilding on the basis of loss of rental

³⁰ (1954) 90 CLR 613 at pg. 620.

³¹ (1990) 19 NSWLR 417 at pg. 428-433.

³² [1994] 4 CLJ 646, High Court of Malaya, Kuala Lumpur.

³³ [1983] 1Qd R 276.

value of that period.³⁴ It is the writer's opinion that, the loss of use on the basis of loss of rental should not be allowed since the house was occupied by the owner and was not for rent. However, the cost of rebuilding would be correct since there was no clear intention of the owner to sell the property and the judge might be of the opinion that the owner was intended to continue to own the land. On the other hand, it would be unreasonable to award the cost of rebuilding a house that had been built some 30 years ago, whereby the reinstatement would entitle the owner to a 'new structure which would be more valuable than the old one'.³⁵

However, the diminution in value is the true measure of damages if, the plaintiff reasonably intended to sell the property in its damaged condition or where it can be established that the plaintiff is holding on to the property merely for investment purposes. On the other hand, if the plaintiff intended to continue to occupy the property or if the property was for rent and generated income for the owner, the proper measure of damages is the cost to repair the defects. According to Donaldson LJ in *Dodd Properties (Kent) Ltd. & Anor v. Canterbury City Council & Ors.*:³⁶

Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.

The intention of the owner to remedy the defects is also important in order to avoid the court from determining an unjust decision. For example, it would be unjust if the owner that has been awarded the rectification cost was later found to be capable of selling the building or property at market value without undertaking the remedial works. This would put the owner in a far better position of being able to have both the cost of reinstatement and the market value of selling price.

In *Perry v. Sidney Phillips & Son*,³⁷ the owner was awarded by the trial judge the cost of repairing the defective works, but after the trial and before the appeal, the owner sold the house without doing any of the repair works. Lord Denning MR found that, the house was bought for £27,000 but without doing any repair works the owner was able to sell it for £43,000. Accordingly, the Court of Appeal reversed the trial judge's decision and held that 'the proper measure of damages was the difference in price between what the plaintiff had

³⁴ Ibid., pg. 279.

³⁵ Ibid., pg. 277.

³⁶ [1980] 1 All ER 928 at pg. 938.

³⁷ [1982] 1 WLR 1297; [1982] 3 All ER 705.

paid for the property and its market value'.³⁸ Though, in order to avoid error of law on the face of the award of damages, the intention of the owner is an essential requirement to the assessment of damages.

Similarly, in the Canadian case of *Eldon Weiss Home Construction Ltd. v. Clark*,³⁹ the owner had re-sold the defective house at full market value without being affected by the defects and the judge was of the opinion that, the intention of the owner to remedy the defects is significant to the assessment of damages. The judge said that:

The intention of the injured party whether to remedy or realize on the asset is significant. Where he has remedied, the Court will favour reimbursement. Where he has sold, the Court will favour loss of value.⁴⁰

In *Monteleone v. AV Constructions Pty Ltd.*,⁴¹ the Court of Appeal held that the owner was entitled to the cost of replacing the defective roof membrane with a more expensive material which would last for fourteen years and rejected the trial judge's decision that the owner could only recover the cost of the less expensive membrane which would last only four years. The trial judge decided that the owner could only recover the cost of the less expensive membrane, which would last only four years because there was no clear intention from the owner to accept or carry out the more expensive remedy. Thus, a clear intention of the owner to remedy the works is an important element in helping the court to determine the appropriate measure of damages.

REASONABLENESS

The owner's intention to remedy the defects was also relevant in determining whether the award of damages would be reasonable to carry out. In *Ruxley Electronics and Construction Ltd v. Forsyth*,⁴² the House of Lords described the questions whether the owner really intended to remedy the defects are as follows:

- (a) Would the plaintiff spend his own money on doing the remedial work?
- (b) Would the plaintiff spend the damages on the remedial work if he was free to decide whether to do so?
- (c) Would the plaintiff spend the money on the remedial work if the court attached this as a condition of recovery?

³⁸ [1982] 1 WLR 1297 at pg. 1300-1301.

³⁹ *Eldon Weiss Home Construction Ltd. v. Clark* 1982 CarswellOnt 135; 20 BLR. 1; 39 OR (2d) 129; 26 RPR. 311. (online). <http://international.westlaw.com> (24 October 2002).

⁴⁰ *Ibid.*

⁴¹ Unreported Judgments, Supreme Court of New South Wales Court of Appeal, Clarke, Meagher and Hope JJA, 12 December 1989. (Online). http://www.butterworthsonline.com/lpBin20/lpext.dll/bw/L2/66/4/5/1c8bc9/1dcb7b?f=templates&fn=bwalmartmain-j.htm&2.0#JD_BC8901344 (15 June 2002).

⁴² [1996] AC 344 at pg. 348.

However, those questions are useful to the test of reasonableness if the courts are in doubt with regards to the actual loss or damages suffered by the owner. In *Ruxley Electronics and Construction Ltd. v. Forsyth*,⁴³ the court had decided that to award the reinstatement cost of removing and rebuilding a new pool in order to comply with the required depth would be unreasonable to do since the pool as constructed was useable, substantially done and safe to dive into. Although the depth was not in accordance with the actual design, the loss suffered by the owner was nominal because the pool as constructed was fit for the intended purpose and accordingly, the House of Lords restored the trial judge's decision to award the loss of amenity.⁴⁴

According to Lord Bridge of Harwich, the test of reasonableness seems 'to fly in the face of common sense'.⁴⁵ An example taken from the case of *Ruxley Electronics and Construction Ltd. v. Forsyth*,⁴⁶ illustrated how the test of reasonableness was determined by using the common sense:

A man contracts for the building of a house and specifies that one of the lower courses of brick should be blue. The builder uses yellow brick instead. In all other respects the house conforms to the contractual specification. To replace the yellow bricks with blue would involve extensive demolition and reconstruction at a very large cost. It would clearly be unreasonable to award to the owner the cost of reconstructing because his loss was not the necessary cost of reconstruction of his house, which was entirely adequate for its design purpose, but merely the lack of aesthetic pleasure which he might have derived from the sight of blue bricks.

Another example can be illustrated through the issue of colours of the external wall or roof tiles that are not in accordance with the contract or as agreed by the owner. Should the owner be entitled to the cost of replacing the external walls paint or to change the roof tiles in order to properly accord with the agreed colour? Although it is reasonable to award the owner the replacement cost since the replacement works would not require demolition, the loss suffered by the owner is nominal and the owner should only be entitled to the loss of amenity for not being able to receive the exact colours, provided that the works conform to the specifications and are fit for its purpose. It would be unreasonable for the court to award the owner the replacement cost merely for the lack of individual pleasure.⁴⁷ In *De Cesare v. Deluxe Motors Pty Ltd.*,⁴⁸ it was held that the measure of damages should be subjected to the 'test of reasonableness and a careful consideration of what was contracted for and what has been lost'.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid., pg. 354.

⁴⁶ Ibid.

⁴⁷ [1996] AC 344 at pg. 358.

⁴⁸ (1996) 67 SASR 28.

Simple tests that can be used in determining whether the remedial work is a reasonable method to adopt are to examine the nature of the facts and the comparatively small cost of affecting the work.⁴⁹ For example, if the cost of repairing the works is considered to be small and reasonable to adopt, there is no reason for the court not to award such damages. The difficulty arises when the cost of remedial work was found to be too large and out of proportion of the benefit to be obtained.

In *Eldon Weiss Home Construction Ltd v. Clark*,⁵⁰ the court agreed that the two approaches in the assessment of damages are the rectification cost approach and the diminution in value approach. According to the judge, if the cost of remedying the defects is disproportionate to the end to be obtained, the diminution in value approach is appropriate. However, in this case, the court held that the defendant was not entitled either to the cost of repair or diminution in value, since the defendant had re-sold the defective house at full market value and the selling price was unaffected by the defects. The court held that, it would have been successful if the defendant had tried to recover the cost of remedying the defects while still as the owner of the house.

However, in *Perry v. Sidney Phillips & Son*,⁵¹ the court had awarded the difference in price between what the owner had paid for the property and its market value, although the owner was able to sell the defective property more than the purchased price. Therefore, it is suggested the court should assess the damages with regards to the actual loss suffered by the owner. The true measure of damages for such cases would be suggested as follows:

- (a) if the owner was able to sell the defective house at full market value and the selling price was unaffected by the defects, the award of reinstating the works or diminution in value would unjustly enrich the owner. So, the true measure of damages should be the loss of amenity or other general damages, since the owner had not suffered any true loss; and
- (b) if the owner was able to sell the defective house for more than what they had actually purchased it for but less than the market value, the true measure of damages should be diminution in value, because the owner was unable to sell the house at full market value.

The issue as to whether the cost of reinstatement is out of all proportion to the benefit to be obtained by the owner is also within the test of reasonableness and must be determined by the court. A clear example of this test has been described by the court in *Ruxley Electronics and Construction Ltd v. Forsyth*,⁵²

⁴⁹ *Director of War Services Home v Harris* [1968] Qd R 275 at pg. 280.

⁵⁰ *Eldon Weiss Home Construction Ltd v. Clark* 1982 CarswellOnt 135 (online).

⁵¹ [1982] 1 WLR 1297; [1982] 3 All ER 705.

⁵² [1996] AC 344.

whereby the cost to demolish and rebuilding of the pool would be out of the proportion to the benefit of being able to receive the required depth. In *Coshott and Anor v. Fewings Joinery Pty Ltd.*⁵³ the Supreme Court of New South Wales Court of Appeal decided that, to award the replacement cost would be an unreasonable method because the defective joinery works were accepted as within the ordinary industry practice standard and accordingly awarded the owner with the cost of rectification plus solatium.

In *Turner v. Henning*,⁵⁴ the Court of Appeals of District of Columbia upheld the decision from the Supreme Court of the District of Columbia that the building owner is entitled to the cost of reconstructing the floor and other defective works which were not in accordance with the contract specifications. The Court of Appeals rejected the contractor argument that 'the owner should have been allowed only the difference between the value of it as done and the value of it if performed in accordance with the contract'.⁵⁵ According to the Chief Justice Smyth:

...the appellant did not do the things for which appellee agreed to pay him, and he should not be permitted to thrust upon the latter things not substantially the same, but much inferior, even though he is willing to let him have them at a reduced price.⁵⁶

His Honour's suggested that the owner would be entitled to the difference in value between the values as constructed and the agreed contract provided the owner had accepted the contractor's works.⁵⁷ However, if the owner does not accept the defective works done by the contractor, so far as it is reasonable and necessary, the proper remedy is to award the building owner with the reinstatement cost.

In another Canadian case of *Macaulay v. Wagorn*,⁵⁸ the judge did not refer the assessment of damages to the test of reasonableness but subsequently awarded the plaintiff a 'damages of \$50,000 to rectify the building defects and a further \$10,000 to compensate them for their inconvenience while the repairs were carried out'. The judge was satisfied with the facts that the house was very poorly constructed and did not conform to the relevant building code, laws and regulations. Furthermore, the court found that the defects might potentially affect

⁵³ Unreported Judgments, Supreme Court of New South Wales Court of Appeal, Gleeson CJ, Priestley and Beazley JJA, 15 July 1996. (online).

⁵⁴ *Turner v. Henning* 49 U.S. App. D.C. 183; 262 F. 637; 1920 U.S. App. LEXIS 1581; 49 App. D.C. 183 (1920), <http://www.lexis.com> (29 June 2002).

⁵⁵ Ibid.

⁵⁶ *Turner v. Henning* 49 U.S. App. D.C. 183; 262 F. 637; 1920 U.S. App. LEXIS 1581; 49 App. D.C. 183 (1920) (online).

⁵⁷ Ibid.

⁵⁸ *Macaulay v Wagorn* 1991 CarswellOnt 785; 46 C.L.R. 32, <http://international.westlaw.com> (29 June 2002).

the safety and health of the occupants. This judgment is consistent with decision in *Bellgrove v. Eldrige*,⁵⁹ whereby the High Court of Australia decided that the building owner is entitled to the cost of making the work or building conform to the contract, provided that the work undertaken is necessary to produce conformity and is the reasonable course to adopt.

The assessment of damages should also be made fairly to both parties. In another Canadian case of *Peterson v. Reilly*,⁶⁰ Robichaud J held that the plaintiffs were entitled to an award of damages for the builder's breach but the award should not be unreasonable or oppressive and must be fair to all parties. In *Evans v. Balog*,⁶¹ the court had decided that the award of damages in tort should not be assessed on the basis of diminution in value, but the appropriate test is to examine the reasonableness of the owner's desire to reinstate the property. The reasonableness of the owner's intention to reinstate has also been recognized in *Paramatta City Council v. Lutz*,⁶² where by the Court of Appeal agreed with Smart J's finding that:

I cannot see anything unreasonable in Mrs Lutz insisting that her home be restored. She wants a home, not sum of money. A sum equivalent to the value of her home will not give her a home. The Council must pay the cost of reinstating her home.⁶³

From the analysis, a clear intention to remedy the defects and the reasonableness of the remedial works has an important role in the assessment of damages. The question as to whether the reinstatement is reasonable to carry out should be assessed by examining the reasonableness of the intention to remedy the defects. If the owner was able to establish the reasonableness of the intention to reinstate, the owner should be awarded the cost of demolishing and rebuilding the house. It has been decided that if the cost of demolishing and rebuilding would be unreasonable to adopt, the correct assessment of damages should be diminution in value.

It is agreed that in *Bellgrove v Eldrige*,⁶⁴ the owner was entitled to the cost of demolishing and rebuilding the house because the owner had contracted the contractor to build a completely new house that are in accordance with the contract, plans and specifications. Though, the award of demolishing and rebuilding of the house is a reasonable works to adopt if it can be satisfied that:

- (a) the defect resulted from the breach to built a house in accordance with the contracts;
- (b) the defect was so serious and threaten the safety of the occupants;

⁵⁹ (1954) 90 CLR 613 at pg. 620.

⁶⁰ *Peterson v. Reilly* 2000 CarswellNB 37, <http://international.westlaw.com> (10 October 2002).

⁶¹ [1976] 1 NSWLR 36.

⁶² (1988) 12 NSWLR 293.

⁶³ *Ibid.*, pg. 335.

⁶⁴ (1954) 90 CLR 613 at pg. 619.

- (c) no other reasonable methods to rectify the defect was available;
- (d) clear intention to occupy the property; or
- (e) intended to continue to own the property for rental purpose that would generate income to the owner; and
- (f) the reasonableness of the intention to remedy the defects.

CONCLUSION

Throughout this article, it is found that the essential requirements in the assessment of damages for defective building works shall be:

- (a) the intention of the owner to remedy the defects and the reasonableness of the intention; and
- (b) the reasonableness of the remedial works.

The intention of the owner to remedy the defects must be also reasonable to adopt. For example, in order to be entitled to reinstate the defective works, the owner must be able to satisfy the court a clear intention to carry out the remedial works. The intention to remedy the defects and the appropriate award of damages is suggested as the following Figure 1. However, it is suggested that the objective test of reasonableness of the owner's intention to remedy the defects, is crucial for a case where the owner claimed the cost of demolition and reconstructing the work or, where the remedial cost claimed is out of proportion to the benefit to be obtained.

The reasonableness of the remedial works has been regarded as an overriding requirement in determining the appropriate award of damages. Through this research paper, the writer finds that, the priority measure of damages for the defective building works should be the reinstatement of the work. Reinstatement would be awarded if it is 'reasonable' and 'necessary' to make the work conform to the contract. The test of reasonableness can be assessed through detailed examination of the actual loss suffered by the owner as follows:

- (a) Defective works flowing from departure from the contract.
 - (i) cost of repairing, replacing or demolishing and rebuilding the works;
 - (ii) if the cost of remedying the defect is relatively small, so far as it is reasonable to adopt, the proper remedy is to award the owner with the cost of replacing and rectifying the defective works;
 - (iii) if the replacement work is 'disproportionate to the benefit to be obtained', the court may award the owner with the cost of repairing the work plus solatium;
 - (iv) the cost of demolishing and rebuilding the work shall be awarded if this is the only method available to remedy the defects which are so defective and endangered the safety of the occupants;

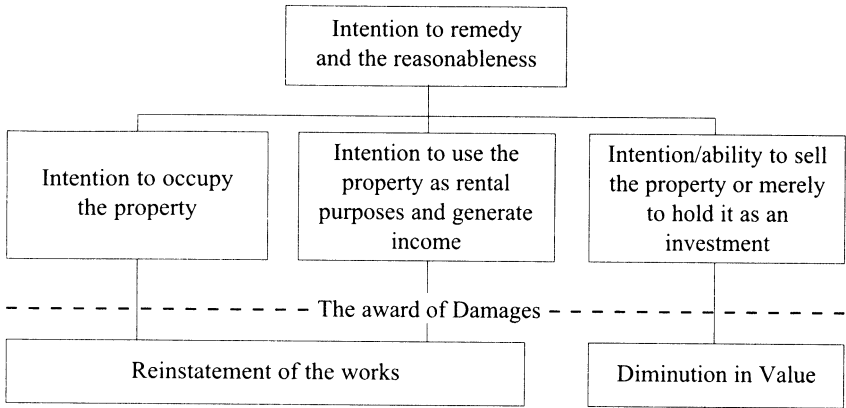


FIGURE 1. Interrelation between the Intention and the Reasonableness

- (v) the court shall award diminution in value, if the reinstatement works (all above i. to iv.) would be an unreasonable course to adopt, together with the assessment of the true intention of the owner to remedy the defect (see Figure 1).
- (b) Defective works flowing from departure from the contract but the works was fit for its purpose (to reinstate the works would be unreasonable and disproportionate to the benefit to be obtained).
 - (i) The court shall award diminution in value, if the owner was able to sell the defective property more than the purchased price without doing any repair works; or
 - (ii) The court shall award general damages, if the owner was able to sell the defective property at full market value without affected by the defective work. However, method b) i. and ii. should be assessed together with the true intention of the owner to remedy the defect (see Figure 1).
 - (iii) If no decrease in value, the court shall award the loss of amenity or other general damages for not being able to receive the actual works as contracted.

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