CASE SUMMARY

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THE PROPER MEASURE OF DAMAGES FOR CONTRACTOR'S BREACH OF CONTRACT

Diotte v. Consolidated Development Co.

If a contractor builds something for an owner that does not comply with the contract specifications, but the completed structure is no less useful and worth no less than if it had been built to specifications, can the owner still insist on recovering the cost of repair and reinstatement? That is the issue the New Brunswick Court of Appeal recently reviewed in *Diotte v. Consolidated Development Co*.

The usual remedy for breach of a construction contract is damages. However, there are different approaches to the assessment of damages for breach of a building contract.

In *Diotte*, the parties entered into a building contract in which the builder, Diotte, agreed to erect an office building and garage for the owner, Consolidated. The buildings were to be constructed

in accordance with the specifications of the federal Department of Fisheries and Oceans, which had agreed to lease the buildings. The buildings were completed at a cost of $479,197.16. Upon completion, it became clear that the garage did not meet the square footage requirement of the underlying contract, which specified 150 sq. meters. The deficiency equalled 6.5 sq. meters (70 sq. feet). The builder admitted that some of that loss was attributable to the foundation protruding into the floor space. The owner sought damages of $54,000, the amount required to pay for the remedial work needed to achieve compliance with the contract specifications. Instead, the trial judge awarded nominal damages of $2,000 on the basis that the owner had experienced no loss as a result of the missing square footage, since the Ministry, the tenant of the building, had accepted the building as provided and paid the rent as negotiated. The owner's claim that the missing footage might result in reduced rent payments in the future was dismissed as "speculative at best". The owner appealed.

The Court outlined the common law framework governing this issue as follows: Where a party sustains a loss by reason of a breach of contract, that party is to be placed, so far as money is concerned, in the same position as if the contract had been performed. Applying that rule, Consolidated would be entitled to the $54,000 needed to undertake remedial work to achieve compliance with the contract specifications. However, the rule was held not to be absolute and the court held that, in the case of building contracts, there are other possible bases for assessing damages. One option is to determine the "diminution in the value" of the work. For example, damages may be assessed having regard to the difference between the fair market value of the land/building with and without the breach. If there is no measurable discrepancy between the two valuations, nominal damages may still be awarded. Typically, however, nominal damages are assessed for "loss of amenity" in those cases where the owner's "personal preference" is not met. Finally, the court referred to the option of assessing damages by reference to any cost saving that accrues to the builder because of the deviation from the contract specifications. For example, if the builder uses less costly materials than those specified in the contract, the owner could seek damages based on the cost differential.

The court reviewed the classic cases on point. In *Jacob & Youngs Inc*., a 1921 decision by the New York Court of Appeals, the plaintiff builder had failed to install the contractually specified brand of pipe in a country residence, which had been built for the then princely sum of $77,000. When the owner entered into occupation only to learn that the specified pipe had not been used throughout the residence, he demanded that the non-compliant pipe, most of which was now encased within the walls of the residence, be removed and replaced by the brand contractually specified. The builder refused to comply, since compliance meant demolition, at great expense, of substantial parts of the completed structure. In response, the owner refused to pay the balance owing on the contract. The builder sued. The court held that in such circumstances, the measure of the allowance was not the cost of replacement, but the difference in value, which would be either nominal or nothing.

The other case reviewed by the New Brunswick Court of Appeal was *Ruxley Electronics & Construction Ltd. v. Forsyth,* a U.K. House of Lords decision concerning a homeowner who had contracted with a builder to build an enclosed swimming pool for £70,000. The parties agreed the pool would be built to a depth of 7 feet 6 inches. During construction, the relationship between the parties became strained, and eventually the builder sued to recover the £10,000 owing on the contract. Having discovered that the pool had been built to a depth of 6 feet 9 inches, the homeowner counterclaimed for the cost of reinstatement—that is, to

say the cost of demolishing and rebuilding the pool such that it complied with the contract specifications. The cost of reinstatement was £21,560. However, the trial judge concluded that the pool, as constructed, was safe for diving, and therefore, the shortfall in depth did not decrease the value of the pool. That decision was reversed in the Court of Appeal but reinstated in the House of Lords, which held that the expenditure for reinstatement was out of all proportion to the benefit to be obtained and that the appropriate measure of damages was therefore not the cost of reinstatement but the diminution in the value of the work occasioned by the breach even if that would result in a nominal award.

Appellate courts in other provinces have come to the same conclusion. In *514953 B.C. Ltd. v. Leung*, for example, the British Columbia Court of Appeal cited its earlier decision in *Strata Corp. N.W. 1714 v. Winkler* for the proposition that where to achieve fully what had been contracted for would have involved enormous expense in demolition and reconstruction, it was entirely appropriate to opt for the diminution of value test.

In sum, an owner is generally entitled to damages measured by the cost of making good the defects and omissions. Where the cost of rectification would be excessive in comparison to the nature of the defect, courts will not strictly follow the precise specifications in the contract. When judging the reasonableness of the owner's decision to rectify defects, courts will not be overly critical, since the necessity of making the decision was caused by the builder.

As the Court of Appeal held, this result is a testament to how common sense and the common law go hand in hand.

New Brunswick Court of Appeal

Robertson, Bell and Green JJ.A.
August 28, 2014

CITATIONS

514953 B.C. Ltd. v. Leung, [2007] B.C.J. No. 339, 2007 BCCA 114.

Diotte v. Consolidated Development Co., [2014] N.B.J. No. 225, 2014 NBCA 55.

Jacob & Youngs Inc. v. Kent (1921), 129 N.E. 889 (U.S. N.Y. Ct. App.).

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] S.C.J. No. 17, [1999] 1 S.C.R. 619.

R. v. Ron Engineering & Construction (Eastern) Ltd., [1981] S.C.J. No. 13, [1981] 1 S.C.R. 111.

Rankin Construction Inc. v. Ontario, [2014] O.J. No. 4314, 2014 ONCA 636.

Ruxley Electronics & Construction Ltd. v. Forsyth, [1995] 3 All E.R. 268, [1995] UKHL 8, [1996] 1 AC 344.

Strata Corp. N.W. 1714 v. Winkler, [1987] B.C.J. No. 2340, 27 C.L.R. 225 (B.C.C.A.).

Urbacon Building Groups Corp. v. City of Guelph, [2014] O.J. No. 2885, 2014 ONSC 3641.