

NATURE OF DEFECTS: RATIO LEGIS

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ABSTRACT: Defective work is a perennial problem within the Australian residential building industry. The cost of rectifying defective work has been found to be 4% of contract value. Such costs would be higher if they included the intangible, but real costs of disruption caused by schedule delays, litigation, and dysfunctional contract relationships. From a legal perspective, the issues surrounding defective work that materializes into a contractual dispute and subsequently litigation are complex and varied. Bearing this in mind, this paper the standards imposed on the builder, the resultant action that is appropriate when a defective work arises, and the principals relating to the award of damages are examined

Keywords: Australia, defects, express provision, common law, tort, damages, statutory requirements

INTRODUCTION

The residential building industry is an important contributor to the Australian economy; the industry employs a very large component of the national workforce. The Australian Bureau of Statistics in 2006 indicated that Australia's expenditure on *new* residential construction totalled \$30.9 billion and accounted for approximately 3.8% of Gross Domestic Product (GDP). In the case of the expenditure on *alterations and additions*, expenditure totalled \$27.2 billion in the 2006 calendar year and constituted 2.9% of GDP. Considering the importance of the residential sector and the how it supports the economy through the generation of an output multiplier effect of up to 1.93 (i.e. for every \$100 spent of residential building, \$93 is spent elsewhere in extra production) (Ilozor *et al.*, 2004), it vital the industry runs efficiency and effectively. Yet, the lack of attention to 'quality' by residential builders remains a contentious issue (Georgiou *et al.*, 2000). Defects remain prevalent, particularly among registered builders (Georgiou *et al.*, 1999; Ilozor *et al.*, 2004).

An indication of the volume and nature of defective building work may be gauged from the information contained in the annual reports of the Western Australian (WA) Builders Registration Board (BRB). In the period 2004 to 2005 the number of complaints to the Board increased by 17% (785) from the previous year. Of these complaints the majority (62%) involved claims of defective workmanship and or materials.

In the period 2005 to 2006 a total of 888 complaints were lodged with the Board for determination by the Building Disputes Tribunal. Some 609 of these related to workmanship matters; an increase of 25% over the previous reporting period. The increase in defective building work could simply be attributable to the high level of building activity being experienced in WA; nevertheless it anticipated that complaints will continue to increase. In terms of financial cost, the value of orders made by the Building Disputes Tribunal where builders had to pay owners for defective work in the period 2005 to 2006 was \$991,032.00. By comparison in the 2006 to 2007 period builder were ordered to pay owners \$1,651,920.

The cost of rectifying defective work in the residential building sector has been found to be 4% of contract value (Mills *et al.*, 2008). Such costs would be higher if they included the intangible, but real costs of disruption caused by schedule delays, litigation, and dysfunctional contract relationships. From a legal perspective, the issues surrounding defective work which materializes into a contractual dispute and subsequently litigation are complex and varied. Such issues include the definition and interpretation of the parties respective rights and obligations arising under the contract, performance of these obligations, liability in tort and under statute. Where there has been some breach in performance, issues will arise concerning the appropriate remedy in the circumstances, quantification of losses, the effect of exclusion clauses and the requirement to mitigate losses. Other issues will include the time for commencement of an action and the date when damages should be assessed.

While there has been research undertaken on the causes and costs of defects (e.g., Cheetham, 1973; BRE, 1982; Josephson, and Hammarlund, 1999; Georgiou *et al.*, 1999; Ilozor *et al.*, 2004; Mills *et al.* 2008), limited attention has been given to the legal issues arising from defective work. In this paper the standards imposed on the builder, the resultant action that is appropriate when a defective work arises and the principals relating to the award of damages are examined. While it is acknowledged that different countries, and even states within them, have differing legal constitutions, it is suggested that many of the issues that arise may be common with respect to defective work.

DEFECTIVE WORK

The starting point for a consideration of the legal issues relating to building work is the definition of a *defect*. A plethora of definitions of a defect can be found in the literature. For example, Ashford (1992:p.192) defines a defect as “the non-fulfilment of intended usage requirements”. While *The Home Building Contracts Act 1991*(WA) defines a defect as a failure to:

- (a) perform the home building work in a proper and workmanlike manner and in accordance with the contract; or
- (b) supply materials that are of merchantable quality and reasonably fit for the purpose for which the owner required the home building work to be performed.

Atkinson (1987), however, provides a clear distinction between the terms failure and defect and states:

“A failure is a departure from good practice, which may or may not be corrected before the building is handed over. A defect, on the other hand, is a shortfall in performance which manifests itself once the building is operational”.

Put simply, defective building work is work which is not in conformity with the contract. That is, work is defective whenever it falls short of a standard it was required to meet. These standards are imposed upon the builder by:

- the express provision of contracts;
- the general law of contract;
- the law of tort (negligence); and
- statutory obligations; that is building statutes and regulations incorporated by reference into contracts.

While a number of forms of contract will specify the rights of the owner in the event of defective work, Australian Standard forms of contract (e.g., AS 2124-1992, Clause 30.3; AS 4000-1997, Clause 35) are generally silent with respect to a universally accepted definition of defective work. Consequently, if the work is defective in accordance with these standards, in the absence of any exclusion or limitation clause, there will be an entitlement for the owner to rectify the defective work or alternatively seek a remedy from the builder.

CAUSES OF DEFECTIVE WORK

The BRE (1981) found that 50% of defects in buildings had their origin from design related issues (e.g., incorrect design), 40% during construction (e.g., poor construction practices, lack of supervision) and 10% because inappropriate material failures. Similarly, Josephson and Hammarlund (1999) revealed that 32% of the defect costs were found to originate from the early stages of a project,

such as the client and design team, 45% originated on-site and were attributable to site management and subcontractors and 20% from materials, plant and equipment. Josephson and Hammarlund (1999) suggest that a major contributor to the occurrence of defects was simply ‘carelessness or forgetfulness’ of the design team, builder and subcontractors, which resulted in incomplete contractual documents, lack of adequate supervision on-site and poor workmanship being experienced. Similar findings have been reported in Robinson (1987), Porteous (1992), Georgiou *et al.* (1999) and Love (2002).

The WA Builders Registration Boards annual reports provide useful background to the nature of building defects. As can be seen in Table 1, the three most common sources of defective work relate to *brickwork*, *wet plastering* and *water ingress*. A number of brickwork problems occur as a result of defective footing design and or incorrect soil classification but separate figures are not available for these causes. With reference to the type of construction that gave rise to the complaints both in the periods 2004 to 2005 and 2005 to 2006, new homes (including additions) constituted 78% of the complaints.

< Insert Table 1. Nature of complaint items assessed by BRB Inspectors >

Mills *et al.* (2008) study of defects in residential housing in the State of Victoria revealed that the most frequent defects encountered were water ingress through *leaking roofs* and *windows*. The most expensive defects to rectify were found relate to footings such as *V-Slab* and *U-Strip Footings*.

STANDARDS IMPOSED UPON THE BUILDER

Express Provision of Contracts

Domestic building contracts will expressly provide that the builder agrees to construct the building work in a proper and workmanlike manner in accordance with the terms of the contract and the drawings and specification¹ or to complete the works to the standard set out in the contract documents². With respect to materials a specification will typically require that all materials shall be new unless otherwise stated and further shall comply with all relevant statutory authority requirements³. Similarly, the Standards Australian General Conditions of Contract provide that the contractor shall use the materials and standard of workmanship required by the contract⁴ or that the contractor shall supply everything necessary for the proper performance of the contractors obligations and discharge of the contractors liabilities⁵.

Common Law of Contract

At common law a contractor has an obligation to construct work free of defects at final completion⁶ and it will readily be implied⁷ that the builder warrants carrying out the work with proper skill and care⁸. Sometimes this is expressed using the phrase “in a proper and workmanlike manner”. Also, in a contract for the provision of services it will be implied that the services will be carried out with reasonable care and skill. In *O’Neale v Barra Rosa Pty Ltd*⁹ the court noted that there is an implied term of an agreement that a house should be built in a “good and workmanlike manner and with good and workmanlike materials”. Similarly, in the absence of an express term it will readily be implied, at common law, that a person contracting to do work and supply materials warrants, will do so with good quality and ensure that the work is reasonably fit for the purpose for which they are intended¹⁰. In a building contract involving subcontractors there will usually be an express term that requires the main contractor to accept responsibility for any liability or obligations under the contract unless otherwise stated¹¹. There will also be an implied term at common law¹².

Law of Tort

The relevant cause of action in tort for defective work will generally be in negligence. Negligence occurs through some act or omission in circumstances where the law imposes a duty of care¹³ and establishes a requisite standard of care¹⁴ to protect persons and property. Whilst the starting point for a remedy for defective work will be under the contract there may be situations where a cause of action based on negligence is necessary. For example, where there is no privity of contract in the case of subsequent purchasers¹⁵ or the limitation period for bringing an action in contract has expired¹⁶.

While it is not the intention of this paper to elaborate on the legal principles relating to negligence, it should be noted that a duty of care will only arise from some relationship between parties that are regarded as being sufficiently close to attract the imposition of liability. The rationale being in the famous words of *Cardozo CJ* that liability in tort should not be “in an indeterminate amount for an indeterminate time to an indeterminate class”¹⁷. The closeness of the relationship that gives rise to a duty of care has been described as *proximity*. Three factors are relevant in determining the closeness of the relationship:

1. physical proximity in terms of time and space;
2. circumstantial proximity which occurs due to the relationship between the parties (as in the case of employer and employee or client and professional); and

3. causal proximity between the act or omission and the loss or injury¹⁸.

It is well established that a contractual relationship as in the case of owner and builder¹⁹ or for example architect and client²⁰ establishes the requisite degree of proximity to establish a duty of care as a consequence of circumstantial proximity. Until recently, the notion of proximity in determining the existence of a duty of care has generally been discarded by the Australian High Court²¹. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd and Another*²² the criterion to establish a duty of care in economic loss cases is based on reliance²³ and vulnerability. Even if proximity has been abandoned as a determinate of the existence of a duty of care, as noted by Gummow J in *Pere and Apand*, in determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular relationship between the parties. This duty will clearly arise where parties are in a contractual relationship.

Statutory Requirements

Construction contracts invariably incorporate the terms of all statutes and regulations relevant to the construction work²⁴. There are a number of statutory requirements with respect to the minimum requirement of building work. In Western Australia (WA), the *Builders Registration Act 1939*²⁵ permits the Building Disputes Tribunal, where it is satisfied that the work has not been carried out in a proper and workmanlike manner, to order the builder to remedy the unsatisfactory work. The *Trade Practice Act 1974* (Cth) also implies into every contract for the supply of services a warranty that the services shall be carried out with due care and skill and any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied²⁶. Noteworthy, this warranty does not apply to services of a professional nature such as those provided by a qualified architect or engineer²⁷. Moreover, since the introduction of the *Construction Contracts Act 2004* (WA) where there is a dispute regarding payment for construction work, the provisions of the *Act* will apply²⁸.

Having considered the causes of action that may be applicable in the case of defective work the next issue is to usually determine the appropriate remedy in the circumstances. Another important issue, however, is who decides if the work is defective?

WHEN IS THE WORK DEFECTIVE?

The starting point is the express terms of the contract. Generally it will be the responsibility of the owner's representative or supervisor to decide whether the work has been carried out in accordance with the contract and if their opinion it has not, then they are entitled to direct the builder in accordance with the specific provisions of the defective materials or work clause²⁹. For example to remove materials from site, demolish or reconstruct work. Typically the contract will provide a right of review of the superintendent's decisions made with respect to defective work through a dispute resolution clause in the contract³⁰.

Remedies Available for Defective Work

Having determined that the work is defective because of some non conformity with the contract the next issue will relate to the appropriate remedy. There are three principal types of remedy applicable with respect to defective work. They are: *rectification*, *variation*, and *damages*. Other remedies may include injunction to prevent a breach from continuing or specific performance, which will be discussed later in the paper.

Rectification will involve either the demolition or correction of defective workmanship or replacement of faulty materials. A significant issue will be the *defect liability period*. Variation involves a direction to overcome the defect usually by way of an alternate design, construction technique or use of different materials. The quantum and type of damages is a major issue. This will depend upon whether the breach is in contract or tort. The starting point is that damages are meant to be compensatory but in determining quantum and liability, a court will be concerned with issues such as *remoteness*, *reasonableness* of any action proposed, the existence of *disclaimers* or *exclusion* clauses and mitigation.

WHAT ACTION IS APPROPRIATE?

Under Contract

Again the starting point is; what are the terms of the contract? According to the provisions of the contract the availability of each of these remedies in respect of a particular piece of defective work depends upon the time period in which it is discovered. Generally the remedies available to an owner will fall within each of three time periods:

1. Before practical completion
2. During defects liability period
3. After the end of the defects liability period

For example, the Australian Standard General Conditions of Contract terms regarding remedies for defective work are generally contained in two broad types of clause.

1. Materials and workmanship clauses which provide for the making good of any defective work during construction and prior to practical completion³¹.
2. Defects liability clauses which require the correction of defective work which may exist at the time of practical completion or which appears appearing during the specified defects liability period³².

Rectification

As noted above the starting remedy will usually be for an order or instruction to rectify the defect. The contract will provide that the superintendent may order the contractor to demolish or correct the defective workmanship or replace the faulty materials at the contractor's expense. Again, each of the Australian Standard General Conditions of Contract (GCOC) allows the superintendent to stipulate the time period in that the contractor is to carry out these obligations. They will further provide that if the contractor defaults upon these obligations the superintendent may arrange to have the work performed by another party at the contractor's expense. The amount claimable by the owner (or principal) depends on the terms of the contract. For example clause 30.3 of AS2124 states quite clearly that the cost incurred by the principal in having the work so carried out shall be a debt due from the contractor to the principal. It is well established that the contractor must be given an opportunity to remedy the defect before an owner or superintendent has the work undertaken by others³³. Additionally rectification may be ordered by virtue of a statutory requirement. In accordance with the *Builders Registration Act 1939* (WA), the Building Disputes Tribunal where it is satisfied that the work has not been carried out in a proper and workmanlike manner, may make an order that the defect be rectified in order to comply with the contract within a specified time³⁴. The Building Disputes Tribunal has unlimited jurisdiction to consider issues of workmanship³⁵.

Expiration of the Defects Liability Period

The defects liability period will be agreed by the parties and stated in the contract and will commence on the date of practical completion³⁶. In the standard form of contract, AS 4000 contains a default provision in that if nothing is stated then the effect liability period will be 12 months. For contracts subject to the provisions of the *Home Building Contracts Act 1991* (WA)³⁷ there is a minimum defect liability of 4 months³⁸. After the expiry of the defects liability period, the

principal generally has no right under the contract to order the rectification of defective work so would need to proceed under the common law. Again the need to resort to damages at general law for relief for defective work will depend upon the specific terms of the contract. The issue of common law damages will usually arise in the situation where the defect becomes obvious only after the expiration of the defects liability period. The opinion generally is that defects liability periods are inserted primarily for the benefit of the builder. The usual contractual arrangement is that the builder not only has the obligation to rectify defective work during the defect liability period, but in most instances, has the right to make good at its own cost those defects that appear during the liability period.

If the principal does not give the contractor the opportunity to make good its defective work, then its claim for damages may be limited to what it would have cost the contractor to perform that rectification. Typically, the cost to a builder to rectify defective work is substantially less than the cost to a proprietor of engaging an outside contractor to rectify. The common law entitlement to damage is limited until notice has been given to the contractor to rectify its work and there has been a failure to perform.

Variation

An alternative may be to issue a variation to the works. There is no common law right for an owner or superintendent to direct a variation and construction contracts will generally confer an express power on the owner to do so. This situation is expressly referred to in AS 2124-1992³⁹, but is absent from AS 4000-1997. AS2124 provides for variations to be done at the expense of the contractor. Likewise, AS 2124⁴⁰ restates the common law requirement that any variation ordered must be within the general scope of the contract⁴¹. A variation of the works rather than direct rectification or replacement would only occur where it would be unreasonable in terms of time or costs, or where the building has progressed to such a stage that removal of earlier works could prejudice the integrity of later works.

Damages

A contract may not expressly provide for rectification or the rectification clause may be discretionary. For example in AS 2124⁴² and AS 4000⁴³ the superintendent may opt simply to accept the defective work with an appropriate alteration to the contract sum. This reflects the common law principle that where a party breaches a term of the contract that party becomes liable for the loss or damage caused to the innocent party by the breach subject to issues of

remoteness and reasonableness. Since a defect evidences performance inconsistent with the obligations agreed, it is a breach which may give rise to monetary compensation in the form of damages. A contractor by continual inadequate performance may also have indicated that it no longer intends to be bound by the terms of the contract⁴⁴. In this case, any continuing directions with respect to rectification will be nugatory.

PRINCIPLES RELATING TO THE AWARD OF DAMAGES

Damages in Contract

The object in any contract is for both parties to fully perform their obligations under its terms⁴⁵, unless in the circumstances something less than entire performance (described as substantial performance) is permitted⁴⁶. However, where a party has not performed their obligations the innocent party may be able to recover damages for any loss which flows directly as a consequence of the breach of the non performing party. This principle derives from the decision in *Robinson v Harman*⁴⁷ where the court held that where a party sustains a loss by reason of a breach of contract, they so far as money can do, be placed in the same situation with respect to damages as if the contract had been performed. Also, there will be imposition of a penalty or punishment with respect to breach in commercial contracts⁴⁸. To assist in determining the losses a party has suffered for breach of contract, a number of rules have evolved (Graw, 2002):

1. damages must not be too remote
2. damages are meant to compensate
3. damages must be reasonable
4. damages will not normally be awarded for stress or disappointment
5. quantum must be pleaded with as much particularity as possible
6. damages must be mitigated
7. damages may be pre-agreed by the parties
8. damages may be limited or excluded by express words or conduct; and
9. specific performance will not be awarded where damages would suffice

Remoteness

Damages under contract are limited to the damages that reasonably flow from the breach or were in contemplation of the parties at the time of entering into the contract. This rule was established in *Hadley v Baxendale*⁴⁹. The rule prevents the recovery of damages that are considered too remote. That is, where two parties have made a contract that one of them has broken, the damages that the other party ought to receive in respect of such breach of contract:

- should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such breach of contract itself; or
- such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach event.

Considering each in turn, the first (limb) enables the recovery of any loss which might fairly and reasonably be considered to arise in the usual course of the breach of the contract judged at the time it was formed. The second limb requires some additional knowledge on the part of the party in breach at the time the contract was formed. If there were special circumstances brought to the attention of the contract breaker at the time the contract was formed, then a loss suffered that does not fall within the first limb then can be recovered under the second⁵⁰.

Damages Must Be Compensatory

An important issue for the court arises in situations where the owner seeks to claim the full costs associated with the demolition of the building, but the builder seeks to have damages awarded on the basis of the costs of repair or rectification. In a building or construction contract the damages recoverable by the principal for breach of a term by a contractor is at first sight the difference between the contract price of the work and the cost of making the work conform to the contract. Also, as a general rule, the innocent party is not entitled to any more than the cost of the cheapest remedy for the damage caused⁵¹. However, in some circumstances a party may be entitled to an award of damages based on the costs of rebuilding or replacement where it is not reasonable to repair the defective work⁵².

The general rule is subject to the qualification that undertaking of the work necessary to produce conformity with the contract must be a reasonable course to adopt. The definitive case in Australian construction law is *Bellgrove v Eldridge*⁵³. In this case Bellgrove constructed a home for Mrs Eldridge. Serious defects, by way of structural cracking, became apparent in the footings and brickwork mortar as a consequence of the cement content of each not being in accordance with the specification. In upholding the trial judges decision that remedial work was not an appropriate measure of damages in the circumstances, but damages should be assessed on the basis of demolition and rebuilding. The court noted⁵⁴:

“In the present case the respondent was entitled to have erected upon her land in accordance with the contract and the plans and specification which formed part of it and her damage is the loss she has sustained by the failure of the appellant to perform his obligations to her...the qualification however to which this rule is subject is that not only must the work undertaken be necessary to produce conformity, but that also it must be a reasonable course to adopt.

Profit on Sale

An interesting issue arose in *Bellgrove* when the defendant builder argued that if Mrs Eldridge was awarded damages based on the cost of demolition and rebuilding of the home there was no guarantee that she would use the award to do so. The court held that once a plaintiff establishes a loss upon the defendant's breach and entitlement to damages it is irrelevant whether the plaintiff intends to apply the damages to repairs or not. Even the fact that the building owner may manage to sell the building at a profit will not displace the ordinary rule concerning the measure of damages.

In *Director of War Services Homes v Harris*⁵⁵ the court held that there were a number of options available to the owners of a defective buildings. Firstly, they may choose to remedy the defects before sale so that they may obtain the highest possible price. They may sell subject to a condition that they will remedy the defects. They may decide to repair the building after it has been sold because they feel morally, though not legally they are obliged to do so. The court noted that these decisions are of no concern to the builder whose liability to pay damages has already occur.

Reasonableness: Rectification, Replacement or Diminution in Value?

As noted in *Bellgrove*, what remedial work is necessary and reasonable in any particular case is a question of fact. But the question whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective footings seriously threaten the stability of a house and experts cannot unequivocally state that repair work will prevent any future instability or cracking⁵⁶. In addition to the cost of completing the work so as to produce conformity with the plans and specifications, consequential damages may be recovered. In *Bellgrove* Mrs Eldridge was awarded damages for additional insurance, storage of furniture, and additional rental (less the demolished value of the house), and the court determining that they fell within the limbs of *Hadley*

and Baxendale. The legal principles with respect to the appropriate remedy were also discussed in *D Galambos & Son Pty Ltd v McIntyre*⁵⁷, where it was stated:

“Where it would be reasonable to perform remedial work in order to mend defects or otherwise to produce conformity with the plans and specifications which were part of the contract the measure of damages is the fair cost of that remedial work. Where the defect is such that repair work would not be a reasonable method of dealing with the situation (usually because the cost of such work would out of proportion to the nature of the defect) then the measure of damages is any diminution in value of the structure produced by the departure from plans and specifications or by defective workmanship.”

The definitive case dealing with the issue of reasonableness of the cost to remedy the breach is *Ruxley Electronics and Construction v Forsyth*⁵⁸. The specification called for the construction of a swimming pool 7 feet 6 inches deep, but the pool was constructed only 6 feet 9 inches deep. There was no significant effect on either the use or value of the pool, but Forsyth sued for an amount to completely rebuild the pool in accordance with the specification for the sum of £21,560. The court held that in the circumstances it was unreasonable to insist on complete reinstatement and awarded Forsyth an amount of £2,500. The court also noted that there is no question of punishing the party in breach⁵⁹.

Loss of Amenity

In awarding Forsyth the amount of £2,500, the court noted that while Forsyth did not get what he bargained for and it was unreasonable on the facts to award damages based on replacement, Forsyth was still the innocent party and was in the circumstances entitled to more than nominal damages⁶⁰. In awarding what will be a modest amount for loss of amenity the court will take into account the disappointed expectations of the plaintiff. The compensation for loss of amenity has been described as compensation for ‘solatium’. This is an amount that takes into account the inconvenience accompanying any rectification work or disappointment of the owner in not getting what was bargained for⁶¹.

Damages for Disappointment or Distress

Despite the award of damages to the owner in *Ruxley Electronics* for breach of contract based on loss of amenity, damages will not normally be available for disappointment or stress arising from the breach. The principle is that such damages are too remote under the *Hadley and Baxendale* principle. Moreover, all commercial contracts may be associated with some aspect of disappointment

or stress arising from the breach. The courts have noted that all breaches attribute some form of disappointment, but as a matter of policy, parties to a contract are required to exhibit robustness when dealing with disappointment in the event of a breach.

One exception to the rule is where damages may be awarded for disappointment where the object of the contract is pure relaxation and enjoyment. For example package holidays⁶². It is therefore a well settled principle of common law that where a contract involves an ordinary commercial transaction, damages for disappointment will not be awarded. For example, in *Falco v James McEwan & Co Pty Ltd*⁶³ the court refused to award damages for disappointment when the defendant failed to perform its contractual obligations with respect to the supply and installation of an oil heater in the plaintiff's home. The court held that the contract between the company and Falco was an ordinary commercial contract, for breach of which Falco was not entitled to recover damages for inconvenience and mental distress. The measure of damages being limited to the monetary loss involved in remedying the breach by the company by failing to properly install the heater. Similarly in *Hobbs v London and South Western Railway Co*⁶⁴ the court noted;

“For the mere inconvenience, such as annoyance and loss of temper, or vexation or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting you cannot recover damages”⁶⁵.

The legal principle underpinning this rule is that disappointment and distress is no more than a mental reaction to the breach and the financial consequences that flow from it. Applying the principle in *Hadley v Baxendale*, the damage is too remote to be recoverable.

Disappointment and Physical Inconvenience

However as noted in *Hobbs*, where the innocent party has suffered anxiety or distress as a consequence of physical inconvenience occasioned by the breach, damages may be recoverable. In *Watts v Morrow*⁶⁶ the plaintiff purchased a house on the basis of a building surveyor's report. The report warranted that the building was structurally sound but when the plaintiffs took possession they found that considerable work was necessary in order to repair the building. The building work was extensive and during this time the plaintiffs had to suffer considerable inconvenience and distress as a consequence of having to live in the

building during the repair work. In this case they were awarded a nominal amount for damages.

The Australian authority is the case of *Boncristino v Lohmann*⁶⁷. Here the Victorian Court of Appeal considered an appeal against a trial judges award of \$500 for inconvenience and \$1,000 for mental distress. The Court stated:

“It now appears to be accepted both in England and Australia that awards of general damages of the type to which I have referred can be made to building owners who have suffered physical inconvenience, anxiety and distress as a result of the builder’s breach of contract but only for the physical inconvenience and mental distress related to those inconveniences which have been caused by the contract. Although, it would seem to have been accepted in England that such award should be restrained or modest.”

Disappoint and Stress Arising From Negligence

Where a claim for damages for disappointment arises from negligence then there is no prohibition against the claim. In *Lyons v Jandon Constructions*⁶⁸, the plaintiff engineer was ordered to pay the plaintiffs \$2,000 for emotional distress following severe cracking in their home as a result of defective footings being constructed in accordance with the engineers design. Also, in *Council of the City of Campbelltown v MacKay*⁶⁹ the plaintiffs were awarded damages for nervous shock after observing cracking and displacement of parts of their home particularly after a heavy downpour. It was determined that the cracking had resulted from the negligence of the builder.

Difficulties in Quantification

In each of the cases discussed above, the general question of how the courts could compute damages for disappointment and distress was an issue. In such cases determining how much the plaintiff should be compensated because of the defendant’s breach is extremely difficult to prove. While the court requires the plaintiff to plead the quantum of damages with as much certainty and particularity as possible, where this is difficult or where the loss is of a speculative manner, the court will determine the amount of damages “by the exercise of a sound imagination and the practice of the broad axe”⁷⁰. Similarly, a court will award damages even if it has to ‘crystal ball’ the amount it should award. For example, in *Jones v Schiffman*⁷¹ it was stated:

“Assessment of damages..... does sometimes of necessity involve what is guess work rather than estimation.”

The rationale is that an innocent party should not be denied a remedy because of difficulties in accurately determining a loss caused by a party in breach.

Mitigation

A plaintiff must take all reasonable steps to mitigate the loss flowing from the breach⁷². The general rule that will be discussed below that damages are assessed as at the date of the breach or when the cause of action arose is based on concerns about mitigation of loss. In mitigating the loss the plaintiff is only required to do what is reasonable upon becoming aware of the breach⁷³. The onus of proof in respect to the plea of a failure to mitigate rests with the defendant.

Damages may be pre-agreed (liquidated damages)

Building contracts will usually contain a liquidated (fixed or settled) damages clause which is inserted to restrict the quantum for a breach and to avoid the necessity to plead the loss as required when claiming general damages⁷⁴. Parties to a contract can agree in advance on the quantum of damages to be paid in the event of a specified breach. The most common use for liquidated damages is to fix the damages, which will be paid, for example by a builder for delays in reaching practical completion. Liquidated damages, however, are not confined to damages for delay. They can be pre agreed for any particular breach. For example, if a contract contains a term requiring the protection of a tree on a site, the parties may set liquidated damages for example of \$1,000 if the tree is destroyed or substantially damaged in carrying out the work. Liquidated damages may also be used in conjunction with a performance specification. For example, a contract for the supply of ready mixed concrete may specify a deduction in the unit rate of x% for every one Mega Pascal the concrete fails to achieve the specified 28 day compressive strength.

Genuine pre-estimate

The liquidated damages amount must be a genuine pre-estimate of the loss. If the sum stipulated is a genuine pre-estimate of the loss, the amount will be payable without proof of the actual loss. However, if the amount bears little resemblance to the greatest loss that could occur from the breach, the court may strike down the clause as a penalty. Whether the agreed sum in a contract is liquidated damages or a penalty will depend upon the intention of the parties at the time of contracting. That intention is ascertained by the courts, by objectively looking at

the particular provision in the light of all the surrounding circumstances at the time. The rules or guidelines to be used in determining if the clause is a penalty were set out in *Dunlop Pneumatic Tyre v New Car Garage and Motor Co Ltd*⁷⁵. For example:

- a clause will be a penalty if the sum stipulated is extravagant and in amount in comparison with the greatest loss which could flow from the breach;
- a clause will be a penalty if the breach consists of a failure to pay money and the sum stipulated is greater than the sum which was originally required to be paid; and
- it is no obstacle to a sum being a genuine pre-estimate that a precise pre-estimation is almost impossible. On the contrary that is just the situation when it is probable that the pre-estimated damage was the true bargain between the parties.

Effect of a penalty clause

If a court determines that the clause is in effect a penalty, the clause will be void and ineffective and the plaintiff will be required to plead and recover damages in the normal way. There are not many cases involving penalty clauses. An interesting example of an attempt by a contractor to claim that the liquidated damages clause was a penalty can be found in *Multiplex Constructions v Abgarus*⁷⁶. The case involved a \$78m office block with a \$4.5m liquidated damages clause. The contractor argued that the clause was a penalty clause because:

- liquidated damages had been assessed from the owners holding charges on money used to finance the works rather than the loss of potential rent, and thus they were not a genuine pre estimate of damages;
- the rate of interest was a bank rate exceeding the owners actual rate the liquidated damages were penal; and
- the contract failed to provide for a reduction in liquidated damages for the owners progressive occupation of part of the building, they were penal.

The court rejected all three arguments. The court held that the liquidated damages clause was a reasonable genuine pre-estimate of the loss that could be suffered by the owner in the event of delay by the builder. The basis of a liquidated damages clause is in act to avoid long and prolonged arguments relating to the quantum of the loss. Davenport (2006) states that contractors are

generally wasting time by attempting to argue that liquidated damages clauses are in fact a penalty.

The issue was considered in the case of *State of Tasmania v Leighton Contractors Pty Ltd (No 3)*⁷⁷. The contract was for the construction of 13.65 kms of highway and a clause of the contract provided that if completion did not occur before the due date the contractor must pay liquidated damages at the rate of \$8,000 per day for each day late. The project was late and in accordance with the contract Leighton paid \$1,832,000 to the Tasmanian government. When this and other matters became the subject of litigation, the court had to consider whether the sum stipulated in the clause was a legitimate liquidated damages clause or a penalty. The court held it was a penalty and ordered the State to repay the sum of \$1,832,000 deducted as liquidated damages.

Cox CJ referred to the annual calculations for the principal, project director and principal's representative and considered that the respective annual rates of \$360,000, \$430,000 and \$330,000, OH&S of \$2,400 per week and an allowance of two hours of legal advice per day were extremely high and speculative. It was further held that the State could not anticipate any loss of revenue if the project was delayed and secondly since the project was being funded by the Commonwealth, the State would not actually suffer the losses associated with the delay.

The decision has done little to help our understanding of liquidated damages as the decision was successfully appealed⁷⁸. The Tasmanian Appeal Court overturned the trial judge's decision and held that the liquidated damages amount of \$8,000 per day was not a penalty but a genuine pre-estimate of the loss. While the court did not disagree with the principles set out by Cox CJ on the application of the evidence they held that the amount of \$8,000 was not chosen arbitrarily but attempted to provide a general basis for the overall damages.

The court also noted that at the time of entering into the contract Leighton had not expressed concern at the figure and only raised the issue by way of amendment to the pleadings on the first day of the trial. To reduce the risk of a liquidated damages amount being challenged the following has been suggested⁷⁹:

- state the liquidated damages amount in the form of a rate rather than a lump sum;

- record in writing the methods by which the liquidated damages amount was arrived at, including any discussions with the contractor as to the calculation of the amount;
- the calculation should only include losses that you can genuinely estimate (e.g. do not include falls in the value of the residential property market);
- ensure both parties to the contract have independent legal advice particularly if they have quite different levels of bargaining power; and
- clearly identify in the contract which losses remain outside the scope of the liquidated damages regimeto preserve your right to seek actual damages in court for such losses.

Specific Performance

An issue which arises in building contracts is whether a court or arbitrator can order, in the absence of some express provision in the contract, the builder to return to site to rectify or complete work. That is, to perform their contractual obligations. Specific performance is an equitable remedy subject to the discretion of the court. Specific performance will normally only be awarded where damages are not considered to be an adequate remedy⁸⁰. As a general rule a court will not order specific performance of a building contract⁸¹ as damages will be considered an appropriate remedy.

Another reason is that as a matter of public policy courts do not like ordering a person to carry out work for someone else against their wishes. In addition, it is difficult to enforce an order of specific judgement that involves some ongoing supervision. However, this is not to say in certain circumstances an order for specific performance for works will not be ordered on the basis of ongoing supervision. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*⁸², it was noted that the concept of continued supervision by the court is no longer an effective or useful criterion for the refusal of specific performance, but the issue was not considered further. In WA the Supreme Court has declined to vary or set aside the award of an arbitrator who made an order for a builder to return to site and repair a number of defective windows. The issue of supervision was not an impediment to the order as the contract was an architect administered contract⁸³.

Exclusion Clauses

The right to order rectification or seek damages arising from a breach of contract or in negligence can be restricted or lost through the use of an operative exclusion clause in a contract. Even if a contract is silent with respect to an

exclusion clause the courts might hold that constructive notice of the clause has occurred as a result of a prior course of dealings between the parties. There are a number of ways such clauses may apply. For example, they may operate to:

- exclude a right to a remedy which an innocent party would normally have in contract or tort;
- limit a parties liability to a specified amount in the event of breach;
- limit the right by placing conditions on the exercise of a right such as specifying that a claim must be made within a certain time; and
- limit a right of appeal or review.

As a stating point, the courts do not like such clauses especially where there is unequal bargaining power between the parties. However, these clauses are not unusual in commercial and building contracts, particularly limiting liability clauses. At the same time courts place a heavy burden on the relying party (proferons) to show that the exclusion term is part of the contract and that the other party had actual or constructive notice of the clause. Additionally, the wording of the term will be interpreted strictly and any ambiguity will be construed against the party relying on the clause. Where the exclusion is contained in a signed document, and it satisfies all of the above criteria, the signatory is bound by the clause unless they can show fraud or misrepresentation. It is irrelevant that the signatory may have not read the document⁸⁴.

Prior Course of Dealings

As mentioned above, where the current contract does not contain an express exclusive clause but the parties have contracted previously for similar work and the earlier contract has contained such a clause, based on this prior course of dealings, a court may hold that there is an operative clause existing. If the recipient claims to be unaware of the clause the court will determine whether the recipient should have been aware of the clause existence by asking:

- Was reasonable notice given of the clause?
- Was the other party's attention drawn to the clause?

The courts will examine all the circumstances surrounding the receipt of the document and attempt to apply an objective test⁸⁵. Courts will do their utmost to limit exclusion clauses. Even if the party relying on the clause can prove that it is part of the contract, the courts will carefully scrutinize the wording of the clause to ensure that it covers the liability sought to be excluded. In the event of any ambiguity the courts will apply the *contra proferentem* rule and will resolve any

issue of ambiguity against the party relying on the clause and give it the narrowest possible interpretation⁸⁶.

Fundamental Breach

It has been suggested that each contract contains some central critical obligation without performance of which there could be no performance of the contract as a whole. This central critical obligation is called a 'fundamental' term and breach of it was equivalent to non performance of the contract. It was considered that exemption clauses could not protect a party in fundamental breach⁸⁷. The argument was that a party who acts in fundamental breach is not acting as required by the contract. Consequently nothing that is done can be within what was contemplated by the contract and therefore the actions of the party in default are not governed by the provisions of the contract. The effect then is that exemption clauses could not protect a party in fundamental breach. As Lord Denning said in *Karsales*;

“A breach which goes to the root of a contract disentitles the party from relying on the exemption clause.....”

The counter argument is that it ignores the general principles of freedom to contract. This holds that if a party freely contracts out of any rights that would normally apply to the contract (subject to any relevant statute) the courts will not generally interfere unless there are issues of mistake, misrepresentation, undue influence, duress or unconscionable conduct. The alternate approach is to ask whether the exemption clause on its true construction is wide enough to cover the breach complained of. If it is then, the exemption clause must apply and the party relying on it will not be liable.

The doctrine of fundamental breach was set aside in England in *Photo Productions Ltd v Securicor Ltd*⁸⁸. The facts were briefly that a contract between the parties provided that Securicor was not liable “for any injurious act or default by any employee of Securicor unless such act could have been foreseen and avoided by the exercise of due diligence on the part of Securicor as his employee”. Another clause exempted Securicor from fire damage. A Securicor guard lit a fire in the factory and it was subsequently destroyed. Photo Productions argued that the breach was fundamental and sought to negate the clause and recover damages. It was held that there is no principle of law that a fundamental breach of contract will automatically nullify the exemption clause. In this situation the clauses were clear and unambiguous, and designed to limit Securicor's liability. Consequently, Securicor was not liable.

The Australian courts have never adopted the English view of fundamental breach. They prefer to follow the approach based on the interpretation of the construction of the clause⁸⁹. Because of the courts attitude towards exemption clauses and uncertainties in the law regarding such clauses, legislation has been enacted to clarify some situations. For example s 68 of the *Trade Practices Act 1974 (Cth)* renders void any clause, which purports to exclude any of the terms, implied by the *Act*. It would impossible, for example, to exclude the implied statutory warranties dealing with contracts for the supply of goods or services⁹⁰.

Tortious Damage

The measure of damages in tort is to place the plaintiff in the same position the plaintiff would be in, but for the damage or injury the plaintiff has suffered⁹¹. The types of damages for an action in tort include *nominal damages*, *compensatory damages*, *aggravated damages* and *exemplary damages*. Other issues relative to a claim in negligence include the effect of contributory negligence, vicarious liability, and apportionment legislation⁹². Where the cause of action is in negligence the plaintiff will usually recover only compensatory damages. In this paper only the tort of negligence is considered.

Where a builder has negligently carried out the building work the remedy may vary. The plaintiff may elect to sue for damages based on⁹³:

- the cost of rectification; and/or
- reinstatement of the damaged building; or
- the diminished value of the building

Damages based on the diminished value of the building occur in circumstances where even though rectification or repairs have been carried out the value of the repaired property is still less than would have been the value if the building had been properly constructed in accordance with the contract, that is, *defect free*. The rationale is that a prospective purchaser will not want to pay the normal market price for a building which has suffered from defective workmanship and which possibly could suffer future damage. It does not matter that the cost of the rectification is greater than the amount of the diminished value of the building. However, as with remedy under contract there will be an overriding requirement that the rectification or reinstatement in the circumstances must be reasonable⁹⁴.

Defects Resulting From Faulty Design

The above cases have discussed the measure of damages where defective work has resulted from a builder departing from the design or specification that has been prepared by a third party. Where a builder carries out the work in accordance with the design, and the design is subsequently found to be defective, the builder will not be liable⁹⁵. However, where a builder became aware of some defect in the design there would be a duty to warn based on the common law of negligence or an affirmative action duty to act⁹⁶.

Where a builder is engaged to both design and construct the works it will be incumbent on the builder to produce a building for the purpose for which it is intended. In this case the owner is relying on the skill and judgement of the builder to warrant the efficacy of the works⁹⁷. The principle is illustrated in *Lyons v Jandon Constructions*⁹⁸. In this case the builder engaged a consulting engineer to design suitable footing for a residential building that had been designed by the owner's architect. The design was defective and the builder was held liable in contract (on the basis of a breach of the warranty that the work would answer the purpose for which it was intended) for the resulting damage as a consequence of inadequate footings.

Defective Work Resulting From Architectural or Engineering Design

In this situation the remedy will differ from the situation where a builder fails to construct the building in accordance with the contract documents. With engineering and architectural design there will be implied into every contract for building design work undertaken by an engineer or architect that the designer will exercise proper professional skill in carrying out the design works. Additionally, a designer may be liable in negligence where they have not exercised the requisite standard of care in the circumstances. In *Auburn Municipal Council v ARC Engineering Pty Ltd*⁹⁹ as a result of the defective work of the design engineer in the preparation of plans and specifications buildings constructed for the plaintiff had to be demolished and rebuilt.

The issue for the court was whether damages should be determined on the basis of the *Belgrove v Eldridge* principle. That is, whether a breach of contract by a builder to erect a building in accordance with plans and specifications, as in *Belgrove v Eldridge*, will result in the same level of damages as the breach of a contract by a designer who fails to exercise professional skill in the design. The court held that in the case of a builder, the contractual obligation is to produce a result. That is a building in conformity with the plans and specification. However in contract, the designer does not warrant the result. The designer only warrants

exercising due care and skill in the design. The court held that an engineer whose negligence results in a building which has to be demolished and rebuilt cannot be held liable for all of the costs of erecting a proper one.

The liability of the design engineer or architect is confined to paying for what was 'thrown away' on the cost of the defective construction caused by breach of contract or negligence plus whatever was necessary to restore the land to its pristine state, free of the useless structure. Normally where there has been professional negligence by an architect or engineer the measure of damages will be the cost of rectifying the defect, but where the total demolition of the building is required different considerations apply. An illustrative case is *Bevan Investments Ltd v Blackhall and Struthers (No 2)*¹⁰⁰ a case involving the negligence of a design engineer. At trial the judge had allowed damages based on the principles expressed in *Bellgrove v Eldridge* and the engineer appealed.

The amount of damages awarded was determined by adding the cost of construction work until the point had been reached where the failure of the design became apparent (the costs thrown away) and the estimated cost of completing the building according to the modified design scheme and then subtracting the original contract price from these two amounts. The appellant engineer argued unsuccessfully that the proper measure of damages should have been the cost of the work already done less the salvage value of the building materials.

The difference in this case, however, was that it was not necessary to demolish the building because it was possible to complete the building using an amended design. Consequently the engineer was required to pay for the additional costs required for completing the building in accordance with a proper design. From the cases there is no clear principle emerging with respect to the determination of damages for defective design. It will depend upon matters such as the construction of the contract, the relationship of the parties, the nature and extent of the defects arising from the faulty design¹⁰¹.

CONCLUSION

The paper has provided a detailed examination of the standards imposed on a builder, the resultant action that is appropriate when defective work arises and the principals relating to the award of damages. Fundamentally, where a builder has departed from the requirements of the plans and specification or has carried out the works in a negligent manner the measure of damages is the cost of the

necessary and reasonable works to achieve the result contracted for. That is as stated in *Bellgrove v Eldridge*¹⁰²:

“...the respondent was entitled to have a building erected upon her land in accordance with the contract and plans and specification which forms part of it, and here damage is the loss which she has sustained by the failure of the appellant to perform his obligations to her.”

Consequently, this may involve the demolition and reconstruction of the building in addition to consequential damages rather than diminution in value.

The courts have consistently referred to the differences in the appropriate measure of damages between a builder negligently carrying out building work and an architect or engineer for negligent design. The negligent designer will not normally be held responsible for the costs of demolition and rebuilding. The appropriate measure of damages is the cost of removal of the structure and restoring the land to its ‘pristine’ condition¹⁰³. The court stated: ¹⁰⁴

“The loss which the respondent experienced qua the appellant was not the loss of the building which it contracted to get, but the loss of its money in a futile enterprise.”

To limit the impact of litigation, it is imperative that parties understand and establish the contractual terms to define the rights and obligations with respect to defective work. When defective work has occurred and then damages must flow from the breach and must be reasonable. Though, what is reasonable is a matter of fact and determinable in each situation. Damages awarded on the basis of total replacement will be awarded where a court is not convinced that repair will prevent the possibility of future damage. In addition, damages for defective work can be pre-agreed, limited or simply excluded by express words in the contract. Finally, when a builder assumes responsibility for both design and construction they warrant the efficacy of the works.

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¹ For example Housing Industry Association Limited HBCA Lump Sum Building Contract Clause 1(a)

² ABIC SW-1 2002 Simple Works Contract Clause A2.1.

³ See Housing Industry Association Limited Specification Form 7HB1- 2006 Clause 5.

⁴ AS 21 24 -1995, Clause 30.1

⁵ AS 4000-1997, Clause 28

⁶ *Qantas Airways v Joesland & Gilling* (1986) 6 NSW LR 327

⁷ For a discussion of the implication of terms in a construction contract see *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337

⁸ See *Young & Marten Ltd v McManus Childs Ltd* (1969) 1 AC 454 @ 469.

⁹ (1989) 96 FLR 436 @ 443

¹⁰ *GH Myers & Company v Brentcross Service Company* (1934) 1KB 46 @ 55.

¹¹ AS 2121-1995 Clause 9.3; 4000-1997 Clause 9.5

¹² *Independent Broadcasting Authority v EMI Electronics & BICC Construction Ltd* (1980) 14BLR 9 @ 44.

¹³ *Donoghue v Stevenson* [1932] AC 562

¹⁴ *The Council of the Shire of Wyong* (1980) 29 ALR217; *Burnie Port Authority v General Jones Pty Ltd* (1994) 68 ALJR 331

¹⁵ *Bryan v Maloney* (1995) 182 CLR 609; *Woolcock Street Investments v CDG* [2004] HCA 16

¹⁶ Limitation Act 2005 (WA), section 12.

¹⁷ *Ultramares Coporation v Touche* (1931) 174 NE 441 @ 444.

¹⁸ *Jaensch v Coffey* (1984) 155 CLR 549 @ 584

¹⁹ *Jandon Constructions v Lyons* [1999] WASCA 310

²⁰ *Voli v Inglewood Shire Council* (1963) 110 CLR 74

²¹ *Hill v Van Erp* (1997) 188 CLR 159; *Perre v Appand Pty Ltd* (1999) 198 CLR 180

²² [2004] HCA 15

²³ *Bryan v Maloney* (1995) 182 CLR 609

²⁴ AS 2124-1992, Clause 14.1

²⁵ Section 12A(a)

²⁶ Section 74(1)

²⁷ Section 74 (2)

²⁸ The Act provides for a rapid adjudication process to resolve payments disputes arising from construction work contracts entered into after 1 January 2005.

²⁹ AS 2124-1992, Clause 30.3; AS 4000-1997, Clause 29.3; ABIC SW-1 2002 Simple Works Contract Clause M10

³⁰ AS 2124-1992, Clause 47; AS 4000-1997, Clause 42; ABIC SW-1 2002 Simple Works Contract Clause P3

³¹ AS 2124-1992, Clause 30.3; AS 4000-1997, Clause 29.3; ABIC SW-1 2002 Simple Works Contract Clause M10

³² AS 2124-1992, Clause 37; AS 4000-1997, Clause 35; ABIC SW-1 2002 Simple Works Contract Clause M13

³³ *Wigan v Edwards* (1973) 1 ALR 497; *Cassidy v Edwards Construction Co (No 2)* [1968] Qd R 159

³⁴ Section 12(a)(1)(a) BRA

³⁵ Section 12A BRA

³⁶ AS 2124-1992 Clause 37; AS 4000-1997, Clause 35

³⁷ For lump sum contracts for building work valued between \$7,500 and \$500,000.

³⁸ Section 11(1)

³⁹ Section 30.4 and 40

⁴⁰ Section 40(1)

⁴¹ *Wegan Constructions Pty Ltd v Wodonga Sewerage Authority* [1978] VR 67

⁴² Section 30.5

⁴³ Section 29.4

⁴⁴ *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; *Kennedy v Collings Constructions Co Ltd* (1989) 7 BCL 25; *Hudson Crushed Metals Pty Ltd v Henry* (1985) 1 QLR 202.

⁴⁵ *Bolton v Mahadeva* [1972] 1 WLR 1009

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- ⁴⁶ *Hoenig v Isaacs* [1952] 2 All ER 176; *Simpson Steel Structures v Spencer* [1964] WAR 101
- ⁴⁷ (1848) 1 EX 850 @ 855
- ⁴⁸ *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344
- ⁴⁹ (1854) 9 EX 341 @ 354; See also *Amman Aviation Pty Ltd v Commonwealth* (1988) 100 ALR 267
- ⁵⁰ *Victoria Laundry v Newman Industries* (1949) 2KB 528
- ⁵¹ *Lester v White* (1992) 2 NZ LR 483 @ 499
- ⁵² *Bellgrove v Eldridge* (1954) 90 CLR 613; *Lyons v Jandon Constructions* (1998) WASC 224; *J-Corp Pty Ltd v Gilmour* [2005] WASCA 136
- ⁵³ (1954) 90 CLR 613
- ⁵⁴ (1954) 90 CLR 613 @ 617
- ⁵⁵ (1968) Qld R 275
- ⁵⁶ *J-Corp Pty Ltd v Gilmour* [2005] WASCA 136
- ⁵⁷ (1974) 5 ACTR 10 @ 11
- ⁵⁸ (1996) 1 AC 344
- ⁵⁹ (1996) 1 AC 344 @ 353
- ⁶⁰ For a discussion of nominal damages see *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 86
- ⁶¹ *Coshott v Fewings Joinery Pty Ltd*, (Unreported NSWSCA 15 July 1999); *Sunvara Pty Ltd v Williams* [2001] NSWSC 7
- ⁶² *Jarvis v Swan Tours* (1973) QB 233; *Baltic Shipping v Dillon* (1993) 67 ALJR 228
- ⁶³ [1977] VR 447
- ⁶⁴ [1875] LR 10 QB111.
- ⁶⁵ [1875] LR 10 QB111 at 122
- ⁶⁶ (1991) 4 All ER 937
- ⁶⁷ (1998) 4 VR 82
- ⁶⁸ (1998) WASC 222
- ⁶⁹ (1989) 15 NSW L R 501
- ⁷⁰ See *Isaacs J in Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 81.
- ⁷¹ (1971) 124 CLR 303 at 308; See *Enzed Holdings Ltd v Wynthea* (1984) 57 ALR 167 @ 183
- ⁷² *Johnson v Perez* (1988) 166 CLR 351 @ 357
- ⁷³ *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653
- ⁷⁴ AS 2124-1992, Clause 35.6, 35.7; AS 4000-1997, Clause 34.7; ABIC MW-1 2001, Clause M8; *Lyons and Ors v Jandon Constructions (A Firm and Ors)* [1988] WASC 224
- ⁷⁵ [1915] AC 79 @ 86
- ⁷⁶ (1992) 33 NSWLR 504
- ⁷⁷ [2004] TASSC 132
- ⁷⁸ *State of Tasmania v Leighton Contractors Pty Ltd* [2005] TASSC 133
- ⁷⁹ Minter Ellison *On Site* 10 June 2005
- ⁸⁰ *Dougan v Ley* (1946) 71 CLR 142.
- ⁸¹ *Hewett v Court* (1983) 57 ALJR 211
- ⁸² (1998) 195 CLR 1
- ⁸³ *IR and CA Hassell v Silent Vector Pty Ltd T/A Sizer Homes* (Unreported SCWA 16 May 2005). See also *Opie v Collum* (1999) SASC 376
- ⁸⁴ *L'Estrange v Graucob Ltd* [1934] 2 KB 394; *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805
- ⁸⁵ *Rinaldi & Patroni Pty Ltd v Precision Mouldings Pty Ltd* [1986] WAR 131; *Brambles Holdings Ltd T/A Oilfield & General transport Co v WMC Engineering Services Pty Ltd* Unreported SCWA 4 March 1999
- ⁸⁶ *White v John Warwick and Co Ltd* [1953] 1 WLR 1285; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 50; *City of Sydney Council v West* (1965) 114 CLR 481
- ⁸⁷ *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936
- ⁸⁸ [1980] AC 827
- ⁸⁹ *City of Sydney Council v West* (1965) 114 CLR 481

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- ⁹⁰ Section 74(1) of the *TPA*
- ⁹¹ *Todorovic v Waller* (1981) 150 CLR 402 @ 412
- ⁹² *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA); *Civil Liability Act 2002* (WA)
- ⁹³ McInnes J, *Handbook on Damages*, Lawbook 1992
- ⁹⁴ *Evans v Balog* [1976] 1 NSWLR 36; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293.
- ⁹⁵ *Cable (1956) Ltd v Hutcherson Bros Pty Ltd* (1969) 123 CLR 143 @ 150; *London Borough of Merton v Stanley Leach Ltd* (1985) 32 BLR 51
- ⁹⁶ *Smith v Leurs* (1945) 70 CLR 256
- ⁹⁷ *McKone v Johnson* [1966] 2 NSWLR 471
- ⁹⁸ (1998) WASC 224
- ⁹⁹ (1973) 1 NSW LR 513
- ¹⁰⁰ [1978] 2 NZLR 97
- ¹⁰¹ *Beregold v Mitsopoulos* (1999) 15 BCL 290; *Roman Catholic Trust v Van Driel* (2001) VSC 310; *Morton v Douglas Homes Limited* (1984) 2NZ LR548
- ¹⁰² *Bellgrove v Eldridge* (1954) 90 CLR 613 @ 617
- ¹⁰³ *Auburn Municipal Council v ARC Engineering Pty Ltd* [1973] 1 NSWLR 513 @ 533
- ¹⁰⁴ *Auburn Municipal Council v ARC Engineering Pty Ltd* [1973] 1 NSWLR 513 @ 535

Table 1. Nature of complaint items assessed by BRB Inspectors

Item	2003/04 (%)	2004/05 (%)	2005/06 (%)	2006/07
Brickwork	7.7	7.8	7.96	7.92
Ceiling	6.5	7.3	7.65	6.64
Ceiling and roof frame	5.5	6.1	5.18	5.76
Concrete paving	2.9	3.9	3.39	3.33
Doors and windows	6.0	7.3	6.54	6.81
Earth footings	1.4	1.8	1.73	1.25
Fixing and joinery	7.8	6.9	6.97	7.36
Flashings	5.7	4.9	5.18	5.28
House site cleaning	1.6	1.6	1.48	1.53
Painting	7.3	8.3	7.22	7.71
Plumbing	6.5	5.9	6.79	5.97
Roof cover	7.4	6.5	7.03	7.64
Slab floor	3.5	3.0	2.71	3.13
Solid plastering	9.5	8.4	9.19	8.61
Swimming Pool	0.9	1.2	1.17	0.83
Termites	0.8	0.6	0.68	0.56
Timber floor	2.1	1.6	2.04	2.64
Wall and floor tiling	6.9	7.5	6.6	7.08
Wall frame	1.3	1.1	1.17	1.53
Water ingress and egress	8.7	8.3	9.32	8.13
Total	100	100	100	100