



CONSTRUCTION LAW UPDATE No. 1003

Demolish or rectify?

Introduction

If a builder has made errors that cannot be completely removed without demolishing the works and starting again, does it have to demolish and rebuild or can compensation be assessed in some other way? The Full Court of the Supreme Court recently examined this question in *Unique Building Pty Ltd v Brown*. This Update focuses only on the issue of the quantum of damages and does not discuss the various other issues of interest in this case.

The Background

In late 2001, Unique entered into three separate contracts to build four three storey townhouses for members of the Brown family. The site was in the Adelaide CBD and was of very tight dimensions; a total of 13.4 metres wide for all four townhouses. After the floor slab was poured, the Browns made numerous complaints about defects including encroachments of the slab on the Council's land by between 23mm and 12 mm, missing starter bars, late installation of termimesh, failure to coordinate underground plumbing and the excessive height of a step in the slab. A dispute over progress payments was referred to a referee but the defect issues were not resolved.

The Browns' surveyors verified the encroachments, found that the Rapid walls were misaligned and also that the garage floor levels were constructed higher than the design level by approximately 90mm. The Browns said that the "as built" garage floor height would prevent some cars from accessing the garages. Unique denied liability saying that the height of the garage floor was a necessary requirement of SA Water.

In July 2002, work stopped on the site and by late 2003, the parties had each terminated the contracts. The dispute proceeded through various stages including referral to a referee and proceedings in the Magistrates Court over the unpaid progress payments. These proceedings were discontinued by consent when some payments were made, but the work did not recommence on site.

In March 2004, the Browns made an application to the Council to demolish the partly built townhouses and to build a seven storey apartment building on the land instead of the building they had originally planned.

The proceedings against Unique

In December 2006, the Browns issued the claim in the District Court seeking damages. Many issues were tried including procedural issues as to the referee's award and the possible finality of the matter due to the Magistrates Court action. The Court found that Unique had breached its contract. What then was the amount of compensation due to the Browns?

The parties put competing evidence to the Court as to the cost of rectifying the problems. Unique said that remedial work to the value of \$42,000 would bring the townhouses into substantial conformity with the Contract with only minor remaining problems. The Browns said the rectification work would not fix the garage floor height without exposing the foundations, that the misalignment of the slabs meant that one of the townhouses could not have an external door where it had been planned and that the encroachments would require negotiation with the Council to realign boundaries. The Browns said they were entitled to damages equivalent to the cost of demolishing the partly built townhouses and rebuilding them to the stage they were at when Unique had stopped work, plus the increase in building costs for completion during the intervening period.

The District Court's decision

The Court agreed with the Browns, notwithstanding that the Browns no longer wanted the same building completed. The Court said that Unique had to put the owners in the position in which they would have been had Unique not breached the contract. The Court awarded to the Browns \$242,000 being the total cost of demolishing and rebuilding the four townhouses to the stage reached plus the increase in construction costs from the date of the contract to the date of the breach.

Unique appeals to the Full Court

Unique appealed to the Full Court on a number of issues. This Update looks only at the Full Court's approach to compensation. Broadly, the issue is: if a builder has breached the contract by carrying out defective work but the owner does not now want the project finished, how should a Court assess the quantum of damages payable to the owner.

The Full Court noted that the High Court has examined the issue and that the position is well settled law. The law established in *Bellgrove v Eldridge* (a decision of the High Court from 1954) can be briefly summarised as follows: once the defect or the departure from the terms of the contract is proved, then the amount of compensation is "the reasonable cost of rectifying the departure or defect so far as that is possible", with the rider that "it must be a reasonable course to adopt".

In *Bellgrove* the High Court gave an example of what would not be a reasonable course when it said, "No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks". In 2009, *Bellgrove* was reinforced by the High Court in *Tabcorp v Bowen Investments*.

Applying the law to the facts in Unique

Unique said that the cost of rectification would be an adequate remedy because demolition was unreasonable. However, it conceded that if rectification occurred rather than demolition, minor defects would remain (e.g. encroachments that would require negotiations with the local council).

Was demolition unreasonable? Unique said that in determining what was reasonable, it is necessary to look at the Browns' intentions. In other words, because they no longer intended to build the four townhouses, it was not reasonable to compensate them on the basis of reinstating the initially planned building in accordance with the contract. Unique said the quantum of any compensation should be calculated by comparison with the evidence as to the rectification costs. The Full Court rejected this argument. The Court said that it was a matter for the Browns to decide what they would do with the compensation after it was awarded and the Browns' intentions as to how they would spend their compensation was not relevant except to the extent that it might

indicate whether rectification was reasonable. The Full Court said it would only be unreasonable to order full compliance with the contract in "fairly exceptional circumstances".

The Full Court said that the encroachments were not "minor". There was no evidence that the council would allow the boundaries to be adjusted, even if the encroachments were only in the order of 20mm. The garage floor level was also problematic and the rectification proposed by Unique would not bring the building into conformity with the contract in a reasonable way. The Full Court dismissed Unique's appeal.

Conclusion

The usual quantum of compensation for defective work is the cost of rectifying the work to bring it into conformity with the contract terms. Where the breaches cannot be rectified without demolition and rebuilding the claimant is entitled to these costs and it is only in "fairly exceptional circumstances" that a Court will hold that the amount of compensation is to be calculated by reference to alternative methods.

This decision and the recent High Court case of *Toll Holdings* indicate that Courts are holding the line and perhaps firming in their approach to the literal application of contract law. Parties are entitled to the full benefit of their bargain under their contract.

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