NECESSITY, REASONABLENESS AND INTENTION TO REBUILD: A RECONCILIATION OF THE AUSTRALIAN AND ENGLISH APPROACHES TO QUANTIFICATION OF DAMAGES IN BUILDING CASES

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Builders are often heard to complain that the owner, if awarded damages for rectification of defects, will not rectify the defects, but will spend the money on something else; perhaps an overseas holiday or new car. The classic case of *Bellgrove v Eldridge* is a well known example of an owner not spending the damages awarded on demolishing and rebuilding the house. In that case, however, the High Court made the position in Australia clear: the court has no role to enquire into what the plaintiff will do with his or her damages. Over time, the strictness of that view seems to have diminished and more recent cases indicate that, while not embracing intention to rebuild as a relevant factor in awarding or assessing damages, there is certainly something almost akin to it in Australian judges' subjective consideration of whether it is reasonable to undertake the rectification works. The situation in England has, traditionally, been different. In England, the emphasis on intention apparently arose to distinguish an old case which insisted that rectification costs were not available where the plaintiff did not seek specific performance. That emphasis, too, has diminished over time and despite their different origins the approaches taken by courts in Australia and England are now reconcilable.

BELLGROVE V ELDRIDGE[1]

The builder and the owner entered into a contract in 1949 for the builder to construct a house for the sum of £3,500. By the time of the proceeding, progress payments totalling £3,100 had been made. The builder claimed to recover the balance of £400. That claim was denied by the owner who cross claimed for damages in respect of substantial departures from the building specifications which, it was alleged, made the structure of the house unstable.

The evidence established, to the satisfaction of the trial judge, that there had been substantial departure from the specifications as to concrete and mortar. It was further established that the house was gravely unstable as a result of such departure.

Faced with the option of awarding damages on the basis of rectification costs or, alternatively, on the basis of demolition of the house and complete rebuilding, the trial judge, O'Bryan J, reasoned as follows:

What is the remedy for such breach of contract? It has been urged upon me that the matter may be remedied in one of two ways. The building might be under-pinned in the manner suggested by the plaintiff in his evidence, or the foundations might be removed and replaced piecemeal, as was outlined in the evidence of Mr Ahearn. I am not satisfied that either of these operations could in this case be carried out successfully. The difficulties of such an operation are aggravated by the paucity of cement ... The weakness of the mortar may cause a collapse in the brick-work ...[2]

O'Bryan J concluded that:

The defendant is entitled to have her contract fulfilled, and if it is not, to be awarded such damages as will enable her to have at least a substantial fulfillment of her contract by the plaintiff. In this case the departure from contract is in my opinion so substantial that the only remedy which will place the plaintiff in substantially the position in which she would be if the contract were carried out, is to award her such damages as will enable her to have this building demolished and a new building erected in accordance with the contract and specifications.[3]

Judgment was given for the owner on the cross claim in the sum of £4,950, which represented the cost of demolishing and re-erecting the

house in accordance with the plans and specifications, together with certain consequential losses less the demolition value of the house and moneys unpaid under the contract.[4]

The builder appealed to the High Court. The sole point in question was the measure of damages given by the trial judge on the cross claim, no objection was taken to the trial judge's findings of fact. Instead, it was submitted for the builder that the building had a value greater than its demolition value:

In particular, it was said, the building as it stood was saleable, at least, to some builders who were prepared to attempt the rectification of the existing defects by methods less drastic than demolition and rebuilding.[5]

As such, it was submitted that the proper measure of damages was the value of the house and land with the house constructed as per the plans and specifications less the value of the house and land with the house as actually built. This measure of damages, it was said, was in accordance with the general proposition that damages should put the injured party in the same position as he would have been if he had not sustained the injury for which damages are claimed;[6] the financial loss in this case being the loss of value caused by the failure to build the house in accordance with the specifications.

In rejecting this submission, Dixon CJ, Webb and Taylor JJ made an important distinction between damages for breach of contract in building cases, on the one hand, and damages for breach of other contracts (particularly sale of goods contracts):

In assessing damages in cases which are concerned with the sale of goods the measure, prima facie, to be applied where defective goods have been tendered and accepted, is the difference between the value of the goods at the time of delivery and the value they would have had if they had conformed to the contract...

In the present case, the respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it... 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 be ascertaining the amount required to rectify the defects complained of and so give her the equivalent of a building on her land which is substantially in accordance with the contract.[7]

Their Honours then gave an example of a room in a house being finished in a colour other than that specified. The house is no less valuable on account of the variation from the specifications, but nonetheless the owner is entitled to the cost of rectification. On this basis, the diminution in value argument was rejected in favour of quantum based on rebuilding. Their Honours held that the usual measure of damages in building cases was ...

... the work necessary to remedy defects in a building and so produce conformity with the plans and specifications... (which frequently) will require the removal or demolition of a more or less substantial part of the building.[8]

Their Honours placed a qualification on this general rule that to undertake the rectification, work contemplated must be a reasonable course to adopt. For instance, it was said by their Honours, it would be unreasonable to demolish and rebuild a house built of new first-quality bricks merely because second-hand bricks were specified in the contract.[9]

Their Honours did not go so far as to equate reasonableness with the avoidance of 'economic waste' (a term used in America). Economic waste was seen as a term more limiting of the owner's position in that it would not allow, for instance, the demolition and rebuilding of a structure that, though perfectly sound, nonetheless was of quite different character to that called for by the contract.[10]

What is 'necessary' and 'reasonable' in any particular case is a question of fact.[11] In *Bellgrove* the appellant builder took no issue with the factual findings of the trial judge. On appeal, the court was satisfied that anything other than complete rebuilding of the house was 'a doubtful remedy'.[12]

As a final point, their Honours dealt with the question of whether any weight could be afforded to consideration of the owner's intention whether or not to rebuild the house. The builder submitted that, if the judgment remained, then the owner would have her house, plus the cost of a new one. The court rejected this submission and found that it could not look to intention:

To our mind this circumstance is quite immaterial and is but one variation of a feature which so often presents itself in the assessment of damages in cases where they must be assessed once and for all.[13]

THE UK POSITION: *RUXLEY ELECTRONICS AND CONSTRUCTIONS LIMITED V FORSYTH*[14]

Similar issues arose in *Ruxley Electronics and Constructions Limited v Forsyth*. In that case the owner contracted with builders to construct a swimming pool in the garden at his house in Kent, the maximum depth of which was to be seven feet six inches. After construction had been completed the owner discovered that the maximum depth was only six feet

nine inches, and only six feet at the point where people would dive into the pool. The estimated cost of rebuilding the pool to the specified depth was £21,560.

The Trial judge made the following findings:

(1) the pool as constructed was perfectly safe for diving;

(2) there was no evidence that the shortfall in depth had decreased the value of the pool;

(3) the only practicable method of achieving a pool of the required depth would be to demolish the existing pool and reconstruct a new one at a cost of £21,560;

(4) he was not satisfied that the owner intended to build a new pool at such a cost;

(5) such cost would be wholly disproportionate to the disadvantage of having a pool of a depth of only six feet nine inches as opposed to seven feet six inches and it would therefore be unreasonable to carry out the works; and

(6) the respondent was entitled to damages for loss of amenity in the sum of £2,500.[15]

The owner appealed to the Court of Appeal, which upheld the appeal holding that the only way in which the owner could achieve his contractual objective was by reconstructing the pool at a cost of £21,560 which was accordingly a reasonable venture.[16]

BUILDER'S APPEAL TO THE HOUSE OF LORDS

The leading judgments may be summarised as follows:

Lord Bridge of Harwich described the situation as follows:

When the work is complete it served the practical purpose for which it was required perfectly satisfactorily. But in some minor respect the finished work falls short of the contract specification. The difference in commercial value between the work as built and the work as specified is nil. But the owner can honestly say: This work does not please me as well as would that for which I expressly stipulated. It does not satisfy my personal preference ... Nevertheless the contractual defect could only be remedied by demolishing the work and starting from scratch. The cost of doing this would be so great in proportion to any benefit it would confer on the owner that no reasonable owner would think of incurring it ...

... the cost of reinstatement, which has not been and will not be incurred.

... to hold in such a case as this that the measure of the building owner's loss is the cost of reinstatement, however unreasonable it would be to incur that cost, seems to me to fly in the face of common sense.[17]

Lord Jauncey of Tullichettle cited with approval the decision of Lord Cohen in *East Ham Corporation v Bernard Sunley & Sons Ltd*[18] which is to the effect that reinstatement is the normal measure of damages in building cases:

... there are three possible bases of assessing damages, namely, (a) the cost of reinstatement; (b) the difference in cost to the builder of the actual work done and work specified; or (c) the diminution in value of the work due to the breach of contract. They go on: There is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the courts will treat the cost of reinstatement as the measure of damage ...[19]

His Lordship then considered what 'reasonableness' means in the context of reinstatement. He reviewed the 'body of authority' (including *Bellgrove*) before coming to the following conclusion:

Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure.[20]

The concept of substantial performance is therefore the key to Lord Jauncey's conception of reasonableness. It is worth quoting at length the central passage to the judgment as it is, perhaps, the clearest statement on reasonableness to emerge from the judgments:

I take an example suggested during argument by my noble and learned friend, Lord Bridge of Harwich. 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. Thus in the present appeal the respondent has acquired a perfectly serviceable swimming pool, albeit one lacking the specified depth. His loss is thus not the loss of a useable pool with consequent need to construct a new one. Indeed were he to receive the cost of building a new one and retain the existing one he would

have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide.

What constitutes the aggrieved party's loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing. Furthermore in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large.[21]

For this reason Lord Jauncey agreed with the trial judge that it would be unreasonable to incur the cost of demolishing the existing pool and building a new and deeper one and, therefore, the owner's loss did not extend to the cost of reinstatement.[22]

Finally, in comment by the way, his Lordship stated that:

Intention, or lack of it, to reinstate can have relevance only to reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant.[23]

Lord Mustill agreed with the reasons stated by Lord Jauncey and Lord Lloyd that the test of reasonableness is central to determining the basis of recovery, and is decisive in a case such as the present when the cost of reinstatement is disproportionate to the non-monetary loss suffered.[24]

Lord Lloyd of Berwick's judgment is heavily influenced by two judgments from other countries: firstly *Jacob & Youngs v Kent* in which Cardozo J gave the majority opinion in the Court of Appeals of New York; and secondly the decision in *Bellgrove v Eldridge.*

His Lordship takes the following points from the judgment of Cardozo J:

... first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the good to be obtained, and, secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award.[25]

Bellgrove v Eldridge[26] is described by his Lordship as 'instructive'.[27] It is, apparently, the first reported case in which the reasons for decision emphasise the central importance of the concept of reasonableness in choosing between rectification and diminution of value in determining quantum. His Lordship makes no attempt to further define what 'reasonableness' means. It remains a fluid conception whereby a decision can be made subjectively on the facts of the case at hand:

If reinstatement is not the reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff's loss.[28]

The closest his Lordship comes to further guidance on the nebulous 'reasonableness' test is that it will be invoked where the defects are not very serious and it would be unreasonable to go to the expense of rectification,[29] and where the expense of the work involved would be out of all proportion to the benefit to be obtained.[30] This is, most likely, akin to Lord Jauncey's preferred test of not allowing the cost of compliance where there has been substantial performance of the contract and little benefit to be obtained by rectification when compared with the cost.

Having already accepted the fact that there was no loss of utility caused by the relative shallowness of the pool as constructed compared with that contracted for, and having accepted that rectification was an inappropriate remedy because it was unreasonable in the circumstance, his Lordship nonetheless proceeds with a discussion of 'intention'.[31]

His Lordship's view of intention is stated as follows:

I fully accept that the courts are not normally concerned with what a plaintiff does with his damages. But it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate.

By this statement, I take his Lordship to mean that if the plaintiff evinces an intention not to reinstate that may change an otherwise reasonable reinstatement into an unreasonable one. That, however, seems to approach intention from entirely the wrong direction. Surely the use of intention, if any, should be that where a plaintiff genuinely intends to reinstate or rectify, that may have a bearing on the reasonableness of the reinstatement or rectification.

Thus, in *Ruxley* the owner gave an undertaking to the court that if awarded damages reflecting the cost of rebuilding the pool, he would have the pool rebuilt. It may be sensible, in such cases, that the court consider the undertaking as showing the plaintiff's strong commitment to that for which he contracted. It would certainly modernise and modify the much-quoted rule for the measure of damages in cases of disappointed expectation in contract.[32] I say 'modernise' not because the rule in *Robinson v Harman is* not still a logical starting point for consideration of lost expectation,

but because the principles subsidiary to the rule have been developed almost entirely within the context of commercial contracts. That is, contracts where losses can readily be determined in money. The reason that cases like *Ruxley* cause so much difficulty is that the loss is indeterminate: how do you assess the appropriate remedy where the whole point of the contract, and the action for breach, is customer satisfaction? Perhaps only by looking behind the scenes at the plaintiff's unique desires and expectations. This appears to be the way in which Lord Jauncey approaches the question of reasonableness.

Lord Lloyd, however, finds that such an undertaking is of no consequence, or else is disingenuous:

Does Mr Forsyth's undertaking to spend any damages which he may receive on rebuilding the pool make any difference? Clearly not. He cannot be allowed to create a loss, which does not exist, in order to punish the defendants for their breach of contract. The basic rule of damages, to which exemplary damages are the only exception, is that they are compensatory not punitive.[33]

ARE THE DECISIONS IN *BELLGROVE* AND *RUXLEY* RECONCILABLE?

Both decisions take as their starting point that the cost to bring the work into conformity with the plans and specifications is the usual measure of damages in building cases. However, in Australia the only restriction on this general rule is that the work must be necessary and reasonable in the circumstance of the particular case. There is no additional requirement in Australia that (a) the work has actually been done;[34] (b) the plaintiff has undertaken to have the work done;[35] or (c) the plaintiff has shown 'sufficient intention' to have the work done if he receives damages on this basis.[36]

Intention, however, is a part of the English law of damages. It is helpful to consider the line of English authority to place the decision in *Ruxley* in context because the requirement of intention apparently arose in order to distinguish an old and very difficult precedent.

In *Wigsell v Corporation of the School for the Indigent Blind*[37] the executors and devisees in trust and the parties beneficially interested under the will of Colonel Wigsell brought an action for breach of a covenant entered into by the defendants with Wigsell as part of a conveyancing transaction. The relevant covenant by the defendant was that the '[land] ... should be and be kept enclosed on all the sides abutting on the land belonging to Colonel Wigsell with brick wall or iron railing seven feet high'.[38] In breach of that covenant, the defendants never enclosed their land.

Damages were claimed under three separate heads:

(1) the sum which the wall or fence would cost;

(2) the damage resulting from the non-exercise by the plaintiff of an option to buy back the land, which was said to be due to the absence of the fence; and

(3) damage to the adjoining land.[39]

In rejecting the first head of damage Field J provided the following reasons:

... the plaintiffs, if they really wished to have the wall built in accordance with the contract, so that they might have the very thing contracted for, and nothing else, might have claimed in the Chancery Division specific performance of the covenant ...

The effect, however, of electing to bring the action for damages, is to convert the right to the performance of the contract into a right to have compensation in money ...

The element of cost to the defendants ... cannot be the measure of the difference to the plaintiffs ...[40]

Thus, Field J would not allow the cost to conform with the contract in circumstances where specific performance was available, and the plaintiff had elected to pursue damages.

The decision in *Wigsell* was considered in *Radford v De Froberville*.[41] Radford also dealt with a covenant to build a wall. The plaintiff, Radford, owned a substantial house in London that was divided into six flats which were, at all material times, let to tenants. The property had a large garden which contained an area of about 23 feet by 140 feet ('the plot') which was unbuilt and suitable for subdivision.

In 1965, the plaintiff prepared plans for a new house to be erected on the plot and obtained planning permission. The plaintiff then sold the plot to the defendant. The defendant covenanted that she would build the house in accordance with the plans and the planning permission, and that she would forthwith erect a wall between the two properties, and not sell the land before carrying out the developments. There were other facts, but they do not impact upon this discussion.

Oliver J (and Megarry V-C in *Tito v Waddell* (No. 2)) went to elaborate lengths to distinguish *Wigsell:*

Now, I am, of course, very conscious of the doctrine of stare decisis and of the duty of a judge to adopt and apply the rationes decidendi of decisions of superior courts ... But what, I ask myself, is the true ratio decidendi in Wigsells case? ... So far as they treated the matter as one of principle, they seem to me to be saying no more

than this: that one who has the benefit of a specifically enforceable covenant and who declines specific performance but elects his remedy in damages will be confined to the normal contractual measure of damages ... an enquiry which has to be approached in the light of the deliberate election which the plaintiff has made ... It looked at what the plaintiffs had actually lost and it did so in the light both of the fact that they had elected not to sue for specific performance and the great improbability of their ever even thinking of building the wall for themselves.[42]

Later, Oliver J cites with approval Megarry V-C in *Tito v Waddell* (No.2):

Megarry V-C then set out four general propositions specifically in relation to the type of contract with which I am concerned in the instant case ...

> *In the absence of any clear authority on the matter before me, I think I must consider it as a matter of principle. I do this in relation to the breach of a contract to do work on the land of another, whether to build, repair, replant or anything else: and I put it very broadly. First, it is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of the (sic.) compensating the plaintiff ...*
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> *Second, if the plaintiff has suffered monetary loss, as by a reduction in the value of his property by reason of the wrong, that is plainly a loss that he is entitled to be recouped. On the other hand, if the defendant has saved himself money, as by not doing what he has contracted to do, that does not of itself entitle the plaintiff to recover the savings as damages; for it by no means necessarily follows that what the defendant has saved the plaintiff has lost.*
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> *Third, if the plaintiff can establish that his loss consists of or includes the cost of doing work which in breach of contract the defendant has failed to do, then he can recover as damages the sum equivalent to that cost. It is for the plaintiff to establish this: the essential question is what his loss is.*
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> *Fourth, the plaintiff may establish that the cost of doing the work constitutes part or all of his loss in a variety of ways. The work may already have been done before he sues. Thus, he may have had it done himself as in Jones v Hexheimer [1950] 2 KB 106. Alternatively, he may be able to establish that the work will be done. This, I think, must depend on all the circumstances, and not merely on whether he sues for specific performance ...*
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> *In the instant case, the plaintiff says in evidence that he wishes to carry out the work on his own land and there are, as it seems to me, three questions that I have to answer. First, am I satisfied on the evidence that the plaintiff has a genuine and serious intention of doing the work? Secondly, is the carrying out of the work on his own land a reasonable thing for the plaintiff to do? Thirdly, does it make any difference that the plaintiff is not personally in occupation of the land but desires to do the work for the benefit of his tenants?*[43]

Thus, in *Wigsell* the court disallowed the cost of the expectation created by the covenant to build a fence on the ground that specific performance was not sought. In *Radford*, Oliver J distinguished *Wigsell* on the basis that, though specific performance was not sought, the plaintiff had exhibited a genuine intention to build the fence. The intention requirement, therefore, was a means by which Oliver J could distinguish an old but binding precedent in the face of a fact situation which was very similar. Having the intention to undertake the work was equivalent to seeking specific performance.

In the light of its dubious origins, it is not surprising that the intention requirement has been queried and challenged. In *Dean v Ainley*[44] Kerr LJ said the following:

The second aspect concerns the authorities and the undertaking given by the plaintiff ... In my view the test which distinguishes cases such as Wigsell ... from Radford ... is merely the question whether or not the plaintiff can show some economic loss as the result of the defendant's breach, i.e. a real loss which is properly to be assessed in terms of money and which therefore justifies an award of substantial, as opposed to merely nominal, damages. This was ... the reality in [Radford]

... I do not accept that [the plaintiff] has to go further by anything in the nature of an undertaking ... It would have made no difference if he had said that he intended to sell the property ... Nor would it make any difference if ... he were to change his mind and decide—for whatever reason—not to spend anything on improvement of the cellar. In my view all these matters are irrelevant in a case such as the present, because the plaintiff has established a real economic loss ...[45]

Thus, the insistence on the intention requirement was not universal at the time it came to be considered by the House of Lords in *Ruxley*. In *Ruxley*, as it was unnecessary in the circumstance of the case, the House

of Lords did not decide on the issue, being unanimous in the view that the cost of compliance with the contract was unreasonable.

Dicta from *Ruxley* is not strong. As quoted above, Lord Lloyd states his opinion of intention in alternatively negative or equivocal (i.e. 'can' and 'may') terms so that it is unclear whether he believes intention is a strict requirement or not: 'But it does not follow that intention is not relevant to reasonableness ...';[46] 'There is ... a good deal of authority to the effect that intention may be relevant [to reasonableness] ...';[47] and finally, his Lordship states that he is in complete agreement with a paragraph of written submissions from one of the counsel in the case to the effect that absence of desire to rectify may undermine the reasonableness of the higher cost measure of rectification and that it 'can be a factor which the court must consider'[48] (whatever that phrase means). Similarly, Lord Jauncey states his view as being that intention *can* [emphasis added] have relevance to reasonableness of the cost of rectification.[49] The other Law Lords did not give their view as to whether intention to reinstate should be taken into account.

Is Lord Lloyd's conception of intention consistent with the view of Megarry V-C which he quotes:

... if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done?[50]

If so, it is difficult to conceive of a fact situation, save for the circumstance of the plaintiff having either sold or deserted the subject property, in which rectification would be reasonable but for the plaintiff's lack of intention to rectify.

TWO AUSTRALIAN CASES

Two Australian cases are relevant here. In *Director of War Service Homes v Harris*[51] the Full Court of the Supreme Court of Queensland (or Court of Appeal) considered the situation where the owner had sold the building he contracted for prior to discovering defects and bringing an action for defective work. At first instance the trial judge found that the owner had not suffered any loss. The owner appealed. The relevant facts of the case were as follows. The respondent and the appellant entered into a contract dated 27 September 1949 for the respondent to construct ten houses on the appellant's land in accordance with general conditions, plans and specifications. The specifications provided that the materials should be the best materials available and that the building work should be in accordance with best building practice. The buildings were completed and delivered to the appellant in July 1952. The houses were all sold by May 1954. Purchasers complained to the appellant of defective workmanship. When the respondent refused (upon the request of the appellant) to rectify the defects the appellant employed other builders, at a cost of $1,760, to undertake the work. The trial judge assessed the value of work attributable to rectification at $650 but held that the appellant had spent such money while under no legal obligation to do so. One of the major questions on appeal was whether a right of action which accrued on delivery of the houses was extinguished upon sale. In other words, whether *Bellgrove* could be distinguished in cases where the subject building had been sold.

In a judgment with which other members of the Court of Appeal agreed, Gibbs J provided the following reasons in finding for the appellant:

It is true that Bellgrove v Eldridge was not a case in which the building owner had sold the building before bringing the action but I am unable to see any reason why there should be a different measure of damages in such a case and nothing is said in Bellgrove v Eldridge to support such a distinction. When the builder, in breach of his contract, delivered to the building owner a building that did not conform to the specifications, the owner became entitled to recover damages according to the measure approved in Bellgrove v Eldridge. If the owner subsequently sold the building, or gave it away, to a third person, that would not affect his accrued right against the builder to damages according to the same measure. The fact that the building had been sold might be one of the circumstances that would have to be considered in relation to the question whether it would be reasonable to effect the remedial work, but assuming that it would be reasonable to do the work the owner would still be entitled to recover as damages the cost of remedying the defects or deviations from the contract (assuming of course that the contract price had been paid).[52]

It is, according to Gibbs J, irrelevant whether or not the claimant is under a legal liability to repair defects, and if it is reasonable to have the rectification carried out then damages can be claimed. What does Gibbs J mean, though, when he says that sale of the building may impact on reasonableness? In what circumstances would sale of the building be relevant to the question of whether it would be reasonable to effect the remedial work? It would be interesting to know how Gibbs J would have dealt with the situation if the appellant had not paid for the remedial work, but had instead insisted that he was not legally liable to carry out the works and had no intention of so doing.

Would his claim have been confined to measuring his damage as the difference between the value of the houses as they actually were when delivered to the plaintiffs and the value which they would have had if they had been properly built? That is, would damages have been assessed on the theoretical difference in sale price? If so, his damages may have been nominal as it appears from the facts of the case that the defects were discovered after and not before purchase.

In my view the sale of the building by the appellant cannot impact on reasonableness except in that it may betray the appellant's intention to not carry out remedial work, which may have been reinforced in this case had the appellant actually refused to pay for the remedial work. Furthermore, courts should be loath to award the cost of rectification to a claimant who has no legal liability in respect of the property, as in most cases such an award will represent a windfall gain. Interestingly, the case seems to fall into the English line of decisions, rather than being genuinely consistent with the Australian approach.

The question of legal liability was addressed further by the Supreme Court of Victoria in *Alucraft Pty Ltd (In Liquidation) v Grocon Ltd* (No.2).[53] In *Alucraft* the plaintiff subcontractor sued the defendant head contractor for the balance of the sum payable under a contract to supply and install aluminium and steel windows, doors, screens and glazing at a car park and office building in Flinders Street, Melbourne. The defendant counter claimed for defective work. The plaintiff did not contest that the work was defective, but argued that the defendant had suffered no loss as the owner had not, in the four years since the parties became aware of the breach, sought rectification of the defects. In fact, the proprietor appeared to have accepted the work, having issued a final certificate three years before the trial (which, however, was not expressed to be conclusive of satisfactory performance), and not complained about the work. The evidence was that the defendant had been paid in full by the owner, had made no undertaking to complete the work, had no intention of doing the work, and that there was a significant disproportion between the cost and the value of the rectification work. Nor was there any evidence that the owner intended to make a demand on the defendant for rectification in the future, even though legally the defendant remained at risk of such a claim.

Smith J distinguished both *Bellgrove* and *Harris* on the basis that those cases were concerned with the liability of the contractor to the owner. In cases between contractor and subcontractor, his Honour held, the cost of rectification is not the measure of damages for lost benefit:

I am not persuaded that it would be reasonable to assess damages in this way bearing in mind that:

- *over four years have elapsed since all parties became aware of the breach;*
- *no work has been done to rectify the defective work;*
- *the proprietor appears to have accepted the work, issued a final certificate three years ago and, since doing so, not complained about the work;*
- *Grocon does not intend to initiate any rectification work and is not prepared to undertake to do so; and*
- *there is a significant disproportion between the cost of rectification and the value of the work.*[54]

His Honour accepted that the cost of rectification was $35,000, but:

It is then necessary to discount that figure in the light of the risk of Grocon being called upon to rectify the surrounds or pay for their rectification. As I have indicated, I regard the risk faced by Grocon to be very remote and in all the circumstances consider that a figure of $5,000 would adequately represent reasonable compensation having regard to that risk.[55]

Some further points to come from the decision are:

- the rule in *Commonwealth v Amann Aviation Pty Ltd*[56] that a party should not by an award of damages be placed in a better position than if the contract had been performed was accepted as correct;
- the measure of damages calculated by reference to the savings made by the defaulting builder was rejected, consistent with the view that damages are compensatory not punitive; and
- whereas in *Director of War Home Services v Harris* the Director had been the owner of the land at time when the breach occurred and had undertaken rectification on a voluntary basis, Grocon was never the owner of the Flinders Street property and had no intention of performing or undertaking to perform any rectification work.

The fact that Grocon did not intend to rectify the defects, combined with the overwhelming likelihood that it would never be called on to rectify, placed it in a situation where an award of damages calculated in accordance with the cost of rectification would have represented a windfall gain.

In both *Alucraft* and *Director of War Home Services* considerations of obligation and intention to rectify are very close to the surface. In *Alucraft* the owner did not intend to rectify and Grocon did not intend to rectify the defects, and Grocon was awarded (reduced) damages on the possibility that the owner may at some stage alter its intention and oblige Grocon to undertake the

work. In *Director of War Home Services* the Director was under no legal obligation to rectify the defects but did nonetheless. Thus, although the strict position is that courts in Australia do not receive evidence of intention as relevant in determining quantum, it does seem to be considered in difficult cases.

In view of the above, and the emphasis on 'reasonableness' in both countries for determining which measure of damages to apply, and in particular the explicit approval of *Bellgrove* in the reasons for decision of Lords Bridge, Mustill and Lloyd, I suggest that *Ruxley* has far more in common with *Bellgrove* than it does with the line of English authority represented by *Radford* and *Tito v Waddell* (No.2). The strictness of the older English cases' approaches to the question of actual rectification/intention to rectify is not found in the judgments of any of the Law Lords.

Bellgrove concludes its decision at the point at which intention could be discussed as a necessary element of reasonableness. In *Ruxley,* once it is found that rectification is unnecessary, the decisions indicate that consideration of intention is not relevant. This extends to disclaiming the owner's undertaking to use damages awarded on rectification. Overall, the concept of intention as discussed in *Ruxley* seems to have been approached with greater ambivalence, certainly with less certainty as to its application, than in *Radford.* It is difficult to say, given the statements disclaiming intention made by Kerr LJ in *Dean v Ainley* whether there is a trend to retreat from or distinguish *Radford.* In any case, given the uncertainty with which intention is discussed in *Ruxley,* I would not call any of the pronouncements therein diametrically opposed to those in *Bellgrove.* In so far as both decision rely on the concept of reasonableness, absent any reliance on intention, the two decisions are reconcilable.

SHOULD EVIDENCE OF INTENTION BE RECEIVED BY THE COURT AS RELEVANT TO THE ISSUE OF QUANTUM?

Whether evidence of intention should be received by the courts depends on what interests of the plaintiff the law of contract should aim to protect. Contracts are primarily, but not always, concerned with financial or economic matters. Thus, damages usually protect our interest in money, services and property and compensate a plaintiff for an established pecuniary loss.

This is why, as a general rule, courts are not interested in the use to which the plaintiff puts his damages. Once a loss is determined and that loss can be quantified in money it is immaterial whether the plaintiff intends to spend that award of damages on fixing his house (or having his car repaired or buying a new watch for the one stolen and so on). Intention simply does not impact on the value of his loss.

What cases like *Ruxley* bring into focus, however, is that the consequences of a breach of contract are not always economic. Breaches of consumer contracts, in particular, are susceptible to causing non-economic consequences such as distress, inconvenience and disappointment. As suggested earlier, courts have struggled to come to terms with loss of customer satisfaction because it does not fit neatly into the principles developed for dealing with commercial contracts. It does not follow, however, that the law of contract should not recognise such non-economic consequences with an award of damages.

The question for building contracts is whether disappointment or distress can convert an otherwise unreasonable measure of damages based on the expectation interest into a reasonable one. I suggest that where intention is a legitimate component of the plaintiff's expectation interest it is because the desire to alleviate that distress translates into or is equivalent to the cost of the work necessary to alleviate it, which cost may be far in excess of the market diminution in value caused by the breach of contract.

We have seen the rather vague concept of reasonableness used by courts in Australia, America and England in order to weigh the right of a plaintiff to obtain the performance expected against the fairness of the burden imposed on the defendant. Courts will not allow a plaintiff to make a windfall gain by assessing damages based on rectification, where such rectification is either unnecessary or disproportionately expensive when measured against the benefit to be obtained. On the other hand, we have also seen that in cases where the cost of rectification is reasonable that the court is not concerned with the use to which the plaintiff puts his damages. Intention, if it is to be a valuable component in the matrix of factors determining quantum, must deal with unique situations where a general appeal to reasonableness is unsatisfactory because the evidence reveals that the plaintiff's beliefs and values are such that the uneconomic intention to reinstate or rebuild is a given.

Clearly in *Ruxley* the House of Lords was not nearly satisfied with the strength of the owner's convictions that he truly wished his pool to be rebuilt. The cost of doing so was completely disproportionate, considering that the pool as a purely utilitarian item was fit for purpose. There is nothing

significant about a pool which would cause an owner to have a perfectly acceptable pool rebuilt in order to give it greater (unnecessary) depth.

What the courts should be interested with, I believe, is whether there are circumstances in which a plaintiff's strongly held belief could demonstrate a necessity to reinstate or rebuild despite the lack of utility of doing so considering the expense. Alexander Loke gives the example of an owner's communication to a builder of the importance of his doors having a certain orientation in order not to offend the principles of fengshui.[57] Such an owner may, regardless of substantial completion by the builder, regardless of the otherwise proper functioning of the doors, regardless of the fact that the house is otherwise perfect as a utilitarian structure, still fully intend to have the house rebuilt in accordance with his beliefs.

It is surely possible, also, that a particular colour may be significant for religious purposes. In a passage quoted above, Lord Jauncey gives an apparently telling example of an unreasonable repair when he suggests that the replacement of yellow brick with blue, involving extensive demolition and reconstruction would clearly be unreasonable; unreasonable because the building was entirely adequate for its design and the choice of colour was merely a matter of aesthetic pleasure.[58] What, though, if the choice of colour was not merely a matter of aesthetics? It is not beyond the realms of possibility, for instance, that a place of religious worship may have a good reason for insisting on a particular colour, or at least being offended by the 'wrong' colour. A church with an interior of black bricks, for instance, may create a satanic feel completely unsatisfactory for Sunday prayer.

Further, it may be the case that decorative brickwork could be offensive to religious observance if incorrectly constructed. A cross instead of a Star of David, or a cross on which the horizontal bar is too low giving it an up–side–down appearance would surely compel church authorities to rectify the breach of contract.

For intention to be a relevant consideration there should be some special reason over and above aesthetics and beyond personal preference—something which transcends mere consumer satisfaction and raises the particular specification contracted for to a level at which an otherwise unreasonable expense can be justified. Intention would become the way in which the plaintiff could prove the special value that exact performance has for him.

It is difficult to formulate a rule for this use of intention, other than to say that an otherwise economically wasteful expense may be reasonable if evidence shows that the owner has a special conviction or belief that inclines the court to believe that he will definitely rectify the particular defect for which he seeks damages.

Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co* said the following which is thoroughly apposite to the function of intention in consideration of reasonableness and quantum:

In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonise. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.

Subject to these observations, I think that there are certain broad principles which are quite well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.[59]

Intention, in my view, did develop in order to mould existing principles to a particular fact situation against the backdrop of a difficult precedent. In *Dean v Ainley* it was found to be difficult to harmonise and was questioned, even rejected. In *Ruxley* it was given an ambiguous treatment. Usually the question of quantum is resolved easily enough because in most cases the loss is purely pecuniary or substitute performance is available. Even in building cases where a range of remedies is available, application of the reasonableness test usually suffices to bring quantum into context. It is only in those minority of cases where a proper quantification of the expectation interest involves an inquiry into the value that the plaintiff places on the expected contractual performance that there is room for intention to become relevant.

REFERENCES

1. *Bellgrove v Eldridge* (1954) 90 CLR 613.

2. Cited in *Bellgrove v Eldridge*, cited above note 1 at p615.

3. Cited in *Bellgrove v Eldridge*, cited above note 1 at p615.

4. *Bellgrove v Eldridge*, cited above note 1 at p616.

5. *Bellgrove v Eldridge,* cited above note 1 at p616.

6. See the classic statement of general principle of Parke B in *Robinson v Harman* (1848) 154 ER 363 at p365: Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed.

7. *Bellgrove v Eldridge,* cited above note 1 per Dixon CJ, Webb and Taylor JJ at p617.

8. *Bellgrove v Eldridge,* cited above note 1 per Dixon CJ, Webb and Taylor JJ at p618.

9. *Bellgrove v Eldridge,* cited above note 1 per Dixon CJ, Webb and Taylor JJ at p618.

10. *Bellgrove v Eldridge,* cited above note 1 per Dixon CJ, Webb and Taylor JJ at p618.

11. *Bellgrove v Eldridge,* cited above note 1 per Dixon CJ, Webb and Taylor JJ at p619.

12. *Bellgrove v Eldridge,* cited above note 1 per Dixon CJ, Webb and Taylor JJ at p619.

13. *Bellgrove v Eldridge,* cited above note 1 per Dixon CJ, Webb and Taylor JJ at p620.

14. [1995] 3 WLR 118.

15. *Ruxley,* ibid. at pp121–2 per Lord Jauncey of Tullichettle.

16. *Ruxley,* cited above note 14 at p122 per Lord Jauncey of Tullichettle.

17. *Ruxley,* cited above note 14 at pp120–1 per Lord Bridge of Harwich.

18. [1966] AC 406.

19. *East Ham Corporation v Bernard Sunley & Sons Ltd,* ibid. at pp434–5 per Lord Cohen.

20. *Ruxley,* cited above note 14 at p124 per Lord Jauncey of Tullichettle.

21. *Ruxley,* cited above note 14 at pp124–5 per Lord Jauncey of Tullichettle.

22. *Ruxley,* cited above note 14 at p125 per Lord Jauncey of Tullichettle.

23. *Ruxley,* cited above note 14 at p125 per Lord Jauncey of Tullichettle.

24. *Ruxley,* cited above note 14 at p127 per Lord Mustill.

25. *Ruxley,* cited above note 14 at p133 per Lord Lloyd of Berwick.

26. *Bellgrove v Eldridge,* cited above note 1.

27. *Ruxley,* cited above note 14 at p133 per Lord Lloyd of Berwick.

28. *Ruxley,* cited above note 14 at p134 per Lord Lloyd of Berwick.

29. *Ruxley,* cited above note 14 at p134 per Lord Lloyd of Berwick.

30. *Ruxley,* cited above note 14 at p134 per Lord Lloyd of Berwick.

31. *Ruxley,* cited above note 14 at p137 and following per Lord Lloyd of Berwick.

32. *Robinson v Harman,* cited above note 6.

33. *Ruxley,* cited above note 14 at p139 per Lord Lloyd of Berwick.

34. *Jones v Herxheimer* [1950] 2 KB 106.

35. *Tito v Waddell* (No.2) (The Ocean Island Case) [1977] Ch.106 at p333 per Megarry V-C.

36. *Tito v Waddell* (No.2), ibid. at p333 per Megarry V-C; *Radford v De Froberville* [1971] 1 WLR 1262 at pp1269–70 per Oliver J.

37. (1882) 8 QBD 357.

38. *Wigsell,* ibid. at p360 per Field J.

39. *Wigsell,* cited above note 37 at p361 per Field J.

40. *Wigsell,* cited above note 37 at pp363–4 per Field J.

41. [1977] 1 WLR 1262.

42. *Radford,* ibid. at pp1279–1280 per Oliver J.

43. *Radford,* cited above note 41 at pp1282–3 per Oliver J.

44. [1987] 1 WLR 1729.

45. *Dean v Ainley,* ibid, at p1737 per Kerr LJ.

46. *Ruxley,* cited above note 14 at p137 per Lord Lloyd of Berwick.

47. *Ruxley,* cited above note 14 at p138 per Lord Lloyd of Berwick.

48. *Ruxley,* cited above note 14 at pp138–9 per Lord Lloyd of Berwick.

49. *Ruxley,* cited above note 14 at p126 per Lord Jauncey of Tullichettle.

50. Megarry V-C in *Tito v Waddell* (No.2), cited above note 35 at p332 cited in *Ruxley,* above note 14 at p138 per Lord Lloyd.

51. [1968] Qd R 275.

52. *Director of War Service Homes v Harris,* ibid. at p278 per Gibbs J.

53. [1996] 2 VR 386.

54. *Alucraft,* ibid. at p396 per Smith J.

55. *Alucraft,* cited above note 53 at p400 per Smith J.

56. (1991) 174 CLR 64 at pp82, 136.

57. Alexander FH Loke 'Cost of Cure or Difference in Market Value? Towards a Sound Choice in the Basis for Quantifying Expectation Damages', (1996) 10 *Journal of Contract Law* 189 at p207.

58. *Ruxley,* cited above note 14 at pp124–5 per Lord Jauncey of Tullichettle.

59. [1912] AC 673 at p688 per Haldane LC.

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