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Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts,* 5th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada

Owner Awarded Nominal Damages For Deficient Construction Not Affecting Market Value

What is the appropriate remedy when a contractor fails to build the building in accordance with the specifications but the deficiencies are not proven to affect the market value of the property? Should the answer to that question depend on the sort of building being constructed: a home as opposed to an office building? Should the answer be the same if the contractor's work is deficient rather than not in accordance with the specification?

These were the issues dealt with recently by the New Brunswick Court of Appeal in ***Diotte v. Consolidated Development Co.*** The court upheld an award by the trial judge of nominal

damages in the amount of $2,000 when the owner claimed $54,000 to correct the deficiency. This area of the law is largely unexplored in Canada so this important decision will be of interest to all those involved in building contracts.

Background

Diotte agreed to build an office building and garage for the owner, Consolidated. The building was to be built to the specifications of the federal Department of Fisheries and Oceans, which had agreed to lease the building. The specifications called for a garage of 150 sq. meters. The garage as built was 6.5 sq. meters, or about 4 percent, less than the specified size. The owner sought about $54,000 to pay for the remedial work to make the garage comply with the specifications. The trial judge awarded $2,000 and the award was upheld by the New Brunswick Court of Appeal.

Decision of the New Brunswick Court of Appeal

The Court of Appeal reviewed the seminal decisions of Cardozo J. in ***Jacob & Youngs Inc. v. Kent***, 129 N.E. 889 (U.S. N.Y. Ct. App. 1921) (where the failure was the installation in a country residence of pipe which was of identical quality but a different brand than the contractually specified pipe) and the House of Lords in ***Ruxley Electronics & Construction Ltd. v. Forsyth*, [1995] UKHL 8** (U.K. H.L.) (where the failure was the construction of a household swimming pool to a depth of 6 feet 9 inches instead of the specified 7 feet 6 inches). In both cases, the courts discussed what approach a court should take when the contractor installs something which does not meet the specifications but causes no economic damage to the property or the owner.

The New Brunswick Court of Appeal set out the four basic ways in which damages can be assessed in these circumstances: the cost of re-instatement:

the diminution in the value of the property:
the savings by the contractor by the breach; or
the loss of amenities to the owner.

In selecting the appropriate measure of damages, the N.B. Court of Appeal referred to the classic words of Justice Cardozo in the ***Jacob & Youngs*** decision:

> "It is true that in most cases the cost of replacement is the measure. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be omissions of that which could not afterwards be supplied exactly as called

> for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable". The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance, has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end." (underlining added)

The court then devoted fourteen lengthy paragraphs to a discussion of the ***Ruxley*** decision, and concluded with this summary:

> "To summarize, their Lordships are in agreement that for breach of contract, the assessment of damages begins with measuring the actual loss suffered from the unfulfilled bargain. The damage award is to place the claimant in as good a situation as if the contract had been performed. Thus, as stated by Lord Lloyd with respect to building cases, the loss is "almost always measured in one of two ways: either the difference in the value of the work done or the cost of reinstatement" ….. Reasonableness informs the assessment, resulting in cases such as *Ruxley*, where it would "fly in the face of common sense" to award the cost of reinstatement, but where the difference in the value of the work done amounts to nil. It is in such cases of contract deviation that their Lordships diverge somewhat in approach. However, whether referred to as a personal preference, a consumer surplus, or the loss of an amenity, each judgment rendered in *Ruxley* recognizes that a non-monetary loss, arising from a deviation from contract specifications, is real and deserving of compensation, despite not being easily measurable in economic terms. Taken together, the various approaches make it evident that the law of damages allows some flexibility in constructing an appropriate award." (underlining added)

Writing for the New Brunswick Court of Appeal, Justice Robertson emphasize that this case was one of "first impression" and that "care must be taken not to lay down rules or frameworks that are too distant from the trial judge's factual determinations." He expressed his view about the importance of the decision as follows:

> "the substantive issue at hand forces the writer to make general observations with respect to matters that may become relevant in future cases. Experience teaches that the articulation or development of legal rules or principles or legal frameworks is rarely achieved with the issuance of a solitary set of reasons. These reasons for decision should be interpreted accordingly. As they are to be released on the eve of my retirement, the task of ensuring a solid foundation to the law of New Brunswick is left with my colleagues."

Justice Robertson then went on to make the following points:

1. The case did not 'raise allegations that the work performed was defective in the sense that it involved shoddy workmanship, below the "industry standard". ' Accordingly the

court did not have to decide whether the same approach to damages ought to be taken in the case of shoddy workmanship as opposed to a failure to meet the specifications. On the one hand, Justice Robertson was of the view that in the former case, "one is driven to expect that the law would expect the contractor to redo the work or, alternatively, provide the owner with compensation equal to the cost of reinstatement." On the other hand, "the distinction between contract deviation and defective workmanship may be one without a difference. An appraiser may well conclude that it is not difficult to justify a diminution in value of property, due to slapdash workmanship, by reference to the cost of reinstatement. I say no more of the perceived distinction other than to point out that the law should be careful not to craft rules that serve as an incentive for builders to depart from their contractual obligations."

2. A different damage rule could possibly be justified when "the innocent party is a consumer who complains of contract deviation," as opposed to the situation when "both the owner and builder are commercial parties." Justice Robertson did not hold that there should always or necessarily be a different approach in the two cases, saying:

   > "Fortunately, this is not a case where breach of the contract specifications has deprived the owner of an amenity or personal preference. This is a commercial case in which the owner (Consolidated) lost 4.33 percent of the garage's leasable floor space because of the builder's (Diotte's) failure to adhere to the contract specifications. The broad issue is whether it would have been reasonable to award damages equal to the cost of reinstatement ($54,000) or some lesser sum ($2,000). Evidence was led to demonstrate that Diotte had offered to undertake renovations that would have eliminated some of the deficiency in the size of the garage, but that Consolidated was unwilling to provide Diotte with access to the building. Evidence was also led at trial to establish that the tenant, who leased the property from Consolidated and for whom the property was being constructed, was prepared to enter into possession without compensation for the deficiency. In response, Consolidated argued that future tenants might not be as obliging."

   Justice Robertson also noted that the trial judge had found that Consolidated had not effected any of the repairs recommended by any of the experts and had not allowed Diotte to make the repairs that it had offered to make, leaving the trial judge with the "strong suspicion that even if the Court is to grant compensation to Consolidated to reinforce the garage or increase the usable space, the work will never be done."

3. Justice Robertson was strongly influenced by the absence of evidence about the impact of the deviation on the value of the property. Since the building was for rental purposes, in his view it would have been a "relatively simple matter to assess damages based on the lower of the cost of reinstatement or diminution in value of the work done. Had the appraisal revealed the fair market value of the property to be lower, because of the contract deviation, and by an amount less than the cost of the reinstatement, the court

would be compelled to award damages based on the property's diminished value. On the other hand, had the cost of reinstatement been lower than the diminished value of the property, the court would normally be compelled to award damages equal to the former….In the absence of expert evidence regarding the impact of the contract deviation on the property's value, it cannot be assumed that an award of damages equal to the cost of reinstatement is reasonable."

4. However, Justice Robertson was satisfied that Consolidated was entitled to an award of nominal damages, either for lost expectations or a presumed diminishment in value. He pointed out that, to date, Consolidated has experienced no loss as a result of this missing square footage since the tenant had accepted the building as provided, and paid the rent as negotiated. Consolidated's view that a future tenant might not be so accommodating was speculative, and Consolidated had not allowed Diotte to rectify the problem. In these circumstances, the trial judge's award of $2,000 nominal damages was reasonable.

Discussion

This fascinating decision should definitely be put in the top drawer to be pulled out the next time we have to deal with the proper measure of damages when a contractor fails to adhere to the specifications. It contains a discussion of the relevant principles and the leading U.S. and U.K. decisions. It raises the key issues of whether damages should be assessed in a different way in the case of a commercial property as opposed to residential property, or in the case of defective work as opposed to work which deviates from the specifications.

Ultimately, however, the decision was based on the facts and the absence of evidence: the willingness of the tenant to take the building with the smaller garage; the refusal of the owner to allow the contractor to remedy the situation; the absence of any impact on market value; the absence of any savings by the contractor; and the failure of the owner to spend any money to correct the deficiency. All of these factors led both the trial judge and the Court of Appeal to conclude that it would not be fair to award the cost of correcting the deficiency to the owner.

But a decision based on facts is just as useful as one based upon law. This decision helps us provide advice to the owner or contractor about what to do or not do to support or avoid a claim for substantial damage award arising from defective work or work which does not meet the specifications. And it helps counsel decide what evidence ought to be led at trial to establish or negate the claim.

See *Heintzman and Goldsmith on Canadian Building Contracts* (5th ed.), chapter 9, part 6(m)(i)(B)

***Diotte v. Consolidated Development Co.* 2014 CarswellNB 410, 32 C.L.R. (4th) 282**

Building Contracts – Damages – Measure of Damages – Breach of Contract

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