

CONTRACT DAMAGES FOR DEFECTIVE CONSTRUCTION WORK: AN UNSOLVABLE PUZZLE?

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Synopsis:

This paper considers how the law decides upon the appropriate measure of damages where there is a breach of contract resulting in defective construction work. Its focus is upon recent caselaw from the Australian state of South Australia offering a 'menu' of factors which can be taken into account in deciding whether damages based upon the cost of rectification of the work ought to be awarded.

The paper commences by outlining the high-level principles applicable to assessment of damages for defective work in the UK and Australia, leading to a discussion of the 2017 decision of the Full Court of the Supreme Court of Australia, *Stone v Chappel*.¹ That case, involving as it does a scenario where the ceiling height of an apartment building was lower than contracted for, offers a useful exegesis of the difficult balancing act involved in upholding the building owner's expectations in the face of the modern realities of multi-dwelling construction. The Court in *Stone* provided a distillation of factors relevant to whether it is reasonable to award damages based upon the rectification measure. Despite having been handed down several years ago, and the subject of an (unsuccessful) application for Special Leave to appeal to the High Court of Australia, *Stone* has been the subject of relatively little judicial or academic consideration.² However, the utility of *Stone*'s 'shopping list' of principles has recently been borne out in *Xtraordinary Constructions Pty Ltd v Luppino*.³

The paper posits that the approach taken in *Luppino* demonstrates that the listing of criteria compiled in *Stone* is sufficiently flexible and robust to enable practical justice to be done in diverse circumstances. Hence, that approach is worthy of consideration in other jurisdictions in pursuit of principled and efficient dispatch of the puzzle posed by rectification damages. The paper notes a reminder of the urgent need for such consideration, provided in a December 2021 judgment relating to preliminary proceedings in *Naylor v Roamquest Ltd*. This case concerns rectification of combustible façade building materials at the New Capital Quay development in London.⁴

The paper concludes by highlighting a risk that the codification of factors as expounded in *Stone* could tend in practice to undermine considerations which should be overarching, including the claimant's performance interest and the need for the building to be safe for all occupants. The paper concludes, therefore, by suggesting that, if a *Stone*-type menu is to be considered outside of South Australia, it should be an overriding factor, not bowing to other contractual measures, that rectification will be deemed reasonable to the extent that the defect threatens the health and safety of occupants of the building.

¹ (2017) 128 SASR 165.

² [2017] HCASL 269 (12 October 2017).

³ [2021] SASC 132.

⁴ [2021] EWHC 3507 (TCC).