

## Article Information

Author: Karyn Reardon

Service: Arbitration, Commercial Disputes, Construction Litigation, Dispute Resolution & Litigation, Projects Infrastructure & Construction, Property & Development

Sector: Infrastructure

---

## Construction Contracts: How much is recoverable when work is defective?

---

**If a contractor fails to rectify defective work, the contractor will be exposed to 'damages' for breach of contract.**

### **How do you calculate the value of any 'damages'?**

The value of damages for any contractual breach ought to be the amount that will put the innocent party in the position it would be in if the contract had been performed without breach.

When work delivered under a construction contract is defective, this might be the cost of rectifying defective work.

For example, a home builder who constructs a building that is so riddled with defects that it must be demolished and rebuilt will be required to pay the home owner the reasonable cost of a complete rebuild.[\[1\]](#)

Alternatively, if defects are insignificant with rectification costs being disproportionate, recoverable damages will more likely be the difference between:

- the value of the asset that is impacted by the breach; and
- its hypothetical value: if it had been delivered free of defects.

When the court calculates the total value of any award of damages, the court will only include loss that was directly caused by the wrongdoer's actions (or inaction).

Also, the loss must be:

- a *direct loss* in that, objectively assessed, the loss:
  - fairly, reasonably and naturally flows from the breach;
  - was a direct consequence of the breach; and
  - arises out of the 'ordinary course of things'; or
- an *indirect or consequential loss* (or 'special damages'), being losses that:
  - arise from special circumstances that were known to the defaulting party; and
  - given the known special circumstances, were reasonably in the contemplation of the parties when the contract was made as being the probable result of the breach.[\[2\]](#)

An innocent party will also be required to mitigate its loss and damage and will not be entitled to recover costs or losses that were unreasonably incurred. For example, the builder of a swimming pool that was 6 foot 9 inches deep when it ought to have been 7 foot 6 inches deep (but was otherwise sound) was only liable to pay the home owner nominal damages[\[3\]](#) because:

- the only way to rectify the defect was to rebuild the pool;
- the pool owner did not intend to rebuild the pool;
- the pool owner was able to use and enjoy a pool that was 6 foot 9 inches deep equally as well as a pool that was 7 foot 6 inches deep; and
- there was no difference in the market value of a pool that was 6 foot 9 inches deep compared to a pool that was 7 foot 6 inches deep.

The court focused on the reasonableness of the pool owners claims. In circumstances where the cost of rebuilding was out

of proportion with any benefit that would be obtained, it was not reasonable to rebuild the pool and the cost of rebuilding was not awarded as damages.

As the cost of rebuilding could not be awarded as damages, the correct measure of damages was the difference in value: which was nil.

However, this outcome might have been quite different if an indemnity clause had been included in the contract. The impact an indemnity clause might have is explained [here](#).

[1] See *Bellgrove v Eldridge* [1954] 90 CLR 613

[2] *Hadley v Baxendale* (1854) 9 Exch 341