



Rising from the Rubble: what damages can be recovered when a residential building contract has been breached?

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In our previous articles in relation to residential building contracts we have considered:

- [How a building contract might be terminated;](#)
- [A party's right of termination of a building contract for major defects;](#) and
- [A party's right of termination of a building contract for delay.](#)

For breach of a building contract, whether or not termination of the contract has occurred, damages may become recoverable by the party not in breach.

Delay and Liquidated Damages

Most residential building contracts provide that liquidated damages may be claimed against a builder where there has been a delay to reach practical completion.

Liquidated damages are a sum predetermined by the parties to the contract which specify an amount payable in the event of an identified breach.

In a building contract this predetermined sum must be a genuine pre-estimate of the loss likely to

be caused by a delay of the builder in reaching practical completion. The predetermined sum cannot be extravagant or unconscionable in the circumstance it is applied. Where it is, a court will not allow its enforcement to the extent the sum is a penalty.¹

Liquidated damages provide certainty for the parties to a building contract. They enable the parties to project the cost consequence of a breach by delay at the time the contract is entered into. A valid liquidated damages clause will be an exhaustive remedy,



excluding a party to also making a claim for unliquidated (or common law) damages in relation to delay.² This is so, regardless of whether, the claimant's actual loss is more or less than the liquidated amount specified.

For example, an owner might incur unexpected and prolonged holding costs (e.g. finance, insurance or the cost of leasing until the construction is completed) because there has been a delay of the date of practical completion, in breach of the building contract. If the contract provides that liquidated damages apply for such a breach, the owner's damages would be confined to the agreed pre-estimate, even if the additional holding costs were unforeseen and costly.³

If there is no agreement for a predetermined sum in relation to damages for delay, then common law damages are available.

Common Law Damages

Generally, common law damages award the innocent party an amount to place that party in the same position that party would have been in had the contract been performed by the other party.⁴

An example of common law damages in building disputes is the cost in relation to repair of poor quality works.

If a building contract has not been terminated then a builder may have an opportunity under the contract

to rectify defects or omissions. Most standard form building contracts such as those of the HIA, Master Builders and QBCC provide clear steps in relation to the opportunity a builder has to rectify any faults in the work within the stated defects liability period.

If a building contract has been terminated because of the fault of the builder (for example, due to delay or seriously defective works) then no defects liability period will apply prior to the owner being able to make a claim for damages for substandard work against the builder.

To prove an amount of damages, Courts and Tribunals will give weight to the opinion of an independent expert builder, engineer or quantity surveyor.

Summary

This article completes our series of four articles on termination rights and consequences of termination of residential building contracts.

Broadley Rees Hogan acts for various clients to advise on building contracts and has represented owners, builders and consultants in construction disputes.

A party seeking to terminate a building contract and claim for damages should seek legal advice promptly. Delays in making claims make the task of recovering damages much more difficult and sometimes not possible.

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¹ *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656.

² *J-Corp Pty Ltd v Mladenis* (2010) 26 BCL 106; [2009] WASCA 157, [35]–[36]; *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* (2013) 29 BCL 19; [2012] VSC 99, [644]; *Bruno Zornow (Builders) Ltd v Beachcroft Developments Ltd* (1989) 51 BLR 16.

³ See *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* (2013) 29 BCL 19; [2012] VSC 99, [644].

⁴ *Robinson v Harman* (1848) 1 Ex 850, 855.