Additional work

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Charles Blamire-Brown and Adam Latner look at the avenues of recovery available to an employer when a building does not meet the standards specified in the building contract. Can an employer insist on rectification to meet the specified standards?

A building contract includes a requirement for the walls between flats to be insulated up to 50dB. However, the contractor only installs sound insulation up to the Building Regulations? standard of 45dB. Can an employer insist on rectification to meet the specified standards?

It is a basic premise of contract law that awards of damages for breach of contract are intended to put the innocent party in the position they would have been in had the contract been properly executed. Where an innocent party has suffered financial loss, an award of damages will be relatively straightforward: an employer will be able to recover damages representing the cost of remedying any breaches of the contractual requirements.

However, in the above scenario, what is the employer's remedy? Could it recover the cost of remedying the defect, which would potentially involve dismantling large parts of the building and replacing the walls in order to achieve the level of sound insulation required by the contract? The answer is likely to be no, since a court would regard the costs of remedying the breach as wholly disproportionate to the minimal loss suffered, and therefore unreasonable.

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This scenario is analogous to that in the House of Lords? decision in Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 , where Mr Forsyth engaged a contractor to construct a swimming pool with a maximum depth of 7ft 6in. The pool built extended to only 6ft 9in; however, the court held that it was unreasonable for Forsyth to insist on reinstatement because the expense of reconstructing the pool to the contractual specification would, at more than ?20,000, be out of all proportion to the benefit to be obtained.

What other avenues of recovery are available to an employer in this scenario? Where the cost of remedying a defect is disproportionate to the end result, damages fall to be measured by the value of the building had it been constructed as required under the contract, less its value as it stands: that is, the diminution in value.

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If it can demonstrate that the value of the building has decreased as a direct consequence of having insufficient sound insulation, then the employer would be entitled to an amount reflecting the di erence in value between the building as constructed and the building as required in the contract.

Diminution in value

But in a situation where a contractor has installed walls with sound insulation that meets the Building Regulations? standard of 45dB, it may be difficult to establish that the value has been aff ected at all as a result of the contractor?s breach. If there is no diminution in value, then the employer has arguably suff ered no loss, so the damages awarded will be nominal only. At best, the employer may be entitled to claim the value of the cost saving made by the contractor resulting from its decision to install a lower level of insulation.

Damages are not limited to the cost of reinstatement or diminution of value. The court in Ruxley recognised that there may be another measure of damages that could reflect loss of amenity or inconvenience when the claimant has not been provided with what the contract stipulated. However, it is a long-standing rule of contract law that a claimant cannot recover damages for its injured feelings. Although there is a limited exception to that general rule where the purpose of the contract is to aff ord pleasure, does our scenario fall within the scope of that exception? Possibly not.

There are similarities between the facts here and those in Farley v Skinner [2001] UKHL 49 , where the level of surrounding noise interfered with the claimant?s enjoyment of the property. In these circumstances, the House of Lords held that the claimant was entitled to damages for loss of amenity on the basis that an important object of the contract ? which in this instance had been made between the homeowner and his surveyor ? was to give pleasure, enabling relaxation and peace of mind.

It is therefore arguable, although far from certain, that an employer-cum-occupier might be able successfully to rely on the exception established in Farley, on the basis that the contractual specification of 50dB sound insulation was included in the contract in order to provide peace of mind and pleasure for itself as the future occupier.

Whether or not this would be considered an important object of the contract between employer and contractor is, however, debatable, and there is no guarantee that such an argument would entitle an employer to compensation for loss of amenity as a consequential loss of the contractor's breach.

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Further information

- Related competencies include: Construction technology and environmental services , Contract practice
- This feature was taken from the RICS Building surveying journal (October/November 2017)
- Related categories include: Contract administration , Disputes , Rectification period

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