
503.21 CONTRACTS - ISSUE OF COMMON LAW REMEDY - DIRECT DAMAGES - OWNER'S MEASURE OF RECOVERY FOR A CONTRACTOR'S PARTIAL BREACH OF A CONSTRUCTION CONTRACT.

Direct damages are the economic losses that usually or customarily result[1] from a breach of contract. In this case, you will determine direct damages, if any, by determining the reasonable cost[2] to the plaintiff of labor and materials (and other costs) necessary to

[complete the improvement in conformity with the requirements of the contract]

[correct the work to bring the improvement into conformity with the requirements of the contract.[3]]

> *NOTE WELL: If there is any evidence that the cost to correct would be economically unreasonable, the court must give the following additional instruction: However, if you find that this corrective work would be economically unreasonable to perform under the circumstances,[4] a different measure of damages will apply. In determining whether this corrective work would be economically unreasonable to perform, you may consider*

[whether the work can be corrected only at a cost that is unreasonably disproportionate to the value to be added to the improvement by performing the corrective work][5]

[whether a substantial portion of the improvement would have to be undone or destroyed in order to perform the corrective work][6]

[whether the plaintiff will be denied the substantial benefit of *his* bargain unless the corrective work is performed, even if a significant amount of the work already completed must be undone or destroyed].[7]

[whether the parties' expectations regarding a remedy for non-conforming work are set forth in their contract].[8]

If you find that the corrective work proposed by the plaintiff would be economically unreasonable to perform under these circumstances, then you will determine the plaintiff's direct damages, if any, as follows: First, you will determine the fair market value of the (*describe improvement*) as actually constructed by the defendant on [the date that (*describe events constituting breach*)] [(*specify date*)]. Second, you will determine the fair market value the improvement would have had if it had been constructed in conformity with the requirements of the contract.[9] Fair market value is the amount which would be agreed upon as a fair price by a seller who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.[10] Third, you will subtract the fair market value of the improvement as actually constructed from the fair market value of the improvement as contracted for. [The difference would be the plaintiff's direct damages.] [The difference less any portion of the contract price which the plaintiff has not paid to the defendant would be the plaintiff's direct damages.]

If, on the other hand, you find that it is not economically unreasonable under the circumstances to perform the corrective work, then the plaintiff would be entitled to recover the reasonable cost of labor and materials (and other costs) necessary to correct the work to bring the improvement into conformity with the requirements of the contract.)]

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1. "'In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is

sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.'" *Stanback v. Stanback*, 297 N.C. 181, 187, 254 S.E.2d 611, 616 (1979) (quoting the RESTATEMENT OF THE LAW OF CONTRACT, § 330, p. 509). The foreseeability limitation on recovery was first enunciated in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

2. When measuring damages for defects or omissions in the performance of a construction contract, the fundamental underlying principle is that a party is entitled to have what he contracted for or its equivalent. *Robbins v. C. W. Myers Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 887 (1960). Determining what constitutes an equivalent is dependent upon the circumstances of the case. *Id*. Where it is unclear whether a minor repair is involved or whether a "substantial undoing 'resulting in economic waste,'" will be required, the fact-finder must determine which measure of damages is appropriate. *City of Charlotte v. Skidmore, Owings and Merrill*, 103 N.C. App. 667, 683, 407 S.E.2d 571, 581 (1991) (*quoting Warfield v. Hicks*, 91 N.C. App. 1, 11, 370 S.E.2d 689, 695, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988)). However, "where it is clear that substantial undoing is needed but plaintiff will not receive the benefit of his bargain without such undoing or that substantial undoing is not required, a trial court may properly instruct as to the cost measure only." *Id*. at 683-84, 407 S.E.2d at 581.

3. Where there is no question that bringing the building into conformity with the contract would result in economic waste, use N.C.P.I.–Civil 503.24 (Contracts–Issue of Damages–Owner's measure of Recovery for a Contractor's Partial Breach of a Construction Contract Where Correcting the Defect Would Cause Economic Waste). If there is an issue of fact concerning economic waste, the trier of fact must determine which measure of damages is applicable. *Warfield*, 91 N.C. App. at 11-12, 370 S.E.2d at 695.

4. *Warfield*, 91 N.C. App. at 11, 370 S.E.2d at 695, *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 344, 315 S.E.2d 311, 314-15 (1984); *see Gaito v. Auman*, 313 N.C. 243, 327 S.E.2d 870 (1985); *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776 (1974); *Leggette v. Pittman*, 268 N.C. 292, 150 S.E.2d 420 (1966); *Robbins*; and *LaGasse v. Gardner*, 60 N.C. App. 165, 298 S.E.2d 393 (1982);.

5. *Kenney*, 68 N.C. App. at 344, 315 S.E.2d at 315.

6. *Warfield*, 91 N.C. App. at 11, 370 S.E.2d at 695; *Kenney*, 68 N.C. App. at 344, 315 S.E.2d at 314. *See also Leggette; Robbins*; *Board of Education v. Juno Construction Corp.*, 64 N.C. App. 158, 306 S.E.2d 557 (1983), *disc. rev. denied*, 310 N.C. 152, 311 S.E.2d 290 (1984); and *Coley v. Eudy*, 51 N.C. App. 310, 276 S.E.2d 462 (1981).

7. "While the diminution in value method can avoid economic waste, when the cost of repair does not involve an imprudent expense, the cost of repair method may best ensure the injured party of receiving the benefit of his or her bargain, even if repair would involve destroying work already completed." *Kenney*, 68 N.C. App. at 344-45, 315 S.E.2d at 315; *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 560, 406 S.E.2d 646, 650 (1991).

8. *Leggette*, 268 N.C. at 293, 150 S.E.2d 421.

9. When measuring damages for defects or omissions in the performance of a

construction contract, the fundamental underlying principle is that a party is entitled to have what he contracted for or its equivalent. *Robbins*, 251 N.C. at 666, 111 S.E.2d at 887. Where making the completed work conform to the contract would require that a substantial part of the completed work be undone, and where the contractor has acted in good faith or the owner has taken possession, the owner is not permitted to recover the cost of making the change, rather he may recover the difference in value between the value of the building contracted for and the value of the building as constructed. *Id*. (quoting 9 Am. Jur., *Building and Construction Contracts*, § 152, p. 89).

10. *Huff v. Thornton*, 287 N.C. 1, 12, 213 S.E.2d 198, 206 (1975).