

## Insights

# ASSESSMENT OF DAMAGES FOR BREACH OF CONTRACT: COSTS OF CURE VS DIFFERENCE IN VALUE

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## SUMMARY

The most common remedy for breach of contract is the award of damages. The usual aim of the court is to place, as far as possible, the innocent party in the position it would have been in had the breaching party performed their contractual obligations.

Two usual methods of assessing damages for breach, in a construction setting involving defects, are (i) the innocent party's costs of curing the defective performance, or (ii) the difference in value by reason of the defective performance.

A recent HK court case [\*New Era Group \(China\) Ltd v Studio M Interiors HK Ltd\* \(\[2021\] HKCFI 3711, HCA 2963/2018 10 December 2021\)](#) provided insights on the use of these methods for the assessment of damages.

## BRIEF FACTS

The Plaintiff (as owner) and the Defendant (as contractor) entered into a contract (the "**Original Contract**") in respect of the renovation works for a duplex unit. The contract sum of the Original Contract was HK\$3,000,000. The Plaintiff made two partial payments to the Defendant in the total sum of HK\$1,200,000.

It was not disputed that the Defendant wrongfully abandoned the renovation works, and the Defendant's repudiation of the Original Contract was accepted by the Plaintiff.

Subsequently, the Plaintiff entered into a contract with a new contractor (the "**New Contract**"). The contract sum of the New Contract was HK\$2,000,000.

The parties came before the court for assessment of damages.

## DIFFERENCE OF VALUE

The Plaintiff relied on an expert report that the value of works that had been carried out by the Defendant for the duplex unit was HK\$466,783.30.

The Plaintiff claimed against the Defendant for a refund of overpayment in the sum of HK\$733,216.70, being the sum of two partial payments of HK\$1,200,000 less HK\$466,783.30.

The Court clarified that the normal measure of damages for breach of contract is the costs to the Plaintiff of completing the original contract in a reasonable manner less the original contract price. The Plaintiff's claim should not be approached on the basis of a refund.

There were works under the Original Contract which were not covered in the New Contract. The Court found that there was no evidence that the Plaintiff had any intention to get these "missing" works completed. In addition, the New Contract covered works which did not form part of the Original Contract, ie, extra works.

As a result of the difficulties in comparing the content or scope of the Original and the New Contracts, the Court was of the view that the circumstances in the present case were not appropriate for assessing damages on the basis of the Plaintiff's costs of completion of the Original Contract.

However, this did not disentitle the Plaintiff to compensation for loss resulting from the Defendant's breach of the Original Contract. The Court said the best it could do on the available evidence was to assess damages on the difference in value. In the present case, the difference in value was HK\$733,216.70, being the value of works the Plaintiff had paid (the sum of two partial payments of HK\$1,200,000) less the value of the works the Plaintiff had carried out (HK\$466,783.30 as the value of works done assessed by the expert).

## LOSS OF USE AND ENJOYMENT

The Plaintiff submitted that the duplex unit was a residence for the Plaintiff's director and/or for rental.

The Plaintiff claimed loss of use and enjoyment of the duplex unit for seven and a half months from mid-January 2019 to end of August 2019:-

- Mid-January 2019: The date of completion under the Original Contract.
- End of August 2019: The date of completion under the New Contract.

The Court said the claimed period of 7.5 months was not justifiable. Instead, the Court held that the reasonable period of claim for loss of use and enjoyment was four months from mid-January 2019 to mid-May 2019:-

- Mid-January 2019: The Plaintiff accepted the Defendant's repudiation on 19 December 2018, and only engaged the new contractor on 27 March 2019. The Plaintiff failed to provide a reasonable explanation for the delay in engaging the new contractor. The Court was of the view that a reasonable time to have a replacement contractor engaged should be mid-January 2019, i.e. within one month from the acceptance of the Defendant's repudiation.
- Mid-May 2019: The completion date under the New Contract was the end of August 2019. Taking into account the proportion of additional works within the entire New Contract, which were not covered by the Original Contractor, the Court was of the view that the reasonable time for the new contractor to complete outstanding works under the Original Contract was 100 working days from mid-January 2019 (the reasonable time for the Plaintiff to engage a replacement contractor), i.e. by mid-May 2019.

The expert assessed the market rent of the duplex unit to be HK\$229,200 per month for the relevant period. Therefore, the loss of use and enjoyment was HK\$916,800, being HK\$229,200 x 4 months.

## **BCLP COMMENTS**

For cases arising from breaches of contract, it is clear that the primary method for assessment of damages is the costs of curing the breach.

However, in some cases, such as the present case, the costs of cure often might be difficult to ascertain. The Court in the present case acknowledged that there may be difficulties in assessing the costs of cure, and that it will have to do the best it can to assess damages on the other basis of difference in value.

## **RELATED PRACTICE AREAS**

- Commercial Contracts

## MEET THE TEAM



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