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THE RISE OF BETTERMENT IN BUILDING-SAFETY DEFECT CLAIMS POST-GRENFELL

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SUMMARY

Betterment has rarely been advanced as a defence in English courts until now, post-Grenfell, with the advent of building-safety defect claims. This article, first published in Construction News, takes a closer look at this principle.

Contractual damages aim to put the claimant in the same position as if the contract had been performed. Betterment is where the claimant has been put in a "better" position than they would have been had the contract been performed. The defendant can invoke the defence of betterment to resist payment of overcompensation due to betterment.

Betterment is particularly relevant to building-safety defect claims because building owners often claim the cost of replacing defective materials with materials that meet a higher safety standard, often many years after the works have been completed, meaning they are being undertaken to a higher standard than originally specified. This opens the door to a contractor defence that costs claimed should be reduced to account for betterment.

Betterment claims are notoriously tricky to navigate due to the complexities involved in quantifying the specific benefits accrued by the building owner, although the courts have developed frameworks to help the assessment of such claims.

Below, we explore two examples of how such claims work in practice.

BETTERMENT IN PRACTICE

In Mulalley & Co Ltd v Martlet Homes Ltd [2022] EWHC 1813 (TCC), the building owner, Martlet, carried out a fire-safety review and discovered that the cladding installed by the contractor, Mulalley, included combustible expanded polystyrene insulation boards. Martlet sued Mulalley for contract breach and was successful.

As part of the judgment, the Technology and Construction Court (TCC) examined whether the amount claimed should be reduced because Martlet selected insulation boards of a higher specification to remedy the defect. Mulalley pleaded betterment because the remedial works conferred benefits that otherwise would not have been accorded by the contract.

The TCC considered this in the context of what it saw as the overall requirement of reasonableness, mitigation and betterment. It considered Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd [2020] EWCA Civ 308, which confirmed that even if the claimant had no choice, if it derived a benefit in such a case that can be valued in money terms, it should give credit for that benefit.

The court acknowledged that betterment could be considered in assessing damages although, in this instance, this approach was inappropriate according to the facts of the case.

However, in a subsequent case (LDC (Portfolio One) Ltd v George Downing Construction Ltd (GDC) and European Sheeting (ESL) Ltd [2022] EWHC 3356 (TCC)), the TCC took a different approach.

GMD Developments Ltd employed George Downing Construction as a contractor, which employed European Sheeting as a cladding subcontractor to build three blocks of student accommodation, which were subsequently acquired by LDC (Portfolio One). Following the discovery of fire-safety defects, LDC sued both GDC and ESL for contract breach.

Despite ESL's arguments that the remedial works resulted in betterment, the TCC, relying on Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225, confirmed that betterment would not apply because ESL did not have any reasonable choice other than to remedy the defect. This was the case even where, due to the passage of time, there is a need to comply with the enhanced standards of post-Grenfell building regulations.

By ruling in favour of LDC, the TCC emphasised the importance of acting reasonably and relying on expert advice, when selecting the appropriate remedial work scheme.

FINAL THOUGHTS

Recent case law highlights several factors in the consideration of betterment in construction disputes: the significance of expert advice, the principle of reasonableness, and compliance with building-safety legislation.

While Martlet suggested the possibility of a reduction for betterment where building-safety practices have evolved since the contract was entered into, this and the LDC case demonstrate that each case will depend on the facts.

In the LDC case, the TCC clarified that the concept of betterment would not be applicable if the building owner had no other reasonable choice but to select the specific remedial work scheme, even if such schemes would result in a final project of higher quality than the original scope of

works. This ruling underscores the importance of assessing the availability of reasonable alternatives when considering the applicability of betterment and being able to rely on expert advice in that regard.

The practical lesson for building owners is that in order to avoid arguments about potential betterment, it is worth considering all alternatives before embarking on remedial works and taking expert advice where appropriate.

This article was co-authored by Trainee-Solicitor Francesco Albanese.

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