



The Price of Imperfection: The assessment of damages in building disputes for deviations from the agreed specifications

When building work does not strictly comply with the contract, homeowners often ask: “*Can I claim the cost of fixing it?*” The answer depends on whether rectification damages are considered **necessary and reasonable**. Courts apply a test of **proportionality**: is the cost of fixing the defect (i.e. the “cost of cure”) in proportion to the benefit the owner would receive?

This question arises frequently in cases of *minor defects*, or *deviations from the agreed specifications*. For example, when a driveway is poured in the wrong colour, ceiling heights are slightly lower than agreed, or finishes differ in profile from what was contractually agreed.

Below we explain the key principles and how South Australian courts have recently applied them.

The Starting Point: *Bellgrove v Eldridge*

In the High Court decision of *Bellgrove v Eldridge* (1954) 90 CLR 613, the Court held that damages must be limited to what is **both necessary and reasonable** to achieve conformity with the contract. The guiding principle is proportionality: demolishing and rebuilding for a trivial variation would be "economic waste."

Proportionality in Action: The English Perspective

The House of Lords in *Ruxley Electronics v Forsyth* [1996] AC 344 refused to award the cost of rebuilding a swimming pool that was slightly shallower than specified. The defect did not affect the safety or use of the swimming pool, or the property's market value. Instead, the owner was compensated a modest sum for loss of amenity and disappointment.

Australian Reinforcement: *Tabcorp Holdings*

The High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 clarified that "reasonableness" should not undermine the owner's contractual bargain. If an owner has a **legitimate interest in exact performance**, the cost of reinstatement can be awarded even if it far exceeds any diminution in value. Importantly, the tenant's breach in that case (demolishing and rebuilding the foyer of a building without the landlord's permission) was deliberate and in defiance of the contract, which influenced the outcome.

Minor Deviations and Cosmetic Differences

In *Westpoint Management v Chocolate Factory Apartments* [2007] NSWCA 253, the Court considered the installation of cheaper skirting boards which had been substituted for the agreed design. Rectification would have cost over \$100,000. The Court held this was disproportionate and unreasonable. Because no diminution in value was proven, only nominal damages were awarded.

South Australian Authorities

South Australian courts have applied these proportionality principles in recent years:

- **Stone v Chappel (2017) SASCFC 72:** Ceiling heights were 48mm lower than specified. Rectification would have required major reconstruction. Instead, the owners were awarded \$30,000 for diminution in value. The Chief Justice set out guiding factors, including:
 - the degree of departure from the contract;
 - functional/aesthetic impact;
 - the owner's reasons for insisting on the specification;
 - feasibility of rectification;
 - whether the owner genuinely intends to carry out rectification;
 - cost of rectification;
 - the nature of the builder's breach; and
 - the public interest in avoiding waste.
- **Tincknell v Duthy Homes Pty Ltd (2020) SASCFC 24:** The Court reaffirmed that proportionality is assessed against the **benefit of rectification**, not the overall project cost. A claim for cost of cure failed because it was unreasonable, and the owners had not advanced a diminution in value claim.

Practical Implications for Homeowners

1. **Not every defect justifies rectification costs.** Courts look at necessity and proportionality.
2. **Loss of value vs rectification.** If rectification is unreasonable, damages are usually limited to diminution in value.
3. **Nominal or amenity damages.** Where neither rectification nor diminution in value is established, only a modest award may be made for disappointment or loss of amenity.
4. **Document your intentions.** Owners who genuinely plan to undertake rectification works are more likely to persuade a Court that cost of cure is reasonable.

Conclusion

For homeowners, the key takeaway is that the Courts will not automatically award the cost of rectification for minor defects or deviations from the contractual specifications. The measure of damages depends on whether the claimed cost is proportionate to the benefit of fixing the problem. In many cases, compensation is limited to the reduction in property value or a small amount for loss

of amenity.

If you are in dispute with your builder over defects (whether major or minor), Andersons can advise you on the most effective way to frame your claim to maximise recovery and protect your rights under South Australian law.