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## CASE COMMENT

Lorna Richardson\*

### Uneasy on the Eye: Determining the Basis for Contractual Damages including Non-Pecuniary Loss

In *Peebles v Rembrand Builders Merchants Ltd*<sup>1</sup> Sheriff Collins QC had to consider a number of issues: (i) whether the defenders were in breach of a contract for the sale of goods; (ii) on what basis the pursuers were entitled to damages for such breach; and (iii) whether a sum could be awarded for loss of amenity or inconvenience.

#### A THE FACTS

The first pursuer built a house for himself and the second pursuer, his wife. In order to build the roof the pursuers entered into a contract with the defender for roof tiles.<sup>2</sup> Around five years after delivery of the tiles the pursuers noticed that the tiles had a patchy white appearance. This was due to a failure of the coating on the tiles. But for this failure the tiles would have retained their appearance for at least 15 – 20 years. The problem with the tiles was purely aesthetic, they remained wind and watertight.

Following discussions between the parties and some delay<sup>3</sup> the defenders carried out repair works to the tiles. This remedial work was not carried out correctly and, as such, did not resolve the discolouring of the tiles, although it did reduce the problem. The pursuers then asked the defender to replace the tiles. The defender refused, instead offering further remedial works.<sup>4</sup> Given the problems with the tiles and the previous unsuccessful remedial works the pursuers refused and raised an action for damages for breach of contract, seeking the cost of replacing the tiles at £36,000.<sup>5</sup>

#### B WAS THERE A BREACH OF CONTRACT?

This point was dealt with fairly shortly by the Sheriff. The contract was a contract for the sale of goods to which the Sale of Goods Act 1979 applied.<sup>6</sup> By virtue of section 14 there was an implied term that the goods be of satisfactory quality. In accordance with that section the tiles were of satisfactory quality if they met the standard that a reasonable person would regard as satisfactory, taking into account the description of the tiles, the price paid for them and all other relevant circumstances.<sup>7</sup> The quality of the tiles included their state and condition, and

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<sup>1</sup> [2017] SC DUN 28.

<sup>2</sup> This was a contract for the sale of goods – the tiles were fitted by the first pursuer.

<sup>3</sup> *Peebles v Rembrand* at findings in fact 12-14.

<sup>4</sup> *Ibid* at finding in fact 21-23.

<sup>5</sup> The claim included cost of replacement tiles and the cost of the tiles being replaced. At the date of the proof the first pursuer was 67 years old and did not consider himself able to do the work himself.

<sup>6</sup> Such a contract entered into after 1 October 2015 would be regulated by the Consumer Rights Act 2015, not the Sale of Goods Act 1979.

<sup>7</sup> Section 14(2A) 1979 Act. A provision in identical terms is found in s 9(2) 2015 Act.

in particular, their appearance and finish; and their durability.<sup>8</sup> Taking these matters into account the Sheriff found that the tiles were not of satisfactory quality,<sup>9</sup> and as such the defenders were in breach of contract.<sup>10</sup>

In considering whether there was a breach of contract following the remedial works the Sheriff concluded that there was; noting that the hypothetical person of section 14 was 'neither unduly exacting as to the standard of the quality of goods, nor unduly tolerant of defects in them.'<sup>11</sup> Damages were therefore to be awarded for the period before and after the remedial works were carried out.<sup>12</sup>

### C BASIS ON WHICH DAMAGES ASSESSED

The Sheriff began his consideration of this issue by noting the well-established principle that where a pursuer sustains a loss as a result of a breach of contract he is to be put, in so far as money can do so, into the position he would have been in if the contract had been performed.<sup>13</sup> He went on to note that in assessing damages for defective building work the normal measure is the cost of reinstatement.<sup>14</sup> However, given this was a case regarding damages for breach of a contract for the sale of goods the starting point was that set out in section 53A of the 1979 Act: which provides that the loss is *prima facie* the difference between the value of goods at the time of delivery and the value they would have had if they had conformed to contract.<sup>15</sup> The pursuers had made no attempt to establish what that loss was. In doing so they had, said the Sheriff, implicitly accepted that a diminution in value basis would result in no or a very small amount of damages.<sup>16</sup>

The Sheriff went on to note that the pursuers' argument was similar in a number of respects to the respondent's argument in *Ruxley Electronics & Construction Ltd v Forsyth*<sup>17</sup> and that it fell to be rejected for similar reasons. After considering comments of Lords Jauncey and Lloyd in *Ruxley*<sup>18</sup> the Sheriff noted that a pursuer would not be entitled to damages by way of reinstatement costs unless these were reasonable in the circumstances. Such costs would not be reasonable if they were unnecessary to rectify the defect,

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<sup>8</sup> See s14(2B) 1979 Act. This is also the position in terms of s 9(3) 2015 Act.

<sup>9</sup> In light of the evidence the Sheriff inferred that the coating problem existed at the date of delivery – *Peebles v Rembrand* at para 56.

<sup>10</sup> *Ibid*, findings in fact and law 3-4.

<sup>11</sup> *Peebles v Rembrand* at para 61.

<sup>12</sup> The pursuers, as consumers, would have been able to seek replacement of the tiles in terms of ss48A and 48B of the 1979 Act. However they did not seek this remedy. However, issues about whether replacement was a proportionate remedy, discussed in relation to damages below, would also have arisen should they have done so: see s48B. These sections have been repealed in the 1979 Act. Similar provisions are found in s 23 of the 2015 Act.

<sup>13</sup> Para 63.

<sup>14</sup> Para 64, referring to *East Ham Corporation v Bernard Stanley & Sons Ltd* [1966] AC 406.

<sup>15</sup> Para 64.

<sup>16</sup> Paras 66 – 67.

<sup>17</sup> [1996] AC 344.

<sup>18</sup> Discussed in *Peebles v Rembrand* at paras 70 – 74.

because, for instance a less expensive alternative could do so. Reinstatement costs would also be unreasonable if they were disproportionate to the benefit to be gained. Finally, such costs may not be reasonable if a pursuer did not intend to actually carry out the reinstatement works.<sup>19</sup> Reasonableness therefore went further than questions of mitigation. Given it was for the pursuer to establish his loss it was also for him to establish that a claim for damages, assessed by reference to reinstatement costs, was reasonable, that is to say, that such costs were necessary and proportionate.<sup>20</sup> It was for the pursuers in this case to do so, by proving that the reinstatement works were necessary, which involved establishing that there was no alternative, or that there was none that was cheaper than the cost of replacement.<sup>21</sup>

The Sheriff held that the damages claimed by the pursuers were not reasonable as they were not necessary to rectify the defect; this could be done by further remedial works.<sup>22</sup> Damages on the basis of reinstatement costs were unreasonable as they were disproportionate to the benefit to be achieved, given that the tiles remained wind and watertight, and therefore functional.<sup>23</sup> The Sheriff also considered it unlikely that the pursuers would use any award to replace the tiles. This was therefore a further, although 'strictly subsidiary reason' that he did not consider the damages sought to be reasonable.<sup>24</sup>

#### D DAMAGES FOR LOSS OF AMENITY OR INCONVENIENCE

Having come to this view regarding the basis on which damages should be awarded the Sheriff then considered whether any damages could be awarded for loss or amenity or inconvenience. After considering the opinions on this issue of Lords Mustill and Lloyd in *Ruxley*<sup>25</sup> and the speech of Lord Clyde in *Farley v Skinner*<sup>26</sup> the Sheriff went on to note that the starting point in this case was that it concerned a contract for the sale of roof tiles. While it was true that the pursuers wanted the tiles to be of a particular colour and uniform in appearance this was ancillary to their main purpose in providing a wind and watertight roofing material.<sup>27</sup> The contract was therefore not one for pleasure or peace. The pursuers' position was not comparable to the swimming pool in *Ruxley* or the need to be free from aircraft noise in *Farley*. As such damages for loss of amenity could not be awarded.<sup>28</sup>

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<sup>19</sup> Para 75.

<sup>20</sup> *Ibid.*

<sup>21</sup> Para 76.

<sup>22</sup> *Ibid.*

<sup>23</sup> Para 77.

<sup>24</sup> Para 78.

<sup>25</sup> Paras 83 – 84.

<sup>26</sup> [2002] AC 732, discussed in paras 87 – 88.

<sup>27</sup> *Peebles v Rembrand* at para 90.

<sup>28</sup> *Ibid.*

The Sheriff did, however, find that by not getting the colour and finish of tiles that they contracted for that the pursuers had suffered inconvenience in having to live with a roof that was aesthetically unattractive and in the trouble they experienced in trying to have the problem rectified.<sup>29</sup> He also found that the aesthetic defect was a matter that significantly interfered with the pursuers' enjoyment of their home.<sup>30</sup> As such the pursuers could be awarded damages for inconvenience.

In finding that damages were recoverable the Sheriff went on to consider whether the pursuers had failed to mitigate their loss in failing to allow the defenders a further opportunity to rectify the defect. He found that they had acted unreasonably, noting that the pursuers refused the further remedial works because, by that stage, they had come to the view that they were entitled to have the tiles replaced.<sup>31</sup> The Sheriff noted,

[a]ggrieved though they were entitled to be about the failure to carry out the remedial works properly, it was in the circumstances unreasonable to refuse further remedial work works because they insisted on an alternative remedy which was itself not reasonable.<sup>32</sup>

The pursuers were therefore not entitled to damages for the period since refusing further remedial work.<sup>33</sup>

In determining the level of damages the Sheriff acknowledged that this was a necessarily imprecise exercise but that in doing so he had to take account of the strong admonitions in *Ruxley* and *Farley* that any award should be modest. He found the defenders liable in damages of £1,500.<sup>34</sup>

## E CONCLUSIONS

This case raises a number of interesting issues in relation to the basis on which and the extent to which damages can be recovered. Of particular note is the Sheriff's comments regarding the onus on the pursuers to prove their loss, involving proving that there was no alternative to the cost of replacement. This is contrary to Inner House authority on how damages should be assessed.

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<sup>29</sup> Para 91.

<sup>30</sup> *Ibid.*

<sup>31</sup> Para 92. The position would be different if the pursuers had been able to make use of the Consumer Rights Act 2015. Under s24(5) the consumer buyer has the final right to reject where after one repair the goods still do not conform to contract. However, this may not have been a useful remedy for the pursuers as s24(8) provides that a refund to the consumer of the price paid for the goods can be reduced by a deduction, to take account of the use the consumer has had of the goods since they were delivered. The tiles were delivered in 2003/2004 (the report does not provide the exact date) and the pursuers sought to reject them in 2012.

<sup>32</sup> *Peebles v Rembrand* at para 92.

<sup>33</sup> *Ibid.*, para 93.

<sup>34</sup> *Ibid.*, paras 94 – 95.

In *Duke of Portland v Wood's Trustees*<sup>35</sup> the Inner House was asked to determine whether damages should be assessed on the basis of reinstatement costs or loss of profit, on the basis that the property could not be used in the condition in which it was returned by the tenant. In that case Lord President Clyde noted,

The measures employed to estimate the money value of anything (including the damage flowing from a breach of contract) are not to be confounded with the value which it is sought to estimate; and the true value may only be found after employing more measures than one – in themselves all legitimate, but none of them necessarily conclusive by itself – and checking one result with the other.<sup>36</sup>

On the basis of this authority it is for the court to consider the various ways in which loss might be assessed, as set out in the parties' averments, and to determine which is the most appropriate, each acting as a cross-check against the other, rather than the pursuer having to prove that the loss he seeks is the only reasonable measure of loss. Indeed, in *Prudential Assurance Co Ltd v James Grant & Co (West) Ltd*<sup>37</sup> Lord McDonald noted,

The pursuers are entitled, in the first instance, to quantify their claim by reference to what it will cost to do the work which the defenders have failed to do. If *the defenders* can prove that the true loss suffered by the pursuers is materially less than this it is open *to them*, on suitable averments to do so. I do not consider that it is incumbent on the pursuers at this stage to enumerate in their pleadings all the legitimate but not necessarily conclusive measures of damages, to check these against each other and to produce, as a matter of averment, a figure reached on this basis. They have produced a *prima facie* figure based upon the readily ascertainable figure of cost of repair and it is for the defenders, *if they can*, to aver and prove that it is too high.<sup>38</sup>

The onus is therefore on the defender to prove that the basis of measuring loss used by the pursuer is too high, rather than it being for the pursuer to show that it is a reasonable basis. That said, a pursuer would be well advised to plead an *esto* case with damages assessed on a different basis, where the defender has raised the issue in their pleadings. This would then allow the pursuer to lead evidence as to quantification on that alternative basis.

The Sheriff also had to navigate the thorny issue of when non-pecuniary loss can be recovered for breach of contract. In doing so the Sheriff relied on Lord Clyde's analysis in *Farley* as the basis for his decision that the pursuers had

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<sup>35</sup> 1926 SC 640.

<sup>36</sup> *Ibid* at 652.

<sup>37</sup> 1982 SLT 423.

<sup>38</sup> *Ibid* at 424, emphasis added.

suffered inconvenience and as such were entitled to damages. However Lords Steyn, Scott<sup>39</sup> and Clyde also found that damages could have been awarded on that basis. The more difficult question is determining the difference between disappointment (for which recovery is not permitted unless an important term of the contract is to provide the pursuer with pleasure or peace of mind<sup>40</sup>) and inconvenience. This is where Lord Clyde's analysis in *Farley* seems to differ from the other judges. Lords Steyn, Scott and Clyde all refer to physical inconvenience,<sup>41</sup> with Lord Scott explaining that if the cause of the inconvenience or discomfort is sensory: affecting sight, touch, hearing or smell, damages could be recoverable. Whereas for Lord Clyde there was 'no particular magic in the word "physical"'.<sup>42</sup> Lord Clyde considered the term 'inconvenience' covered 'the kinds of difficulty and discomfort which are more than mere matters of sentimentality.'<sup>43</sup> He found that the aircraft noise in *Farley* significantly interfered with the pursuer's enjoyment of his property and that such inconvenience was recoverable.<sup>44</sup> This seems to come close to the loss of amenity that Mr Forsyth was held to have suffered in *Ruxley*.

It may be that the Sheriff's findings on pecuniary loss in this case meant he was more disposed to finding that non-pecuniary losses were recoverable so that the defenders were held liable for their breach of contract. *Ruxley* would perhaps have been a better foundation for this aspect of his decision.

It may be that any use of this case in future will focus on this aspect of the decision, and it may be a step on the road to increasing the ability to recover for non-pecuniary loss.

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<sup>39</sup> With both of whom Lord Browne Wilkinson agreed.

<sup>40</sup> *Farley*.

<sup>41</sup> *Ibid* at paras 30; 60; and 85.

<sup>42</sup> *Ibid* at para 35.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid* at para 37.