

**Ruxley Electronics and Construction Limited (Appellants)  
v. Forsyth (Respondent) and one other action**

JUDGMENT

Die Jovis 29° Junii 1995

Upon Report from the Appellate Committee to whom was referred the Cause Ruxley Electronics and Construction Limited against Forsyth and one other action, That the Committee had heard Counsel as well on Monday the 27th as on Tuesday the 28th and Thursday the 30th days of March last upon the Petition and Appeal of Ruxley Electronics and Construction Limited, care of Lanes End House, 15 Prince Albert Street, Brighton BN1, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 16th day of December 1993, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of Stephen Forsyth lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 16th day of December 1993 complained of in the said Appeal be, and the same is hereby, **Set Aside** and that the Order of His Honour Judge Diamond Q.C. of the 13th day of July 1993 be, and the same is hereby, Restored: And it is further Ordered. That the Respondent do pay or cause to be paid to the said Appellants the Costs incurred by them in the Court of Appeal and in respect of the said Appeal to this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments if not agreed between the parties: And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Central London County Court to do therein as shall be just and consistent with this Judgment.

Cler: Parliamentor:

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT**

**IN THE CAUSE**

*Ruxley Electronics and Construction Limited*  
*(Appellants)*

v.

*Forsyth*  
*(Respondent)*

**ON 29 JUNE 1995**

**LORD KEITH OF KINKEL.**

My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends Lord Jauncey of Tullichettle, Lord Mustill and Lord Lloyd of Berwick. I agree with them and for the reasons they give would allow this appeal.

**LORD BRIDGE OF HARWICH.**

My Lords, damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for. There is no question of punishing the contract-breaker. Given this basic principle, the court, in assessing the measure of the claimant's loss, has ultimately to determine a question of fact, although the law has of course developed detailed criteria which are to be applied in ascertaining the appropriate measure of loss in a wide variety of commonly occurring situations. Since the law relating to damages for breach of contract has developed almost exclusively in a commercial context, these criteria normally proceed on the assumption that each contracting party's interest in the bargain was purely commercial and that the loss resulting from a breach of contract is measurable in purely economic terms. But this assumption may not always be appropriate.

The circumstances giving rise to the present appeal exemplify a situation which one might suppose to be of not infrequent occurrence. A landowner contracts for building works to be executed on his land. When the work is complete it serves the practical purpose for which it was required perfectly satisfactorily. But in some minor respect the finished work falls short of the contract specification. The difference in commercial value between the work as built and the work as specified is nil. But the owner can honestly say: This work does not please me as well as would that for which I expressly stipulated. It does not satisfy my personal preference.

In terms of amenity, convenience or aesthetic satisfaction I have lost something.'

Nevertheless the contractual defect could only be remedied by demolishing the work and starting again from scratch. The cost of doing this would be so great in proportion to any benefit it would confer on the owner that no reasonable owner would think of incurring it. What is the measure of the loss which the owner has sustained in these circumstances? If there is no clear English authority which answers this question, I suspect this may be because parties to this kind of dispute normally have the good sense to settle rather than to litigate.

The cogent argument of Mr Jacob for the respondent, reduced to its bare essentials, can, I think, be summarised in three propositions. (1) The judge's award of £2,500 damages to the respondent for 'loss of amenity' demonstrates that the respondent suffered a real loss for which he is entitled to be compensated. (2) In a building contract case there is no admissible head of damages capable of assessment by reference to such concepts as loss of amenity, inconvenience or loss of aesthetic satisfaction. These are imponderables which the court can only evaluate by plucking figures out of the air. If a possible head of damage of this nature were to be admitted in building contract cases, this would introduce chaotic uncertainty into

the law and undermine clear and well-settled principles. (3) By these well-settled principles damages in a building contract case can only be assessed by reference to diminution in value or cost of reinstatement. There being here no diminution in value, the only available measure of damages to compensate the respondent for his real loss is the cost of reinstatement. Attractive as was Mr Jacob's development of this argument, it seems to me to suffer from an inherent logical flaw in that it leads from the premise that a loss has been suffered which is incapable of economic measurement to the conclusion that it must be compensated by reference to a measure of economic loss, namely the cost of reinstatement, which has not been and will not be incurred.

It is no doubt correct that, in the absence of any cross-appeal against the judge's award, the propriety of that award is strictly not in issue. But since the attack on the principle of the award was central to Mr Jacob's argument, I think the issue is one which we may properly address and I agree with my noble and learned friend Lord Mustill in the reasons he gives for concluding that there is no reason in principle why the court should not have power to award damages of the kind in question and indeed that in some circumstances such power may be essential to enable the court to do justice.

But, quite independently of these conclusions, to hold in a case such as this that the measure of the building owner's loss is the cost of reinstatement, however unreasonable it would be to incur that cost, seems to me to fly in the face of common sense. My Lords, since the populist image of the geriatric judge, out of touch with the real world, is now reflected in the statutory presumption of judicial incompetence at the age of 75, this is the last time I shall speak judicially in your Lordships' House. I am happy that the occasion is one when I can agree with your Lordships still in the prime of judicial life who demonstrate so convincingly that common sense and the common law here go hand in hand. For the reasons given in the speeches of my noble and learned friends Lord Lloyd of Berwick, Lord Jauncey of Tullichettle and Lord Mustill, I too would allow the appeal and restore the judgment of Judge Diamond QC.

#### **LORD JAUNCEY OF TULLICHETTLE.**

My Lords, the respondent entered into a contract with the appellant for the construction by them of a swimming pool at his house in Kent. The contract provided for the pool having a maximum depth of 7 ft 6 in but, as built, its maximum depth was only 6 ft. The respondent sought to recover as damages for breach of contract the cost of demolition of the existing pool and construction of a new one of the required depth. The trial judge made the following findings which are relevant to this appeal: (1) the pool as constructed was perfectly safe to dive into; (2) there was no evidence that the shortfall in depth had decreased the value of the pool; (3) the only practicable method of achieving a pool of the required depth would be to demolish the existing pool and reconstruct a new one at a cost of £21,560; (4) he was not satisfied that the respondent intended to build a new pool at such a cost; (5) in addition such cost would be wholly disproportionate to the disadvantage of having a pool of a depth of only 6ft as opposed to 7 ft 6 in and it would therefore be unreasonable to carry out the works; and (6) that the respondent was entitled to damages for loss of amenity in the sum of £2,500. The Court of Appeal by a majority (Staughton and Mann LJ; Dillon LJ dissenting) ([1994] 3 All ER 801, [1994] 1 WLR 650) allowed the appeal, holding that the only way in which the respondent could achieve his contractual objective was by reconstructing the pool at a cost of £21,560 which was accordingly a reasonable venture.

The general principles applicable to the measure of damages for breach of contract are not in doubt. In a very well-known passage Parke B in *Robinson v Harman* (1848) 1 Exch 850 at [855](#), [1843-60] All ER Rep 383 at 385 said:

'The next question is: What damages is the plaintiff entitled to recover? The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'

In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 688-689, [1911-13] All ER Rep 63 at 69 Viscount Haldane LC said:

'The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases ... Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach ...'

More recently, in what is generally accepted as the leading authority on the measure of damages for defective building work, Lord Cohen in *East Ham BC v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619 at 630, [1966] AC 406 at 434-435 said:

'... the learned editors of HUDSON'S BUILDING AND ENGINEERING CONTRACTS (8th edn, 1959) say, at p. 319, that there are in fact three possible bases of assessing damages, namely, (a) the cost of reinstatement; (b) the difference in cost to the builder of the actual work done and work specified; or (c) the diminution in value of the work due to the breach of contract. They go on (ibid.): "There is no doubt that wherever it is reasonable for the employer to insist upon re-instatement the courts will treat the cost of re-instatement as the measure of damage." In the present case it could not be disputed that it was reasonable for the employers to insist on re-instatement and in these circumstances it necessarily follows that on the question of damage the trial judge arrived at the right conclusion.'

Lord Upjohn likewise stated that in a case of defective building work reinstatement was the normal measure of damages (see [1965] 3 All ER 619 at 637, [1966] AC 406 at 445). Mr McGuire QC for the appellant argued that the cost of reinstatement was only allowable where (1) the employer intended as a matter of probability to rebuild if damages were awarded, and (2) that it was reasonable as between him and the contractor so to do.

Since the judge had found against the respondent on both these matters the appeal should be allowed. Mr Jacob on the other hand maintained that reasonableness only arose at the stage when a real loss had been established to exist and that where that loss could only be met by damages assessed on one basis there was no room for consideration of reasonableness. Such was the case where a particular personal preference was part of the contractual objective—a situation which did not allow damages to be assessed on a diminution of value basis.

I start with the question of reasonableness in the context of reinstatement. There is a considerable body of authority dealing with this matter. Lord Cohen in the passage in *East Ham BC v Bernard Sunley & Sons Ltd* quoted above referred to the reasonableness of insisting on reinstatement. In *Imodco Ltd v Wimpey Major Projects Ltd* (1987) 40 BLR 1 at 19 Glidewell LJ stated that the cost of work to put pipes in the position contracted for would be recoverable if there was an intention to carry out the work and if it was reasonable so to do. In *Minscombe Properties Ltd v Sir Alfred McAlpine & Sons Ltd* (1986) 2 Const LJ 303 at 309 O'Connor LJ applied the test of reasonableness in determining whether the cost of reinstatement of land to its contracted for condition should be recoverable as damages. In *Radford v De Froberville* [1978] 1 All ER 33 at 54, [1977] 1 WLR 1262 at 1283 Oliver J said: 'In the instant case, the plaintiff says in evidence that he wishes to carry out the work on his own land and there are, as it seems to me, three questions that I have to answer. First, am I satisfied on the evidence that the plaintiff has a genuine and serious intention of doing the work? Secondly, is the carrying out of the work on his own land a reasonable thing for the plaintiff to do? Thirdly, does it make any difference that the plaintiff is not personally in occupation of the land but desires to do the work for the benefit of his tenants?'

In *C R Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784 at 791, [1977] 1 WLR 659 at 667 May J referred with approval to a statement in *McGregor On Damages* (13th edn,

1972) paras 1059-1061 that in deciding between diminution in value and cost of reinstatement the appropriate test was the reasonableness of the plaintiffs desire to reinstate the property and remarked that the damages to be awarded were to be reasonable as between plaintiff and defendant. He concluded that in the case before him to award the notional cost of reinstatement would be unreasonable since it would put the plaintiffs in a far better financial position than they would have been before the fire occurred (see [1977] 2 All ER 784 at 794, [1977] 1 WLR 659 at 670). In *McGregor* (15th edn, 1988) para 1092, after a reference to the cost of reinstatement being the normal measure of damages in a case of defective building, it is stated:

'If, however, the cost of remedying the defect is disproportionate to the end to be attained, the damages fall to be measured by the value of the building had it been built as required by the contract less its value as it stands.'

In *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617-618 the High Court of Australia in a judgment of the court, after referring with approval to the rule stated in *Hudson on Building Contracts* (7th edn, 1946) p 343 that—

The measure of the damages recoverable by the building owner for the breach of a building contract is ... the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract

and referring to a number of cases supporting this proposition, continued:

'In none of these cases is anything more done than that work which is required to achieve conformity and the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner's loss. The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt.'

A similar approach to reasonableness was adopted by Cardozo J delivering the judgment of the majority of the Court of Appeals of New York in *Jacob & Youngs Inc v Kent* (1921) 230 NY 239 at 244-245.

Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party, from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure. This was recognised by the High Court of Australia in the passage in *Bellgrove v Eldridge* cited above where it was stated that the cost of reinstatement work subject to the qualification of reasonableness was the extent of the loss, thereby treating reasonableness as a factor to be considered in determining what was that loss rather than, as the respondents argued, merely a factor in determining which of two alternative remedies were appropriate for a loss once established. Further support for this view is to be found in the following passage in the judgment of Megarry V-C in *Tito v Waddell (No 2)* [1977] 3 All ER 129 at 316, [1977] Ch 106 at 332: 'Per contra, if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages.'

Megarry V-C was, as I understand it, there saying that it would be unreasonable to treat as a loss the cost of carrying out work which would never in fact be done. I take the example suggested during argument by my noble and learned friend Lord Bridge of Harwich. A man contracts for the building of a house and specifies that one of the lower courses of brick should be blue. The builder uses yellow brick instead. In all other respects the house conforms to the contractual specification. To replace the yellow bricks with blue would involve extensive demolition and reconstruction at a very large cost. It would clearly be unreasonable

to award to the owner the cost of reconstructing because his loss was not the necessary cost of reconstruction of his house, which was entirely adequate for its design purpose, but merely the lack of aesthetic pleasure which he might have derived from the sight of blue bricks. Thus in the present appeal the respondent has acquired a perfectly serviceable swimming pool, albeit one lacking the specified depth. His loss is thus not the lack of a usable pool with consequent need to construct a new one. Indeed were he to receive the cost of building a new one and retain the existing one he would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide.

What constitutes the aggrieved party's loss is in every case a question of fact and degree.

Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing.

Furthermore, in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly, if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do. As Oliver J said in *Radford v De Froberville* [1978] 1 All ER 33 at 42, [1977] 1 WLR 1262 at 1270:

'If he contracts for the supply of that which he thinks serves his interests, be they commercial, aesthetic or merely eccentric, then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.'

However, where the contractual objective has been achieved to a substantial extent the position may be very different.

It was submitted that where the objective of a building contract involved satisfaction of a personal preference the only measure of damages available for a breach involving failure to achieve such satisfaction was the cost of reinstatement. In my view this is not the case. Personal preference may well be a factor in reasonableness and hence in determining what loss has been suffered but it cannot per se be determinative of what that loss is. My Lords, the trial judge found that it would be unreasonable to incur the cost of demolishing the existing pool and building a new and deeper one. In so doing he implicitly recognised that the respondent's loss did not extend to the cost of reinstatement. He was, in my view, entirely justified in reaching that conclusion. It therefore follows that the appeal must be allowed.

It only remains to mention two further matters. The appellant argued that the cost of reinstatement should only be allowed as damages where there was shown to be an intention on the part of the aggrieved party to carry out the work. Having already decided that the appeal should be allowed I no longer find it necessary to reach a conclusion on this matter.

However, I should emphasise that in the normal case the court has no concern with the use to which a plaintiff puts an award of damages for a loss which has been established. Thus, irreparable damage to an article as a result of a breach of contract will entitle the owner to recover the value of the article irrespective of whether he intends to replace it with a similar one or to spend the money on something else. Intention, or lack of it, to reinstate can have relevance only to reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant.

The second matter relates to the award of £2,500 for loss of amenity made by the trial judge. The respondent argued that he erred in law in making such award. However, as the appellant did not challenge it, I find it unnecessary to express any opinion on the matter.

#### **LORD MUSTILL.**

My Lords, I agree that this appeal should be allowed for the reasons stated by my noble and learned friends Lord Jauncey of Tullichettle and Lord Lloyd of Berwick. I add some observations of my own on the award by the trial judge of damages in a sum intermediate between on the one hand the full cost of reinstatement and on the other the amount by which the malperformance has diminished the market value of the property on which the work was done: in this particular case, nil. This is a question of everyday practical importance to householders who have engaged contractors to carry out small building works, and then find (as often happens) that performance has fallen short of what was promised. I think it proper to enter on the question here, although there is no appeal against the award, because the possibility of such a recovery in a suitable case sheds light on the employer's claim that reinstatement is the only proper measure of damage.

The proposition that these two measures of damage represent the only permissible bases of recovery lies at the heart of the employer's case. From this he reasons that there is a presumption in favour of the cost of restitution, since this is the only way in which he can be given what the contractor had promised to provide. Finally, he contends that there is nothing in the facts of the present case to rebut this presumption.

The attraction of this argument is its avoidance of the conclusion that, in a case such as the present, unless the employer can prove that the defects have depreciated the market value of the property the householder can recover nothing at all. This conclusion would be unacceptable to the average householder, and it is unacceptable to me. It is a common feature of small building works performed on residential property that the cost of the work is not fully reflected by an increase in the market value of the house, and that comparatively minor deviations from specification or sound workmanship may have no direct financial effect at all. Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result because he wanted to make his house more comfortable, more convenient and more conformable to his own particular tastes; not because he had in mind that the work might increase the amount which he would receive if, contrary to expectation, he thought it expedient in the future to exchange his home for cash.

To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has produced seem just as good as those which he had promised would make a part of the promise illusory and unbalance the bargain. In the valuable analysis contained in *Radford v De Froberville* [1978] 1 All ER 33 at 42, [1977] 1 WLR 1262 at 1270 Oliver J emphasised that it was for the plaintiff to judge what performance he required in exchange for the price. The court should honour that choice. *Pacta sunt servanda*. If the appellant's argument leads to the conclusion that in all cases like the present the employer is entitled to no more than nominal damages, the average householder would say that there must be something wrong with the law.

In my opinion there would indeed be something wrong if, on the hypothesis that cost of reinstatement and the depreciation in value were the only available measures of recovery, the rejection of the former necessarily entailed the adoption of the latter; and the court might be driven to opt for the cost of reinstatement, absurd as the consequence might often be, simply to escape from the conclusion that the promisor can please himself whether or not to comply with the wishes of the promisee which, as embodied in the contract, formed part of the consideration for the price. Having taken on the job the contractor is morally as well as legally obliged to give the employer what he stipulated to obtain, and this obligation ought not to be devalued. In my opinion, however, the hypothesis is not correct. There are not two alternative measures of damage, at opposite poles, but only one: namely the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only

of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' (see eg the valuable discussion by Harris, Ogus and Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless, where it exists the law should recognise it and compensate the promisee if the misperformance takes it away. The lurid bathroom tiles, or the grotesque folly instanced in argument by my noble and learned friend Lord Keith of Kinkel, may be so discordant with general taste that in purely economic terms the builder may be said to do the employer a favour by failing to instal them. But this is too narrow and materialistic a view of the transaction. Neither the contractor nor the court has the right to substitute for the employer's individual expectation of performance a criterion derived from what ordinary people would regard as sensible. As my Lords have shown, the test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the employer. But it would be equally unreasonable to deny all recovery for such a loss. The amount may be small, and since it cannot be quantified directly there may be room for difference of opinion about what it should be. But in several fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.

My Lords, once this is recognised, the puzzling and paradoxical feature of this case, that it seems to involve a contest of absurdities, simply falls away. There is no need to remedy the injustice of awarding too little by unjustly awarding far too much. The judgment of the trial judge acknowledges that the employer has suffered a true loss and expresses it in terms of money. Since there is no longer any issue about the amount of the award, as distinct from the principle, I would simply restore his judgment by allowing the appeal.

#### **LORD LLOYD OF BERWICK.**

My Lords, in the course of his judgment in the Court of Appeal ([1994] 3 All ER 801, [1994] 1 WLR 650) Mann LJ described the question in this case as a simple one, but one which had, nevertheless, attracted arguments which went to the foundation of the measure of damages for breach of contract. It is surprising, and perhaps disconcerting, that at this stage of the development of the law of damages, such a simple question should have caused such a wide diversity of judicial opinion. The facts, so far as are now relevant, may be stated very briefly. In the autumn of 1986 Mr Stephen Forsyth, the defendant, wanted to build a swimming pool adjoining his house at Angley Park, Cranbrook, Kent. He entered into a contract with the plaintiffs, Ruxley Electronics and Construction Ltd, trading as Home Counties Swimming Pools. The contract price for the pool, with certain extras, was £17,797.40 including VAT. The depth of the pool was to be 6 ft 6 in at the deep end.

Subsequently Mr Forsyth wanted the depth increased to 7ft 6in. He had a conversation with Mr Hall, who owned or controlled the plaintiff company. Mr Hall agreed to increase the depth without extra charge. It is important to note that there was no provision in the contract for a diving-board, nor was there any mention of a diving-board in the course of the conversation between Mr Forsyth and Mr Hall; or if there was, it was no more than a very passing reference.

Work started in June 1987. It was carried out by a sub-contractor. But the sub-contractor did not do the job properly, and the pool bottom cracked. Mr Hall agreed to remove the existing pool and replace it free of charge. He also agreed to reimburse the professional charges which Mr Forsyth had incurred.

The new pool was finished by the end of June 1988. In November 1988 the plaintiffs submitted their invoice. But Mr Forsyth insisted on a reduction of £10,000 to compensate him for the disturbance which he had suffered during the rebuilding of the pool. Mr Hall reluctantly agreed. Still Mr Forsyth did not settle the plaintiffs' invoice. Then in March 1989 Mr Forsyth

discovered that the pool was only 6 ft 9 in at the deep end instead of 7ft 6in. On 20 March 1989 Mr Forsyth's architect wrote to Mr Hall to draw his attention to this matter, and to complain of some corrosion. Mr Hall did some further work, but still Mr Forsyth did not pay.

Then on 19 January 1990 the plaintiffs commenced these proceedings, claiming £10,330 as the balance of their account.

On the same date, an associated company owned or controlled by Mr Hall commenced proceedings to recover £33,620, as the balance of account due on a contract for enclosing the swimming pool. But your Lordships are not concerned with the detail of that contract.

On 5 March 1990 Mr Forsyth's solicitors served a defence and counterclaim. The document is interesting. It contains particulars of defects under ten sub-paragraphs. But nowhere is there mention of any complaint about the depth of the pool, although this had been known for nearly a year. There is a counterclaim for the cost of remedial works amounting to £3,694 plus a claim for general damages for 'aggravation, nuisance, annoyance and disappointment'.

Three years later, in April 1993, the defence and counterclaim was amended to increase the amount of counterclaim from £3,694 to £14,175. But there was still no complaint about the depth of the pool.

The trial commenced before Judge Diamond QC on 14 May 1993. On 16 May Mr Forsyth dismissed his solicitors and counsel. On 17 May he amended his defence and counterclaim to raise for the first time the question of the depth of the pool. Thereafter it occupied far more time than any other issue. Expert evidence was called on both sides. As a result, Judge Diamond was able to make certain crucial findings of fact. (1) The pool as constructed was safe for diving. A depth of 6 ft is adequate, even for a beginner. According to the official handbook, the minimum safe depth is 5 ft. (2) Mr Forsyth had no intention or desire to fit a diving-board, and would be unlikely to form such a desire in the future. (3) Since the pool was safe for diving, the shortfall in depth did not decrease the value of the pool. (4) It would not be possible to break out the bottom of the pool, and excavate to the required depth. The only way of increasing the depth of the pool was to demolish the existing pool altogether, and start again at a cost of £21,560. (5) Mr Forsyth had no intention of building a new pool. Mr Forsyth professed to have formed such an intention (I use the language of the judge), but the judge thought it was questionable whether it would continue once the litigation was over. Mr Forsyth has since given an undertaking to the Court of Appeal to rebuild the pool if his claim for the cost of reinstatement should succeed. (6) To spend £21,560 on a new pool would be unreasonable since the cost would be wholly disproportionate to the advantage, if any, of having a pool 7 ft 6 in deep, as opposed to 6 ft, if one takes the depth 6 ft out from the deep end.

Having dismissed his professional advisers on the second day of the trial, Mr Forsyth represented himself thereafter, and argued his case with obvious ability. His two main arguments, neither of which had been pleaded prior to the third day of the trial, were, first, that the contract was an entire contract, and that as the swimming pool had never been completed, he owed nothing, and indeed was entitled to recover back instalments which he had already paid. His second argument was that he was entitled to recover the cost of rebuilding the pool, which he estimated at £33,800 plus VAT.

Judge Diamond rejected both these arguments. As to the first, he pointed out that the contract called for payment in stages, with 10% payable as a deposit, and 40% due on the starting date, and so on. Judge Diamond observed that in those circumstances it was very difficult to regard the arrangement between the parties as a lump sum contract. Moreover, he found as a fact that the pool was substantially completed in June 1988. Mr Forsyth's first argument formed the first of his grounds of appeal to the Court of Appeal. But it does not seem to have been pressed. It was not revived before your Lordships. As to the second argument, the judge held, as I have said, that the cost of rebuilding the pool was wholly disproportionate to any prospective benefit, and was therefore unreasonable. Since Mr Forsyth had no intention of rebuilding the pool he would, if his second argument were to succeed, have a pool which was substantially complete in accordance with the contract plus a windfall profit of £21,560.

But the judge went on to consider whether he might not award some general damages for the loss of pleasure and amenity which Mr Forsyth had suffered by reason of the lack of depth, that is to say, by not being able to dive 7 ft 6 in deep, as opposed to 6 ft or 5 ft deep, the latter being, as I have said, the minimum safe depth. The judge dealt with general damages in the following paragraph:

'In the course of his written submissions Mr Forsyth reminded me that "This is not a matter of commerce to be nicely measured in money. Swimming pools are not necessities, they are for fun. Due to Home Counties' default I have lost some fun". I think that where a contract is for the provision of a pleasurable amenity, such as a swimming pool, it is entirely proper to award a general sum for the loss of amenity. I accept that there has been a loss of amenity brought about by the shortfall in depth and I award damages for loss of that amenity in the sum of £2,500.'

The judge also awarded a modest sum of £750 for general inconvenience and disturbance in lieu of the £10,000 which Mr Forsyth had demanded. I need not go into the reason why, in the circumstances, the judge regarded a modest sum as quite sufficient. In his notice of appeal, Mr Forsyth's second and third grounds were that he ought to have been awarded the cost of rebuilding the pool, and that the figure of £21,560 found by the judge as the cost of rebuilding was too low. His fifth and last ground of appeal was that the figure of £2,500 for general damages was too low.

In the Court of Appeal Dillon LJ, dissenting, agreed with the judge's approach. I quote the penultimate paragraph of his judgment ([1994] 3 All ER 801 at 813-814, [1994] 1 WLR 650 at 662):

'If the evidence had been that the value of the pool as constructed was less than the value of a pool with a depth of 7 ft 6 in as contracted for, but that the loss of value was substantially less than the £21,560 cost of reinstatement, then, given the finding that the pool as constructed is still deep enough to be perfectly safe to dive into, the obvious course would have been to award Mr Forsyth the loss of value. The basis of that would have been reasonableness. He has no absolute right to be awarded the cost of reinstatement. I see no reason, therefore, why if there has been no loss in value, he should automatically become entitled to the cost of reinstatement, however high. That would be a wholly unreasonable conclusion in law. Accordingly, I agree with the judge's approach and would dismiss this appeal.'

Staughton LJ held in effect that Mr Forsyth was entitled to the cost of reinstatement, however expensive, since there was no other way of giving him what he had contracted for. There are two main themes running through Staughton LJ's judgment: reasonableness and intention. As to the first, he held that while reasonableness lies at the heart of the rule that a plaintiff must mitigate his damage, it plays no part at all where there is no cheaper remedy available for the defendant's breach of contract. He said ([1994] 3 All ER 801 at 810-811, [1994] 1 WLR 650 at 659):

'What money will place him "in the same situation ... as if the contract had been performed?"

The answer, on the facts of this case, is the cost of replacing the pool. Otherwise, a builder of swimming pools need never perform his contract. He can always argue that 5 ft in depth is enough for diving, even if the purchaser has stipulated for 6, 7 or 8 ft, and pay no damages. In my judgment the key lies in the proposition of Oliver J that reasonableness is a matter of mitigation. It is unreasonable of a plaintiff to claim an expensive remedy if there is some cheaper alternative which would make good his loss. Thus he cannot claim the cost of reinstatement if the difference in value would make good his loss by enabling him to purchase the building or chattel that he requires elsewhere. But if there is no alternative course which will provide what he requires, or none which will cost less, he is entitled to the cost of repair or reinstatement even if that is very expensive ... Since there is no other alternative which will provide that which he has contracted for, he is entitled to incur that expense and charge it to the defendant.'

As to intention, Staughton LJ held that it was irrelevant that Mr Forsyth did not intend to rebuild the pool. What a plaintiff does with his damages is no concern to the defendant. In any event, Mr Forsyth had now offered an undertaking to renew the pool if he recovered the cost of doing so as damages, although Staughton LJ regarded such an undertaking as unnecessary.

Mann LJ took a middle course. He accepted that there might be cases where it would be unreasonable to award the cost of rectifying a failed project. But this was not such a case, since the bargain was for what Mann LJ called 'a personal preference'. Although the value of the pool was the same, as found by the judge, Mr Forsyth was entitled to have his personal preference satisfied. The only way that could be done was by rebuilding the pool. Since the majority of the court awarded the full cost of reinstatement, they set aside the judge's award of £2,500 general damages for loss of amenity.

Before your Lordships, Mr Jacob did not seek to restore the award of £2,500. Indeed, he argued vigorously that the judge was wrong to have made such an award in the first place. It was, he said, contrary to all principle and unsupported by any authority. This seemed a surprising argument to hear from the mouth of Mr Forsyth's counsel. But Mr Jacob had his reasons. He submitted that there were only two possible alternatives open to the judge. One was to award the cost of rebuilding the pool; the other was to award the difference in value between the pool as built and a pool built to the contract depth. Since the difference in value was nil, and since Mr Forsyth had undoubtedly suffered a real loss (otherwise the judge would not have granted general damages) the judge was bound to award the cost of rebuilding. He had no other choice.

For reasons which I will elaborate later, I am unable to accept that, in a case such as the present, the judge was presented with such harsh alternatives. He was not bound to award either too little or too much. The law of damages is not so inflexible. But before I develop the answer to Mr Jacob's argument, I should first consider the two themes which ran through Staughton LJ's judgment.

### *Reasonableness*

The starting point is *Robinson v Harman* ([1848](#)) [1 Exch 850 at 855](#) at 855, [1843-60] All ER Rep 383 at 385, where Parke B said:

'The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'

This does not mean that in every case of breach of contract the plaintiff can obtain the monetary equivalent of specific performance. It is first necessary to ascertain the loss the plaintiff has in fact suffered by reason of the breach. If he has suffered no loss, as sometimes happens, he can recover no more than nominal damages. For the object of damages is always to compensate the plaintiff, not to punish the defendant. This was never more clearly stated than by Viscount Haldane LC in the first of the two broad principles which he formulated in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689, [1911-13] All ER Rep 63 at 69:

'The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach ...'

Note that Lord Haldane does not say that the plaintiff is always to be placed in the same situation physically as if the contract had been performed, but in as good a situation financially, so far as money can do it. This necessarily involves measuring the pecuniary loss which the plaintiff has in fact sustained.

In building cases, the pecuniary loss is almost always measured in one of two ways: either the difference in value of the work done or the cost of reinstatement. Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be

the cost of reinstatement. By claiming the difference in value the plaintiff would be failing to take reasonable steps to mitigate his loss. In many ordinary cases, too, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages, even where there is little or no difference in value, or where the difference in value is hard to assess. This is why it is often said that the cost of reinstatement is the ordinary measure of damages for defective performance under a building contract.

But it is not the only measure of damages. Sometimes it is the other way round. This was first made clear in the celebrated judgment of Cardozo J giving the majority opinion in the Court of Appeals of New York in *Jacob & Youngs Inc v Kent* (1921) 230 NY 239. In that case the building owner specified that the plumbing should be carried out with galvanised piping of 'Reading manufacture'. By an oversight, the builder used piping of a different manufacture.

The plaintiff builder sued for the balance of his account. The defendant, as in the instant case, counterclaimed the cost of replacing the pipework even though it would have meant demolishing a substantial part of the completed structure, at great expense. Cardozo J (at 243) pointed out that there is 'no general license to install whatever, in the builder's judgment, may be regarded as "just as good"'. But he went on to consider the measure of damages in the following paragraph (at 244-245):

'In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing ... It is true that in most cases the cost of replacement is the measure ... The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable".'

Cardozo J's judgment is important because it establishes two principles which I believe to be correct and which are directly relevant to the present case: first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the good to be obtained, and secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award.

The first of these principles is contrary to Staughton LJ's view that the plaintiff is entitled to reinstatement, however expensive, if there is no cheaper way of providing what the contract requires. The second principle is contrary to the whole thrust of Mr Jacob's argument that the judge had no alternative but to award the cost of reinstatement, once it became apparent that the difference in value produced a nil result.

Next, chronologically, is a decision of the High Court of Australia. In *Bellgrove v Eld ridge* (1954) 90 CLR 613 the builder built a house with defective foundations, as a result of which the house was unstable. The building owner brought an action against the builder claiming the cost of reinstatement. His claim was upheld on the facts. But the statement of principle is instructive. Having said that the building owner is, as a general rule, entitled to have a building which conforms with the contract plans, the High Court continued (at 618-619):

'The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable or it would, to use a term current in the United States, constitute "economic waste" ... We prefer,

however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions "necessary" and "reasonable", for the expression "economic waste" appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials. As to what remedial work is both "necessary" and "reasonable" in any particular case is a question of fact.'

Once again one finds the court emphasising the central importance of reasonableness in selecting the appropriate measure of damages. If reinstatement is not the reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff's loss. If there is no diminution in value, the plaintiff has suffered no loss. His damages will be nominal.

These principles are recognised in the leading English authority, *East Ham BC v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619, [1966] AC 406. In that case stone panels which had been fixed to the external walls of a school fell off, owing to defective fixing by the contractor. It was held by this House that the contractor was liable for the cost of reinstating the stone panels, calculated at the date when the defect was discovered. Lord Cohen quoted with approval a passage in *Hudson on Building and Engineering Contracts* (8th edn, 1959) p 319: 'There is no doubt that wherever it is reasonable for the employer to insist upon re-instatement the courts will treat the cost of re-instatement as the measure of damage.' (See [1965] 3 All ER 619 at 630, [1966] AC 406 at 434.)

Lord Cohen continued:

'In the present case it could not be disputed that it was reasonable for the employers to insist on reinstatement and in these circumstances it necessarily follows that on the question of damage the trial judge arrived at the right conclusion.'

There seems little doubt that if it had not been reasonable for the employer to insist on reinstatement, Lord Cohen would have chosen, as the alternative measure of damages, the diminution in value.

*East Ham BC v Bernard Sunley & Sons Ltd* has been followed in a number of subsequent cases. In *G W Atkins Ltd v Scott* (1980) 7 Const LJ 215 the building owner complained of some defective tiling. He claimed £1,229 as the cost of retiling the whole roof. The county court judge found that the tiling was defective, but that the defects were mostly cosmetic and of a minor character. He refused to give the plaintiff the cost of reinstatement, but awarded instead the sum of £250 as damages for bad workmanship. His reason, according to the Court of Appeal, was because he regarded the defects as not being very serious, and accordingly that it would be unreasonable to go to the expense of completely stripping the tiles. His decision was upheld by the Court of Appeal. Sir David Cairns said that the judge's finding that it would be unreasonable to award the cost of reinstatement was not open to attack on appeal. He said (at 221):

'[Counsel for the defendant] accepts that in some cases it would be grossly unreasonable, or capricious, or perverse, to suggest reinstatement and that in such a case some other basis of assessment must be found. I confess that I can see no reason in principle, nor any support in the authorities, for the proposition that the test is other than lack of reasonableness *simpliciter* ...'

Ackner LJ said (at 221-222):

'I accept that the court must have some regard for the predilections of the building owner, but that is only one of the factors. To take a wholly fanciful example; the half round tiles at the edge of the bath ... were white. They did not match the tiles as they should have done. If, for the purpose of this argument, they could only have been removed and replaced by the removal of all the tiles in the bathroom at a cost of several hundred pounds, would it have been reasonable for the plaintiff to have required this to be done? [Counsel for the defendant]

contends that his client is entitled to say, "I want what I bargained for. What you have done is unacceptable to me." Such an approach seems to me to make his client the sole arbiter of what is "reasonable."

Stephenson LJ agreed with both judgments.

Mr Jacob submits that the decision is erroneous, at least in so far as the court upheld the award of £250 general damages. But it seems to me that it is a well-reasoned authority that the cost of reinstatement is recoverable, but only if it is reasonable for the plaintiff to insist on that course. Otherwise the measure of damages will be the diminution in the value of the work.

One other very recent authority may be mentioned, although it is currently subject to appeal to your Lordships' House. In *Darlington BC v Wiltshier Northern Ltd* [\[1995\] 1 WLR 68](#) at 79

Steyn LJ said:

'... in the case of a building contract, the prima facie rule is cost of cure, i.e., the cost of remedying the defect: *East Ham Corporation v. Bernard Sunley & Sons Ltd*. ([1965] 3 All ER 619, [1966] AC 406). But where the cost of remedying the defects involves expense out of all proportion to the benefit which could accrue from it, the court is entitled to adopt the alternative measure of difference of the value of the works ...'

It seems to me that in the light of these authorities - and many other authorities cited were to the same effect, including *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784, [1977] 1 WLR 659, *Minscombe Properties Ltd v Sir Alfred McAlpine & Sons Ltd* (1986) 2 Const LJ 303 and leading textbooks both here and in the United States—Mr McGuire QC was right when he submitted, and Dillon LJ was right when he held, that mitigation is not the only area in which the concept of reasonableness has an impact on the law of damages.

If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value. If the judge had assessed the difference in value in the present case at, say, £5,000, I have little doubt that the Court of Appeal would have taken that figure rather than £21,560.

The difficulty arises because the judge has, in the light of the expert evidence, assessed the difference in value as nil. But that cannot make reasonable what he has found to be unreasonable.

So I cannot accept that reasonableness is confined to the doctrine of mitigation. It has a wider impact, as indeed Mr Jacob himself accepted in the course of his argument and in his written case. I quote from para 15:

'It is important to realise that when the plaintiff has come to court before taking any steps to rectify the position, the court is acting on the basis of a hypothetical situation. The plaintiff is awarded a sum of money to represent either the cost of cure or diminution whichever course the court considers reasonable in the circumstances of the case.'

How then does Mr Jacob seek to support the majority judgment? It can only be, I think, by attacking the judge's finding of fact that the cost of rebuilding the pool would have been out of all proportion to the benefit to be obtained. Mr Jacob argues that this was not an ordinary commercial contract but a contract for a personal preference. This was the line taken by Mann LJ in the Court of Appeal. It was the way in which Phillips J distinguished the decision in the present case (by which he was bound) in *Channel Island Ferries Ltd v Cenargo Navigation Ltd, The Rozel* [1994] 2 Lloyd's Rep 161 at 166-167, where he said:

'It is always necessary to exercise the greatest care before applying the reasoning in one case to a different factual situation, and this is particularly true in the field of damages. The majority of the Court in *Ruxley Electronics* did not hold that a plaintiff can recover in damages the cost of remedial measures which are unreasonable. They held that, in the circumstances

of that case it was not unreasonable for the plaintiff to spend the substantial sum necessary to have what he had contracted for. The test of what was reasonable had to have regard to his personal preference, as expressed in the depth of water that he had contractually required.

This reasoning can be applied to a requirement which is incorporated in a contract as an end in itself, reflecting a personal preference of the contracting party. It does not apply where the contractual requirement is not an end in itself, but is inserted into a commercial contract because it has financial implications. If, in such a case, the contractual requirement is not met, the costs of remedial measures will not normally be recoverable as damages if they are disproportionate to the financial consequences of the breach. If that is the case it will not be reasonable to incur those costs. The damages recoverable will be those necessary to compensate for the financial consequences of the breach.'

I am far from saying that personal preferences are irrelevant when choosing the appropriate measure of damages ('predilections' was the word used by Ackner LJ in *G W Atkins Ltd v Scott* (1980) 7 Const LJ 215 at 221, adopting the language of Oliver J in *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262). But such cases should not be elevated into a separate category with special rules. If, to take an example mentioned in the course of argument, a landowner wishes to build a folly in his grounds, it is no answer to a claim for defective workmanship that many people might regard the presence of a well-built folly as reducing the value of the estate. The eccentric landowner is entitled to his whim, provided the cost of reinstatement is not unreasonable. But the difficulty of that line of argument in the present case is that the judge, as is clear from his judgment, took Mr Forsyth's personal preferences and predilections into account.

Nevertheless, he found as a fact that the cost of reinstatement was unreasonable in the circumstances. The Court of Appeal ought not to have disturbed that finding. Staughton LJ was much influenced by the decision in *Radford v De Froberville*. The defendant in that case was in breach of covenant to build a wall between two properties. The plaintiff claimed as damages the cost of building the wall on his own land. The defendant argued that a prefabricated fence would do just as well. Oliver J rejected that argument. He asked himself whether 'the carrying out of the work on his own land [was] a reasonable thing for the plaintiff to do?' He answered that question in favour of the plaintiff, and one can see why. It was a case that fell clearly on the other side of the factual line. It throws no light on the question of fact which the judge had to decide in the present case. Indeed, the question which Oliver J asked himself affords further support for Judge Diamond's approach.

Finally, under this head, Mr Jacob argued that in order to arrive at a true figure for diminution in value, one should assume that Mr Forsyth had put his house on the market and bought another house identical in all respects save that it had a 7 ft 6 in swimming pool instead of a 6 ft 9 in swimming pool. Even though the value of the two properties might be the same, one should take into account the notional cost of moving from one house to the other, so as to arrive at a true comparison between diminution in value and the cost of reinstatement. On that view, so it was argued, the diminution in value would be greater than the cost of reinstatement, and not less; and by opting for reinstatement Mr Forsyth was mitigating his loss.

This argument seems to lose touch with reality. Nobody in their senses would move house in order to have the pleasure of diving into a deeper swimming pool. The analogy with defective chattels, such as a motor car, for which there is a ready market, is very strained. In any event, as Sir David Cairns pointed out in *G W Atkins Ltd v Scott* (1980) 7 Const LJ 215 at 220, it is not the diminution in the value of the freehold which provides the correct comparison, but the diminution in the value of the works, in this case a swimming pool.

I have confined my citation of authority to building cases, since that is the subject matter of the present dispute. But the principle that a plaintiff cannot always insist on being placed in the same physical position as if the contract had been performed, where to do so would be unreasonable, is not confined to building cases. In *Sealace Shipping Co Ltd v Oceanvoice Ltd, The Alecos M* [1991] 1 Lloyd's Rep 120 there was a contract for the sale of a ship, including a spare propeller. When the ship was delivered there was no spare propeller. It was

common ground that there was no market for secondhand propellers. So the only way of providing a spare propeller would have been to commission the manufacture of a new propeller at great expense. The arbitrator held that this would be unreasonable. Instead, he awarded the scrap value of the propeller, since that was all the buyer had actually lost by reason of the seller's breach. The arbitrator's decision was upheld in the Court of Appeal. Neill LJ said (at 125):

'I can only read his award as meaning that he asked the question: what did these buyers really suffer as a result of the non-delivery of this spare propeller with this vessel? And he gave the answer: they lost its scrap value which in the circumstances was the only value which it had for them.' *Intention*

I fully accept that the courts are not normally concerned with what a plaintiff does with his damages. But it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate. Suppose in the present case Mr Forsyth had died, and the action had been continued by his executors. Is it to be supposed that they would be able to recover the cost of reinstatement, even though they intended to put the property on the market without delay?

There is, as Staughton LJ observed, a good deal of authority to the effect that intention may be relevant to a claim for damages based on cost of reinstatement. The clearest decisions on the point are those of Megarry V-C in *Tito v Waddell (No 2)* [1977] 3 All ER 129, [1977] Ch 106 and Oliver J in *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262. One of the many questions in the former case was whether the plaintiffs could recover the cost of replanting the plots of land in question, or whether the recovery of damages was limited to the difference in the market value of the land by reason of the work not having been done. Megarry V-C said ([1977] 3 All ER 129 at 316, [1977] Ch 106 at 332):

Again, some contracts for alterations to buildings, or for their demolition, might not, if carried out, enhance the market value of the land, and sometimes would reduce it. The tastes and desires of the owner may be wholly out of step with the ideas of those who constitute the market; yet I cannot see why eccentricity of taste should debar him from obtaining substantial damages unless he sues for specific performance. Per contra, if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages.' In the present case the judge found as a fact that Mr Forsyth's stated intention of rebuilding the pool would not persist for long after the litigation had been concluded. In these circumstances it would be 'mere pretence' to say that the cost of rebuilding the pool is the loss which he has in fact suffered. This is the critical distinction between the present case and the example given by Staughton LJ of a man who has had his watch stolen. In the latter case, the plaintiff is entitled to recover the value of the watch because that is the true measure of his loss. He can do what he wants with the damages. But if, as the judge found, Mr Forsyth had no intention of rebuilding the pool, he has lost nothing except the difference in value, if any.

The relevance of intention to the issue of reasonableness is expressly recognised by the respondent in his case. In para 37 Mr Jacob says:

'The Respondent accepts that the genuineness of the parties' indicated predilections can be a factor which the court must consider when deciding between alternative measures of damage. Where a plaintiff is contending for a high as opposed to a low cost measure of damages the court must decide whether in the circumstances of the particular case such high cost measure is reasonable. One of the factors that may be relevant is the genuineness of the plaintiff's desire to pursue the course which involves the higher cost. Absence of such a desire (indicated by untruths about intention) may undermine the reasonableness of the higher cost measure.'

I can only say that I find myself in complete agreement with that approach, in contrast to the approach taken by the majority of the Court of Appeal.

Does Mr Forsyth's undertaking to spend any damages which he may receive on rebuilding the pool make any difference? Clearly not. He cannot be allowed to create a loss which does not exist in order to punish the defendants for their breach of contract. The basic rule of damages, to which exemplary damages are the only exception, is that they are compensatory not punitive.

### *Loss of amenity*

I turn last to the head of damages under which the judge awarded £2,500. I have already quoted the paragraph in which the judge justified his award. In the Court of Appeal Mr Forsyth sought to increase the award under this head.

According to Staughton LJ this led to an interesting argument. But the Court of Appeal did not find it necessary to deal with the point.

Before your Lordships, Mr Jacob abandoned the point altogether, for what Mr McGuire described as forensic reasons. It undermined the main theme of his argument that since difference in value gave Mr Forsyth nothing by way of damages, he must be entitled to the cost of reinstatement. So Mr Jacob was contending that the judge's award of £2,500 was without precedent in the field of damages, and was fundamentally inconsistent with the decision of this House in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908-10] All Rep 1. For obvious reasons, Mr McGuire did not press the contrary argument. So your Lordships are placed in something of a difficulty. The House does not have the benefit of the views of the Court of Appeal on the point, and the submissions before your Lordships have been artificially restricted.

*Addis v Gramophone Co Ltd* established the general rule that in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings. But the rule, like most rules, is subject to exceptions. One of the well-established exceptions is when the object of the contract is to afford pleasure, as, for example, where the plaintiff has booked a holiday with a tour operator. If the tour operator is in breach of contract by failing to provide what the contract called for, the plaintiff may recover damages for his disappointment (see *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71, [1973] QB 233 and *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, [1975] 1 WLR 1468). This was, as I understand it, the principle which Judge Diamond applied in the present case. He took the view that the contract was one 'for the provision of a pleasurable amenity'. In the event, Mr Forsyth's pleasure was not so great as it would have been if the swimming pool had been 7 ft 6 in deep. This was a view which the judge was entitled to take. If it involves a further inroad on the rule in *Addis v Gramophone Co Ltd* then so be it. But I prefer to regard it as a logical application or adaptation of the existing exception to a new situation. I should, however, add this note of warning. Mr Forsyth was, I think, lucky to have obtained so large an award for his disappointed expectations. But as there was no criticism from any quarter as to the quantum of the award as distinct from the underlying principle, it would not be right for your Lordships to interfere with the judge's figure. That leaves one last question for consideration. I have expressed agreement with the judge's approach to damages based on loss of amenity on the facts of the present case. But in most cases such an approach would not be available. What is then to be the position where, in the case of a new house, the building does not conform in some minor respect to the contract, as, for example, where there is a difference in level between two rooms, necessitating a step?

Suppose there is no measurable difference in value, and the cost of reinstatement would be prohibitive. Is there any reason why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectations? Is the law of damages so inflexible, as I asked earlier, that it cannot find some middle ground in such a case? I do not give a final answer to that question in the present case. But it may be that it would have afforded an alternative ground for justifying the judge's award of damages. And if the judge had wanted a precedent, he could have found it in Sir David Cairns' judgment in *G W Atkins Ltd v Scott* 7 Const LJ 215, where, it will be remembered, the Court of Appeal upheld the judge's award of £250 for defective tiling. Sir David Cairns said (at 221):

'There are many circumstances where a judge has nothing but his commonsense to guide him in fixing the quantum of damages, for instance, for pain and suffering, for loss of pleasurable activities or for inconvenience of one kind or another.'

If it is accepted that the award of £2,500 should be upheld, then that at once disposes of Mr Jacob's argument that Mr Forsyth is entitled to the cost of reinstatement, because he must be entitled to something. But even if he were entitled to nothing for loss of amenity, or for difference in value, it would not follow, as Mr Jacob argued, that he was entitled to the cost of reinstatement. There is no escape from the judge's finding of fact that to insist on the cost of reinstatement in the circumstances of the present case was unreasonable. I would therefore allow the appeal and restore the judgment of Judge Diamond.

*Appeal allowed.*