

CONTRACTS--ISSUE OF COMMON LAW REMEDY--DIRECT DAMAGES--OWNER'S MEASURE OF RECOVERY FOR A CONTRACTOR'S PARTIAL BREACH OF A CONSTRUCTION CONTRACT WHERE CORRECTING THE DEFECT WOULD CAUSE ECONOMIC WASTE.

Direct damages are the economic losses that usually or customarily result<sup>1</sup> from a breach of contract. In this case, you will determine direct damages, if any, as follows: First, you will determine the fair market value of the (*describe improvement*) as actually constructed by the defendant on [the date that (*describe events constituting breach*)] [(*specify date*)]. Second, you will determine the fair market value the improvement would have had if it had been constructed in conformity with the requirements of the contract.<sup>2</sup> Fair market value is the amount which would be agreed upon as a fair price by a seller who wishes to sell, but is not compelled to do so,

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<sup>1</sup>"In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.'" *Stanback v. Stanback*, 297 N.C. 181, 187, 254 S.E.2d 611, 616 (1979) (*quoting* the RESTATEMENT OF THE LAW OF CONTRACT, § 330, p. 509). The foreseeability limitation on recovery was first enunciated in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

<sup>2</sup>When measuring damages for defects or omissions in the performance of a construction contract, the fundamental underlying principle is that a party is entitled to have what he contracted for or its equivalent. *Robbins v. C. W. Myers Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 887 (1960). Where making the completed work conform to the contract would require that a substantial part of the completed work be undone, and where the contractor has acted in good faith or the owner has taken possession, the owner is not permitted to recover the cost of making the change, rather he may recover the difference in value between the value of the building contracted for and the value of the building as constructed. *Id.*; 9 Am. Jur., Building and Construction Contracts, § 152, p. 89.

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and a buyer who wishes to buy, but is not compelled to do so.<sup>3</sup>

Third, you will subtract the fair market value of the improvement as actually constructed from the fair market value of the improvement as contracted for. [The difference would be the plaintiff's direct damages.] [The difference less any portion of the contract price which the plaintiff has not paid to the defendant would be the plaintiff's direct damages.]<sup>4</sup>

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<sup>3</sup>*Huff v. Thornton*, 287 N.C. 1, 12, 213 S.E.2d 198, 206 (1975).

<sup>4</sup>Where a substantial part of the work must be redone in order to comply with the contract or warranty, resulting in economic waste, the measure of damages is the difference between the value of the building as warranted or contracted for and its value as actually built. *Warfield v. Hicks*, 91 N.C. App. 1, 11, 370 S.E.2d 689, 695, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988).