

The common law defence of Abatement: A change of Direction



In the context of construction law, the little known common law right of abatement can provide an employer with the entitlement, by way of defence to a contractor's claim, to reduce sums otherwise payable to contractors by asserting that the sum claimed has not been earned. A typical example arises in circumstances where an employer asserts that the value of works claimed by a contractor should be reduced on account of defects in those works. To date, abatement has not achieved the same use in our courts as the similar and inter-linked defence of set-off.

At the outset, it is useful to differentiate the concept of set-off from abatement. Set-off has a wider application and operates in circumstances where the party claiming set-off is running a counterclaim. Abatement can have a similar result but it only operates as a defence and does not arise from a counter-claim. Of significance in the construction context is when a building contract excludes the application of set-off (e.g. where notices of set-off are not complied with), then the right to abatement may still be available as a defence and the same result can be achieved.¹

The law in respect of the defence of abatement was recently considered in detail by the English courts in *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd*². The court identified seven principles which are used to establish the existence of this defence. The case concerned the issue of defective steelworks in the construction of Wembley Stadium.

After an analysis of the caselaw on the defence of abatement, Justice Jackson held that the following principles apply. (1) In a contract for the provision of labour and materials where performance has been defective, the employer is entitled at common law to maintain the defence of abatement against claims for payment. (2) The measure of abatement is the amount by which the product has diminished in value due to the actions of the contractor. (3) The method of assessing diminution of value depends on facts of the case. (4) In some cases, diminution may be assessed by comparing the current market value of the construction with the market value that it ought to have had. Otherwise, and as was the case here, the best method was the cost of the remedial works, as the value of the steelworks did not have a market value in the conventional sense, only to the contractor who was obliged to produce the completed stadium; (5) The measure of abatement can never exceed the sum that would have been otherwise due to the contractor. (6) Abatement is not available as a defence to a claim in respect of professional services. (7) Claims for delay / disruption / damage caused to anything other than what the contractor constructed cannot feature in the defence of abatement.

The *Multiplex Construction* case has provided a very comprehensive analysis of existing caselaw on the defence of abatement, and the principles outlined in the judgment are essentially a clarification of the existing principles, rather than the adoption of any material change in direction. This clarification might go some way toward highlighting the effectiveness of the defence right thereby leading to its wider application.

¹ *Acsim (Southern) Ltd v Danish Contracting and Development Co Ltd* (1989) 47 B.L. R., 59.

² [2006] EWHC 1341 (TCC)

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