

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D208/2005

CATCHWORDS

Domestic Building List; Claim for work and labour done and materials supplied by concrete contractor; Work found to be defective; Cost of rectification awarded to counterclaiming owner building; Whether allowance should be made in award of costs of rectification for supervision of specialist contractors installing carbon fibre reinforcement; Whether contractor disabled by Section 22 *Domestic Building Contracts Act* 1995 from claiming for concrete pump charges described generally but not specified in accepted quotation; Whether counterclaim should be treated as an abatement defence; Doctrine of *Mondel v Steel*

APPLICANT	Jescor Concreting Pty Ltd
RESPONDENT	Robert Thomas Lloyd
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	19 & 20 January 2006
DATE OF ORDER	2 February 2006
CITATION	[2006] VCAT 3

ORDER

- 1 The applicant's claim is dismissed.
- 2 The applicant must pay the respondent the sum of \$18,563.00 on the respondent's counterclaim.
- 3 The title of the proceeding is amended so as to show the respondent as *'Thomas Roger Lloyd'*.
- 4 The applicant must pay Mr Theodore Papageorge the sum of \$540 by way of witness expenses relative to his appearance to produce documents 18 January 2006.
- 5 Costs reserved.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant

Mr A. Dickenson of Counsel

For Respondent

Mr David Pumpa of Counsel

REASONS

BACKGROUND

- 1 Mr Lloyd is a master builder. He has been a builder for some 30 years. Recently he decided to build a house for his daughter. He bought a property at 36 Monmouth Street, Newport, which was then occupied by a single dwelling. He demolished that house in February 2005. According to Mr Lloyd it was not economic having regard to the land values in the area to erect a single house on that site. He decided to build one unit for his daughter which he intended to sell her for \$340,000 with a second unit on the same site built as a *'spec'* for sale to the public.
- 2 He had recently been dealing with the private building surveyor company, Gibson Dell Pty Ltd and sought a recommendation from that company as to a contractor to pour the concrete slab foundations for the two units. Gibson Dell recommended Jescor Concreting Pty Ltd, a company which had recently been incorporated by a Mr Adam Di Gioacchino. Mr Di Gioacchino had been in the concreting business for 21 years himself. Jescor furnished a quotation dated 7 July 2004 for a total of \$19,580 for *'excavation, preparation and supply of all materials to pour concrete slabs for two units and garages including blinding'*. The quoted price included a base sum of \$17,800 which included an allowance of 78m³ concrete *'25mpa'*. The quotation also included estimated Goods and Services Tax in the sum of \$1,780. It referred to certain *'additional costs'*, namely *'concrete pump for blinding and concrete pump for slabs'*. No particular figure was identified for these *'additional costs'*.
- 3 Mr Lloyd telephoned Mr Di Gioacchino and accepted the quotation. Mr Lloyd had provided Mr Di Gioacchino with all of the documents which he needed to give his quotation. In particular, he and Jescor were provided with the engineering design for the slab prepared by James I Morgan and Partners, Consulting Engineers and a soil report from Southern Geotechnical Pty Ltd. The soil report was dated 10 March 2004. In accordance with Australian Standard 2870-1996 the report classified the site at No. 36 as *'Class P (Problem site – abnormal moisture conditions)'*. The soil report suggested a slab footing system and observed the following site features:
 - The evidence of recently removed vegetation on the site.
 - The presence of proximate vegetation on adjacent road reserve.
 - The evidence of recently removed structures.
 - The evidence of recently removed paving and services.
- 4 It will be recalled that Mr Lloyd had demolished the old house on the site in February 2004. The report stated that in the absence of the observed features described above the site would have been classified as *'H'*, viz. highly reactive. The slab design included a notation:

‘All beams to be taken down in 15mpa conc so that a minimum allowable bearing capacity of 100Pa is achieved at 100mm min into natural undisturbed soil’.

- 5 The slab also contained a note *‘all beams/blinding to be taken down to a level that is 300mm below a 1:1 line of influence to the invert of the pipe in the easement’*. The building permit issued by Gibson Dell Pty Ltd under the *Building Act 1993* and the *Building Regulations 1994* provided for a number of inspections of the site. Relevantly for the slab which Jescor had been engaged to pour there was to be one pre-slab inspection and one steel inspection for slab on ground. The first inspection would check the excavations, the second would inspect the situation immediately prior to the concrete pour where the necessary trenches had been dug and filled with blinding cement. The polythene sealers and/or mesh reinforcements should have been in place ready for the core for the second inspection. Mr Gioacchino and Jescor’s workers commenced excavation on 24 August. The crew included Mr Di Gioacchino’s father and his uncle. They were offsite on 25 and 26 August and completed the excavation to their satisfaction preparatory to the first inspection on 27 August. Gibson Dell inspected on 30 August. It refused to pass the work raising a number of matters most significantly *‘sewer beam to be min 2.5 deep’*. The trenches had been dug by Jescor to 600m. The requirement from Gibson Dell flowed from the second note on the slab plan which is quoted above which required the trench following the sewer easement to go to a level beneath the *‘invert’* viz. lower side of the sewer pipe. As a result of the work not passing its first inspection Mr Lloyd had a telephone conversation with Mr Di Gioacchino. Mr Lloyd said it was clear to him that Mr Di Gioacchino would not carry out the additional excavation work required by the building surveyor. As a result, Mr Lloyd suggested that a small front end loader owned by one of Mr Lloyd’s friends be used. Mr Di Gioacchino agreed.
- 6 Mr Lloyd said that the excavation work was quite difficult because it was necessary to move the front end loader across the trenches which had already been dug by Jescor without collapsing the trenches or bogging the machine. Hence each of those trenches had to be bridged. For the same reason no large vehicle could be brought into the immediate vicinity of the dig so that he, Mr Lloyd had to assist his friend by standing by with a wheelbarrow to collect the spoil from the excavation and remove it to the rear of the site periodically when the barrow was full. Mr Lloyd said that he arranged for Jescor to pour concrete on the afternoon of Friday 3 September. This arrangement he said was made on Thursday 2nd. He called Jescor on Friday afternoon telling Mr Di Gioacchino that the site was ready for pouring to commence but no one from Jescor attended the site that afternoon. Overnight there was some rain. Pouring commenced on site at 11 am Saturday 4 September. The trenches were filled with 100mm of *‘blinding’* on that day. On the days following viz. 6 September, Jescor finished laying polythene and metal reinforcements in preparation for the pour. The second inspection took place on or about 8 September and the

building surveyor passed the site on this occasion. The final pour took place on 9 September. The concrete pump arrived on 6 at 6.30 am. There had been rain overnight but it had stopped by then.

- 7 The steel reinforcement mesh was in accordance with usual practice placed on top of '*bar chairs*' which are intended to hold the mesh above the floor of the trenches and to the requisite height within the slab. Mr Di Gioacchino said that when Mr Lloyd noticed that some of these '*bar chairs*' were sagging below their intended level because of the softness of the soil he told Mr Di Gioacchino to lift the mesh. Mr Di Gioacchino said it was common practice for concreters to have hooks to lift reinforcement mesh which tended to sag, particularly at the corners of the slab. Here however the sagging seemed to be more widespread. Mr Di Gioacchino said that he simply did as Mr Lloyd requested. During the pour it was, he said, '*go go*'.
- 8 Jescor had delineated the outline of the slab with wooden formwork which was held in place by stakes in the form of star pickets. Near the boundary on one side the form work and the pickets were propped against the boundary fence. Because of the wet ground the star picket stakes were moving and not holding firm. As a result in a number of places the wooden formwork which was to delineate the edge of the concrete '*bowed*'. In some places where the ground had not been completely backfilled to the lower level of the wooden formwork the polythene bellied out under the form work with concrete escaping under the formwork. In one place near a courtyard area the slab thereby extended so far beyond its intended boundary that Mr Di Gioacchino chipped the excess away with a crowbar at the end of the day. Mr Lloyd says that Mr Di Gioacchino agreed to return at some later stage with a concrete cutter to trim back the over pour at this point. Mr Di Gioacchino said he made this promise with regard to any areas of over pouring which required trimming back. He said that since most of the walls in this development were to be of cladding rather than brick veneer it was desirable that the person erecting the frame '*chalk out*' the line of the frame before the final trim took place. He said therefore he did not return immediately to do any cutting.
- 9 By the end of the day all seemed to have gone substantially well. The Jescor crew departed apparently on good terms with Mr Lloyd.
- 10 In the days that followed Mr Lloyd said that his inspection of the slab as poured made him increasingly angry. He noted that there were bulges in a number of places and that part of the reinforcement mesh had been exposed to view at the point where Mr Di Gioacchino had chipped away the edge with a crowbar. Mr Lloyd said that apart from the bulging and bowing on the day of the pour he found that some of the lines established with string had not been '*true*'. Further, he says he observed that in the garages the fall of the concrete was in the wrong direction. He said he lost faith in Mr Di Gioacchino and his company and did not intend to have them back on site.

11 On 16 September 2004 Mr Di Gioacchino on behalf of Jescor faxed a tax invoice to Mr Lloyd. It sought payment of a total of \$23,969 inclusive of Goods and Services Tax. In addition to the basic charge of \$17,800 plus Goods and Services Tax, it charged \$2,210 for 13.8m of extra concrete and \$490 and \$1,290 for the attendance of a concrete pump for 'blinding' and the slab pour respectively. Mr Lloyd did not make payment or accept liability. There seems to be some dispute as to who was avoiding whom but the parties did not enter into any form of dialogue until Mr Lloyd sent a facsimile transmission dated 18 November listing what were said to be 'faults' in the slab. There were some 11 alleged faults as follows:

1. Not one side is straight – all have bows.
2. Front room out of square slab edge not to street line.
3. Garage floor fall to rear causing pooling at least 25mm in back garage face south therefore will likely flood during storms.
4. Long side (east wall) has a large bow in it, at least 30mm.
5. Brick rebate is only for single brick should be for two bricks and edges very rough.
6. Excessive over pour (waste) at concrete all round slab.
7. Wax to dining, Unit 1, is out by 100mm.
8. Step at front 100mm too wide.
9. Jagged edge in courtyard, where you chipped it. Due to bow due to poor cropping.
10. Both rear rim edges have bows in them.
11. Slab edge is very rough should have been smooth.

This house is constructed of plywood and the sheets must run past slab 100mm. It is not possible at this stage to do this.

...

I feel, as I told you, that this slab is not as I expected not as you promised. Not a very professional job.

The time taken to prepare and pour was excessive. Heavy rain fell in between start and finish.

The surface has dips and making it hard to glue flooring to slab.

The main complaint is that not one line is straight, due to not proper propping the form work very shoddy.

All nails are still in place these defects have delayed the progress of the project as I must decide the best course of action to rectify the faults.

To put it bluntly I am very p....d off.

Roger Lloyd.

- 12 On 25 January 2004 Jescor Contracting commenced proceedings in the Civil Claims List in the Tribunal seeking its invoiced charge of \$23,969. On 8 April by order of the Deputy Presidents in charge of the Civil Claims and Domestic Building Lists, Jescor's claim was transferred to the Domestic Building List. Solicitors acting for Mr Lloyd filed a counterclaim dated 8 September 2005 seeking damages, interest and costs in an amount exceeding the face value of Jescor's claim.
- 13 Mr Lloyd says that early in the new year of 2005 he began noticing cracking in the slab.

EXPERT OPINIONS

- 14 Mr Lloyd engaged engineering consultant Mr David Taylor to assess the situation. He made his first attendance on site on 31 May 2005. Mr Taylor said that his preliminary investigation indicated that there had been '*excessive displacement of reinforcing mesh intended to be located close to the top of the surface of the slab*'. This he said was the cause of the cracking. He said that:

One crack is ... 1.0mm in width which is well in excess of that normally experienced. Crack widths can be expected to become more severe with time and possibly in extent.

- 15 He said that brittle floor finishes, eg. tiles '*are at risk of being damaged at crack locations*'. He also observed that:

The structural adequacy (strength and stiffness) of the raft slab to adequately resist forces resulting from vertical loads and the effects of foundation soil and movements have been compromised.

- 16 Mr Taylor furnished the final report in September 2005. In this final report Mr Taylor observed:

Cover meter testing and direct measurements have shown that the F82 slab mesh reinforcement to be located much deeper below the slab surface than the 20mm top cover specified. Cover dimensions were found to be variable up to a maximum of 120mm beyond which cover readings became less reliable. Of 124 measurements taken over the surfaces of the slab, 50% exceeded 100mm and 70% exceed 80mm.

- 17 He also said that his tests '*failed to detect any of the 16mm diameter special reinforcing bars specified to be provided at 150 cts in the two areas of the slab cantilevering over the adjacent drainage easement, along the faceline of the west edge beam*'. On the southern edge of the raft slab trench mesh was exposed and located near to the bottom of the edge beam. Mr Taylor advocated the use of carbon strip reinforcements along the full length of the relevant beams and also at the southern edge where the reinforcement mesh had become exposed. He gave an indicative cost for these procedures at \$35,000 inclusive of Goods and Services Tax. Mr Taylor attached a letter from Vertitech Australia Pty Ltd which is the most prominent supplier of the carbon strip reinforcement procedure in Australia costing these works at

\$120 to \$140 per lineal metre. Also in September 2005 solicitors acting for Mr Lloyd engaged Mr Tony Croucher of Buildspect Building Consultants to cost remedial works on the slab. In a report dated 27 September 2005 Mr Croucher costed the remedial works at \$64,284.

- 18 Meanwhile solicitors acting for Jescor engaged Mr D.J. Tsolakis as its engineering consultant. Mr Tsolakis made his first inspection in May 2005 and then carried out further investigations including the taking of core samples on 27 September 2005 and 29 October 2005. In a revised report dated 31 October 2005 Mr Tsolakis concluded that the observed surface cracking on the slab was within the tolerances allowed by the relevant Australian standards and by the Building Commission. In themselves, he said, they would not constitute a defect. He agreed however that the metal reinforcements were below their required level in accordance with the slab design. He found that the slab reinforcement '*varied in depth from 42mm to 78mm*'. His findings were based on core samples rather than the cover meter employed by Mr Taylor. These findings are indicative of a less significant departure from the design standards. Nevertheless Mr Tsolakis remained of the view that the structural stiffness and integrity of the slab had been compromised and remedial action was necessary.
- 19 Until the expert inspections referred to, neither Mr Lloyd nor Jescor was aware of the seriousness of the problems. Mr Lloyd had continued with the construction of the frame. By the time Mr Tsolakis inspected at the end of May 2005 the frame was 75% complete. Since then Mr Lloyd has concentrated on work at the first storey level leaving the ground or slab level as far as possible alone.
- 20 Mr Tsolakis suggested two possible forms of remediation: one was to the same effect as Mr Taylor's proposal employing the carbon fibre reinforcement. He estimated the cost of these works including the provision of a fibre strip to cover the exposed mesh at the southern edge at \$30,000 to \$35,000. He said that had the frame not progressed to 75% completion in May 2005 an alternative remediation process could have been implemented for approximately \$6,500 entailed scabbling the slab and applying carbon fibre strips to the exposed mesh on the edge. This could have been done at that price immediately after the pour because of the absence of the complication now existing with the frame built. The fitting would require cabling of the existing slab with a jack hammer and applying a bonding agent such as bondcrete to bond a new 600mm thick layer of concrete over the entire slab. As things now exist the frame would have to be dismantled and reconstructed following this thickening process. His estimate as at the date of his report for the entire works necessary for this to be done was of the order of \$25,000 to \$35,000.

APPLICANT'S CONTENTIONS

- 21 Mr Dickenson on behalf of Jescor contended that there is no basis for any abatement or set-off against the amounts claimed by Jescor. Therefore there should be an order in its favour for the amount quoted (viz. \$19580) and amounts for extra concrete and a concrete pump totalling \$4,389. There should be an order in favour of Jescor in the sum of \$23,969.00 he contended. In so far as remedial work was required to the concrete Jescor should not be rendered liable for these amounts. The building permit made Mr Lloyd as the owner builder liable for compliance with the terms of the plans. He gave directions on the day of the pour and Jescor complied with those directions. In particular Mr Di Gioacchino lifted the reinforcement mesh at Mr Lloyd's direction all over the slab rather than merely at the edges where the hook lifting procedure was according to Mr Di Gioacchino not infrequently required.
- 22 Mr Dickenson said that if contrary to his primary submission, Jescor was rendered liable for any rectification work it should not be costed according to the calculations provided by Mr Croucher. He said that those figures were artificially inflated allowing for the payment to Mr Lloyd as the owner builder of 30% on costs for supervision. There were also contingency allowances of 10%. In describing work which had already been done on site Mr Lloyd had disclosed the availability to himself of labourers at \$20 or \$30 an hour. He said that his own charge out rate was \$35 an hour and insofar as Mr Croucher allowed figures for labouring work in excess of these sums they should not be admitted. In particular Vertitech was the specialist in carbon fibre reinforcement and it would be inappropriate and unnecessary to provide for any supervision by Vertitech. The figures calculated by Mr Taylor which simply allowed for Vertitech's own charges should be proper basis for any rectification cost, if contrary to his primary submission any were to be awarded against his client.

RESPONDENT'S CONTENTIONS

- 23 Mr Pumpa submitted that in accordance with the costings of Mr Croucher the respondent's claim should be allowed in the sum of \$42,358. An initial claim for rectification of a garage floor was not pressed. The figure claimed was after set off against amounts owed to Jescor. Mr Pumpa submitted that Jescor was a 'builder' in accordance with the terms of the *Domestic Building Contracts Act 1995* as at the relevant date Mr Lloyd had entered into no contract to on-sell either of the units. Any arrangement that he might have had with his daughter was too uncertain he said to be characterised as a contract. He referred to *Australia and New Zealand Banking Group Limited v Frost Holdings Pty Ltd* [1989] VR 665.
- 24 Mr Pumpa said that Jescor's work was in breach of the warranties implied by Section 8 of the *Domestic Building Contracts Act* and Jescor was as a builder disabled from seeking more than its quoted price by virtue of Section 16 of the Act. Insofar as there had been an attempt in the quotation

to reserve extra costs, for instance for concrete pumps, this was not lawful or effective. He said the detail of provisional sums must be set out in writing in accordance with Section 22 of the *Domestic Building Contracts Act*.

- 25 Mr Pumpa said that Mr Croucher's figures should be accepted. He referred to Mr Lloyd's evidence that the 30% supervision charges were in accordance with what he would expect to earn if he were undertaking work himself.
- 26 According to Mr Pumpa there was no occasion to diminish proportionately the liability of Jescor in accordance with Part IVAA of the *Wrongs Act* 1958. Neither the independent building surveyor Gibson Dell Pty Ltd nor the designer of the slab both of whom had been the subject of some incidental criticism in the course of the hearing were parties to the proceeding and hence there is no basis for diminishing Jescor's proportionate liability. He referred to Section 24AI(3) of the *Wrongs Act*.
- 27 There was no occasion he said to diminish the liability of Jescor on the basis of an alleged failure to mitigate damage on the part of Mr Lloyd. The onus of proving a failure to mitigate lay upon Jescor and this was a question of fact to be determined in light of all the circumstances. It was a matter of whether Mr Lloyd had acted reasonably. He referred to *Gull v Saunders* (1913) 17 CLR 82.
- 28 Finally Mr Pumpa referred to the conditions implied into the provision of services by Section 32J of the *Fair Trading Act* 1999.

CONCLUSIONS

- 29 At the outset I reject the contention that somehow or other Mr Lloyd should be held responsible for the quality of Jescor's work. The fact that Mr Lloyd may have called on Mr Di Gioacchino to use a hook to lift the mesh reinforcing in a number of places on the slab area on the day of the pour does not absolve or mitigate Jescor's responsibility for the departure from the design standard. It was not suggested, for instance, that the mesh was too high as a result of having been imprudently lifted. The problem identified by the experts engaged by both parties is that the mesh is too low.
- 30 Doubtless as a matter of public law or perhaps to an end purchaser of one or other or both of these units Mr Lloyd might be responsible for the state of the slab. Nevertheless, as between Mr Lloyd and Jescor, Jescor was responsible for performing in accordance with its contractual obligations. If for instance, Mr Di Gioacchino had said something to the effect that the conditions for the pour were not satisfactory and his company could not be responsible for the quality of the work if the pour went on and Mr Lloyd insisted, these circumstances might relieve Jescor of liability for imperfect work. See Brooking *On Building Contracts* (4th Edition) [11.2] and the authorities there referred. The learned editors state:

In order to escape liability for a defect in circumstances where the contractor can perceive that an instruction or direction might result in a defect arising, a warning sufficient to establish waiver or estoppel must be shown. [11..2]

- 31 Here no such thing happened. At no stage did Mr Di Gioacchino urge that the pour be aborted. Mr Di Gioacchino asserted that Mr Lloyd had the day before the pour told Mr Di Gioacchino senior, his father, that Jescor should arrive to pour concrete the following day or not bother coming back to the site. Mr Lloyd did not distinctly admit or deny saying such a thing but admitted that he was feeling very *'twitchy'* in light of what he regarded as the unreasonable length of time being taken in the preparations for the pour. This is one of the matters which he specifically complained of in denying liability for the amount charged by Jescor. Having seen Mr Lloyd under cross-examination in the witness box he presents as a blunt personality with a quick temper. I could well believe that he made the comment to Mr Di Gioacchino senior which was attributed to him. Nevertheless there is no evidence of a clear warning made on behalf of Jescor.
- 32 Again, whether Mr Taylor is right in saying that the observed surface cracking constitutes a defect in the slab or whether Mr Tsolakakis is correct in saying that it does not is beside the point. Both experts are agreed that remedial action is necessary to establish the structural integrity and stiffness which the design of the slab calls for.
- 33 It is unnecessary for me to consider the interesting contention that in the circumstances described, Jescor would be regarded as a builder rather than a sub-contractor. Even if I accept that view of things, which has a certain measure of plausibility in light of the relevant statutory definitions, the point or points said to be established by a finding that Jescor is a builder do not as it seems to me take the resolution of the present dispute much further. True it is that Mr Lloyd would have the benefit of the implied warranties under Section 8 of the *Domestic Building Contracts Act* if Jescor was to be regarded as a builder. However, the evidence from both sides establishes that the slab was not erected in accordance with the design. Jescor's obligation is to pour the slab in accordance with the design with the metal reinforcement at a particular level. This it failed to do. As *Brooking* observes:
- Building work which is not in conformity with the contract is defective. Defective work is a breach of the contract and, in the absence of contractual provisions to the contrary, gives rise to an entitlement in the proprietor to rectify the defective work and claim damages against the builder. [11.1]
- 34 It is unnecessary to resort to the implied warranties. Moreover, it is also unnecessary to refer to or rely upon warranties or conditions implied by the *Fair Trading Act* in particular Section 32J. The effect of the form of quotation was in general terms to seek to reserve to Jescor the right to charge extra for the provision of concrete pumps. There was no suggestion

that the charges for the concrete pumps had not been incurred. Rather Mr Pumpa's submission was that since these were '*provisional quantities*' and details of them were not given in accordance with Section 22 of the *Domestic Building Contracts Act*, no amounts could be recovered for them. In contrast to Section 31(2) of the *Domestic Building Contracts Act* to which I will turn in a moment, no particular civil consequence is attached by the statute to a breach of Section 22. Given that both parties to the contract covering the concrete pour were '*in the trade*', if there has been a breach of Section 22 of the *Domestic Building Contracts Act* 1995 it is at best technical. I doubt there is any likelihood of a prosecution. However this is a matter for the authorities and not for me. Even if I accept that Jescor has contravened Section 22, no particular civil consequence is attached to that and no more general doctrines of illegality have been invoked. I put Section 22 of the Act to one side.

- 35 A more fundamental point which does not seem to have been taken up at all is that Section 31 of the *Domestic Building Contracts Act* requires a major domestic building contract inter alia to be in writing. Because of the sums of money involved here and accepting for the purposes of the argument that Jescor is to be regarded as a '*builder*' within the meaning of the Act, in these circumstances it would appear that the mere giving of a written quotation which is accepted by word of mouth would not constitute compliance with Section 31. Section 31(2) of the Act in contrast to Section 22 provides that contravention of the obligations laid down by Section 31(1) means that the major domestic building contract is of '*no effect*'. Nevertheless, it remains possible for a builder in such circumstances to recover on a *quantum meruit* *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Harris v B.L. & M. Grollo Plant Hire* [2004] VCAT 1617.
- 36 The issue as to whether Jescor is or is not a builder therefore ultimately leads nowhere.
- 37 Whilst I was referred to a number of authorities including leading authorities such as *Belgrove v Eldridge* (1954) 90 CLR 613 as to the measure of damages for defective building work none of these seem to deal specifically with the issues that were agitated before me, namely whether allowance should be made for supervision rather than an allowance strictly related to the cost of paying specialist contractors such as Vertitech Pty Ltd as was contended for by Mr Dickenson on behalf of Jescor. The evidence of Mr Taylor was clear that Vertitech could undertake the task of strengthening the slab by the application of carbon fibre strips without supervision. They are the experts in the field. Insofar as there might be an allowance to Mr Lloyd for supervision, there would be an additional issue as to whether damages should be awarded against what is in substance remuneration for one of the parties as distinct from an outlay by that party. Mr Croucher justified the allowance of sums of money for Mr Lloyd himself on the basis that there was an opportunity cost. Mr Lloyd as a master builder being engaged in this rectification work was precluded from

undertaking alternative remunerative work. Unsurprisingly Mr Lloyd himself concurred in this view.

- 38 As it is I am not required to deal with the interesting question as to whether damages can be awarded to remunerate a party for his own time as distinct from an outlay which he might make. An award of damages is intended in these circumstances to cover the expenditure which the innocent party necessarily incurs to put himself in the same position as if the contract had been performed. There is no occasion and no basis for an award of damages beyond that. The amounts chargeable by Vertitech form the proper basis for the specialist reinforcement work which is necessary to rectify this work and I adopt the figure of \$35,000 appearing in Mr Taylor's revised report as the proper allowance.
- 39 There was however one point of unclarity. Taken literally, Mr Taylor's answers to Mr Dickenson in cross-examination would have it that the allowance which he made would cover all necessary expenditures to carry out the rectification work. This would doubtless be true if the carbon strip reinforcements were to be applied to a bare concrete slab. As it is, framework and construction to lock-up stage has now been completed. Axiomatically the carbon fibre reinforcement strips must be continuous, therefore there must be a break made in the existing internal walls where the strips are to be laid. The walls will need to be reinstated following the completion of the reinforcement work. In his indicative costings Mr Taylor does not directly refer to this carpentry work as part of the relevant item. He produced a quotation from Vertitech which gave a varying charge per linear metre '*depending on the degree of preparation works required*'. In the end it is unclear to me whether Mr Taylor's costings and the Vertitech quote are intended to cover the carpentry work or not. Mr Croucher said that since Vertitech did not hold itself out as skilled in carpentry he would not regard it as appropriate to leave this carpentry work to Vertitech. In his costings Mr Croucher allowed \$360 for the cutting of the internal walls and \$660 for their reinstatement, a total of \$1,020. That amount should be added to Mr Taylor's quotation for the works.
- 40 In addition as Mr Di Gioacchino ultimately conceded it was part of Jescor's contractual obligation to excavate the deeper trench along the sewerage easement. This his company failed to do and the claim made by Mr Lloyd for \$610 covering \$360 machine hire and \$250 for labour is in the circumstances reasonable and should be awarded to Mr Lloyd.
- 41 In light of my conclusions as to the operation of Section 22 of the *Domestic Building Contracts Act* there is no occasion for disallowing any part of the charges made by Jescor for concrete pumps. Jescor clearly gave itself the elbow room in the form of its quotation to make an additional charge for the use of the concrete pumps, the quotation was accepted by Mr Lloyd in this form.

- 42 Nor is there any basis for the claim made by Lloyd for allegedly excessive concrete. The concrete for blinding was shown on the engineering plans as '15psa'. In fact the concrete supplied was 20 psa. Mr Di Gioacchino explained that 15 psa concrete could not be delivered through a concrete pump since it was clearly contemplated from the form of the quotation that a concrete pump would be used and since Mr Di Gioacchino's evidence that 15 psa concrete could not be delivered through such a pump it is clear that the parties contemplated that some more expensive grade of concrete might be used. I should note that in cross-examination Mr Di Gioacchino conceded that the charge in his company's invoice for concrete was excessive by 1m³ and that the charge should be diminished to that extent.
- 43 Finally I come to the contention put by Mr Dickenson that since there was no claim for abatement by Mr Lloyd, Jescor should have a claim in its favour for the invoiced value of its work. True it is that the claim mounted by Mr Lloyd was pleaded as a counterclaim, not as a setoff and not as an abatement. Nevertheless, the points relied upon by Mr Lloyd all go to the quality of the work. Whatever the form of Mr Lloyd's case, it is in substance a defence to Jescor's claim. In the famous case *Mondel v Steel* [1835-42] All ER Rep. 511, 515-6 Parke B. said:

It must however be considered that in all these cases of goods sold and delivered with a warranty and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a class action, the amount of damages which he has sustained by a breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that amount, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more.

- 44 With regard to commercial sales of goods, this rule is codified now in Section 59 of the *Goods Act* 1958. In substance if not in form, this is what Mr Lloyd has defended the claim against him in accordance with the principle of *Mondel v Steel*. He has gone further and made a counterclaim for the amount of his damage insofar as it exceeds the invoice cost of the work supplied by Jescor.
- 45 I now turn to the net position between the parties. Jescor's invoice price of \$23,969 should be decreased by \$160 by reason of the erroneous calculation of the amount of concrete actually used so that it becomes \$23,809. Mr Lloyd succeeds on his claim for rectification costs in accordance with Mr Taylor's costing together with an additional charge for carpentry work yielding a figure of \$36,020 to which should be added \$3602 Goods and Services Tax, making a total of \$39,622 to which should be added \$2,300 for the cost of concrete cutting allowing for a contractor

and Mr Lloyd's own labourer and \$610 being the cost of digging the deep trench. The total amount therefore for which Mr Lloyd's defence and counterclaim should succeed is \$42,532.00. This would defeat the entirety of the claim by Jescor leaving a net amount payable to Mr Lloyd of \$18,563.

- 46 It seemed at one stage that Jescor was going to contend that its liability should be diminished on the basis that Mr Lloyd had failed to mitigate his loss on the basis that a cheaper remedy for the structural weakness in the slab could have been achieved by the addition of a thickening layer which Mr Tsolakis costed at approximately \$6,500. I did not understand Mr Dickenson to press any such argument in his closing submissions. Such an argument could not in my view have succeeded. The burden to show a failure to mitigate damage is upon the contract break-up. What the innocent party could reasonably have been done must be judged without the wisdom of hindsight. When Mr Lloyd elected to press on with building, neither he nor Jescor were aware that there was any fundamental structural problem with the slab. In those circumstances it was not unreasonable for Mr Lloyd to proceed with further building. *Banco De Portugal v Waterlow* [1932] AC 452, 506; *McGregor On Damages* [322]. Moreover the thickening of the slab may have required the consent of the Responsible Authority to a modification of the endorsed plans on the planning permit for the units – something which could not simply be presumed to be forthcoming.

COSTS

- 47 I have heard no argument as to costs and so I will reserve them.

MFM:RB