[HIGH COURT OF AUSTRALIA.]

BELLGROVE . . . . . APPELLANT;
PLAINTIFF,

AND

ELDRIDGE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 14, 17.

SYDNEY, *Aug.* 20.

Dixon C.J., Webb and Taylor JJ.

Building—Contract for erection of house—Breach by builder—Faulty foundations—Instability of structure—Demolition—Reconstruction—Measure of damages.

In an action for damages for breach of contract brought by a building owner against a builder, it appeared that the builder had substantially departed from the specifications, and that, by reason of such departure, the foundations were defective and the building was unstable.

Held that the measure of damage was not the difference between the value of the building as erected and the value it would have borne if erected in accordance with the contract but the cost, in excess of any amount of the contract price unpaid, of reasonable and necessary work to make it conform to the contract plus consequential losses by reason of the breach.

Held further, that, in the circumstances, demolition of the building and rebuilding was reasonable and necessary to provide a building in conformity with the contract.

Decision of the Supreme Court of Victoria (*O'Bryan* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Maurice Louis Bryan Bellgrove commenced an action on 19th April 1951 in the Supreme Court of Victoria, against Marjorie Alberta Eldridge. The plaintiff claimed the sum of £805 14s. 0d. as money due under an agreement dated 6th June 1949, whereby he undertook to build a house on the defendant's land, Block 15 Southey Road, Sandringham, Victoria and as extras supplied at defendant's request in building the said house. By counterclaim dated 5th May 1952 the defendant alleged that by reason of specified breaches of the contract on the part of the plaintiff the house was worthless and claimed damages.

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The action was heard before *O'Bryan* J. who, in a written judgment delivered on 28th August 1953, held (1) that the plaintiff had not established his claim (2) that by reason of the breaches of contract which had been established the defendant was entitled to have the existing building demolished and a new building erected in accordance with the contract and specifications. Consequently judgment was entered for the defendant on the claim and for the sum of £4,950 on the counterclaim with costs of the action, including the counterclaim.

From this decision the plaintiff appealed to the High Court of Australia.

The facts and the argument sufficiently appear in the judgment hereunder.

A. D. G. Adam Q.C. and *G. B. Gunson*, for the appellant.

M. J. Ashkanasy Q.C. and *J. W. J. Mornane*, for the respondent.

Cur. adv. vult.

Aug. 20.

THE COURT delivered the following written judgment :—

On 6th June 1949 the appellant, a builder, entered into a contract with the respondent to build for her a two-storey " brick house villa " in accordance with certain plans and specifications for the sum of £3,500. Provision was made by the contract for the making of progress payments and by the time the disputes, out of which this litigation has arisen, had fully developed the respondent had paid to the appellant £3,100 of the contract price. The action which has led to this appeal was instituted by the appellant who claimed to recover the balance of £400 together with certain other moneys said to be due for extras and as adjustments under a rise and fall clause in the contract. The appellant's claim was denied by the respondent who also claimed, by way of cross action, for damages in respect of substantial departures from the specifications which, it was alleged, had taken place and which, it was said, resulted in grave instability in the building as erected.

The result of the trial was that the appellant failed entirely in his claim and judgment was given for the respondent in the action for £4,950. No question now arises concerning the appellant's unsuccessful claim and the only question with which we are concerned is the assessment of damages made by the learned trial judge upon the cross action.

The main matters of complaint by the respondent related to the composition of the concrete in the foundations of the building

and of the mortar used in the erection of its brick walls. The specifications provided that all concrete, with an immaterial exception, should be in the proportions of five parts of metal, two and a half parts of sand and one part of cement. The components of the mortar, for bricklaying purposes, were to be ten parts of sand, one and a half parts of cement and one part of lime. The evidence, including the result of the analysis of what were found to be typical specimens taken from the concrete foundations, established to the satisfaction of the learned trial judge that there had been a very substantial departure from the specifications and, indeed, such a departure as to result in grave instability in the building. It is unnecessary to refer to the evidence in detail for the appellant did not seek to challenge the finding of his Honour on this point. But after having, with the aid of abundant evidence, reached his finding on this aspect of the case the learned trial judge proceeded to consider the question whether there was available for the remedying of this defect any practical solution other than the demolition of the building and its re-erection in accordance with the plans and specifications. On this matter his Honour said : " What then is the remedy for such a breach of contract ? It has been urged upon me that the matter may be remedied in one of two ways. The building might be under-pinned in the manner suggested by the plaintiff in his evidence, or the foundations might be removed and replaced piecemeal, as was outlined in the evidence of Mr. Ahearn. I am not satisfied that either of these operations could in this case be carried out successfully. The difficulties of such an operation are aggravated by the paucity of cement in the mortar and by the wet condition of the ground upon which this building stands. The weakness of the mortar may cause a collapse in the brick-work if the under-pinning were carried out in the manner described either by the plaintiff or by Mr. Ahearn. The defendant is entitled to have her contract fulfilled, and if it is not, to be awarded such damages as will enable her to have at least a substantial fulfilment of her contract by the plaintiff. In this case the departure from contract is in my opinion so substantial that the only remedy which will place the plaintiff in substantially the position in which she would be if the contract were carried out, is to award her such damages as will enable her to have this building demolished and a new building erected in accordance with the contract and specifications ". At a later stage his Honour added : " I may say at this stage that I have had the advantage of inspecting this building in the presence of both counsel and both agreed that what I saw on that inspection I might treat as evidence in the action,

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and that for purposes of this trial the house should be regarded as being put in as an exhibit. I have derived a great advantage from my inspection of the house and during that inspection portion of the foundations were exposed to view and some portions of the concrete removed for my inspection"—and, again, speaking of the possibility of under-pinning the house or replacing its existing foundations, he added: "The only remedy for this, apart from demolishing the building, is either to under-pin the building as suggested by the plaintiff or to remove the existing foundations in small sections and replace them by new foundations. It is extremely doubtful if this work could be successfully done or would be a proper remedy for the defects now existing. It would be a hazardous operation at the best. That is why in my opinion the defendant's damages should be assessed on the basis of demolition and re-construction".

In the result his Honour gave judgment for the respondent in the action for £4,950 which represented the cost of demolishing and re-erecting the building in accordance with the plans and specifications, together with certain consequential losses less the demolition value of the house and moneys unpaid under the contract.

The first objection to this finding was a submission of law advanced by the appellant. This submission assumes the validity of all of his Honour's findings but asserts that there was evidence upon which a finding was not only justifiable but inevitable that the building was of some value, over and above demolition value, at the time of the breach. In particular, it was said, the building as it stood was saleable, at least, to some builders who were prepared to attempt the rectification of the existing defects by methods less drastic than demolition and rebuilding. This being so, it was contended, the proper measure of damages was the difference between the value of the house—and presumably the land upon which it stands—ascertained by reference to the amount which could be obtained for it on such a sale and the value which it would have borne if erected in accordance with the plans and specifications. To support this contention counsel for the respondent referred to the general proposition that damages when awarded should be of such an amount as will put an injured party in the same position as he would have been if he had not sustained the injury for which damages are claimed. Accordingly, it was said, damages should have been assessed by reference to the value of the building as it stands and the value it would have borne if erected in accordance with the plans and specifications since this was the true measure of the respondent's financial loss. Whilst

we readily agree with the general proposition submitted to us and with the remarks of Lord *Blackburn* in *Livingstone* v. *Rawyards Coal Co.* (1) which were cited to us, we emphatically disagree with the submission that the application of that proposition or the general principle expounded by his Lordship produces the result contended for in this case. It is true that a difference in the values indicated may, in one sense, represent the respondent's financial loss. But it is not in any real sense so represented. In assessing damages in cases which are concerned with the sale of goods the measure, prima facie, to be applied where defective goods have been tendered and *accepted*, is the difference between the value of the goods at the time of delivery and the value they would have had if they had conformed to the contract. But in such cases the plaintiff sues for damages for a breach of warranty with respect to marketable commodities and this is in no real sense the position in cases such as the present. In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract. One or two illustrations are sufficient to show that the prima facie rule for assessing damages for a breach of warranty upon the sale of goods has no application to the present case. Departures from the plans and specifications forming part of a contract for the erection of a building may result in the completion of a building which, whilst differing in some particulars from that contracted for, is no less valuable. For instance, particular rooms in such a building may be finished in one colour instead of quite a different colour as specified. Is the owner in these circumstances without a remedy? In our opinion he is not; he is entitled to the reasonable cost of rectifying the departure or defect so far as that is possible. Subject to a qualification to which we shall refer presently the rule is, we think, correctly stated in *Hudson* on *Building Contracts*, 7th ed. (1946), p. 343. "The measure of the damages recoverable by the building owner for the breach of a building contract is, it is submitted, the difference between the contract price of the work

(1) (1880) 5 App. Cas. 25, at p. 39.

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or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach ". Ample support for this proposition is to be found in *Thornton* v. *Place* (1); *Chapel* v. *Hickes* (2) and *H. Dakin & Co. Ltd.* v. *Lee* (3). (See also *Pearson-Burleigh Ltd.* v. *Pioneer Grain Co.* (4) and cf. *Forrest* v. *Scottish County Investment Co. Ltd.* (5) and *Hardwick* v. *Lincoln* (6)). But the work necessary to remedy defects in a building and so produce conformity with the plans and specifications may, and frequently will, require the removal or demolition of some part of the structure. And it is obvious that the necessary remedial work may call for the removal or demolition of a more or less substantial part of the building. Indeed—and such was held to be the position in the present case—there may well be cases where the only practicable method of producing conformity with plans and specifications is by demolishing the whole of the building and erecting another in its place. 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. 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 ". (See *Restatement of the Law of Contracts*, (1932) par. 346). 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

(1) (1832) 1 M. & Rob. 218 [174 E.R. 74].
(2) (1833) 2 C. & M. 214 [149 E.R. 738].
(3) (1916) 1 K.B. 566.
(4) (1933) 1 D.L.R. 714.
(5) (1915) S.C. 115.
(6) (1946) N.Z.L.R. 309.

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. But the question whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective foundations seriously threaten the stability of a house and when the threat can be removed only by such a course. That work, in such circumstances, is obviously reasonable and in our opinion, may be undertaken at the expense of the builder. As we have already said the appellant does not seek to challenge the finding of the learned trial judge that the existing foundations are such as to threaten the stability of the building and the question which arises in this case is therefore whether demolition and rebuilding is the only practicable method of dealing with the situation that has arisen. The learned trial judge thought it was and after hearing and considering the arguments on this appeal we agree with him. There was evidence from some witnesses in the case that stability might be assured by under-pinning the existing foundation, but Mr. Ahearn, an architect, upon whose evidence the learned trial judge appears to have been prepared to rely, denied that this process, as described by earlier witnesses and involving the retention of the existing foundations, would constitute any remedy. He said that he would not consider that course at all. Apparently he did not consider such a course practical. He did, however, appear to concede that a practical solution would be " to chop out the existing footings and put in new ". But on a careful reading of Mr. Ahearn's evidence we have come to the conclusion that he did not advocate the piecemeal replacement of the foundations as a practical solution and that the extent of his apparent concession was merely that, if under-pinning of any kind should be decided upon, the whole of the foundations should be replaced. Any other form of under-pinning he regarded as useless. He then went on to say that the replacement of the foundations would present quite a problem from a practical point of view, that it could be done only in a piecemeal fashion by

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removing and replacing three-foot sections at a time, and that "you would finish up not having a uniform run of footings right throughout your building". Mr. Ahearn did not further enlarge upon the difficulties of this process, nor upon the question whether he regarded it as a satisfactory remedy for the present serious defects, but it is clear that the learned trial judge was satisfied that under-pinning or the replacement of the existing foundations in such a manner would constitute but a doubtful remedy. Not only do we think that his Honour's conclusion was justified, but after reading the evidence and considering the submissions of counsel we are satisfied that under-pinning by the piecemeal replacement of the foundations would, at the very best, constitute but a doubtful remedy. To give to the respondent the cost of a doubtful remedy would by no means adequately compensate her, for the employment of such a remedy could not in any sense be regarded as ensuring to her the equivalent of a substantial performance by the appellant of his contractual obligations.

It was suggested during the course of argument that if the respondent retains her present judgment and it is satisfied, she may or may not demolish the existing house and re-erect another. If she does not, it is said, she will still have a house together with the cost of erecting another one. To our mind this circumstance is quite immaterial and is but one variation of a feature which so often presents itself in the assessment of damages in cases where they must be assessed once and for all.

For the reasons which we have given we are of the opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *T. W. Brennan.*
Solicitor for the respondent, *Maurice Cohen.*

R. D. B.