JUDGMENT : BEAZLEY JA; BRYSON JA; BASTEN JA; Supreme Court of New South Wales. Court of Appeal. 28th February 2007

1 **BEAZLEY JA**: On 23 June 1997, the appellant entered into a contract with the respondent for the construction of a residence on the appellant's property. The initial contract price was $90,359. There were a number of variations to the contract which brought the contract price to $100,749. The cost was to be paid in five separate stages. The appellant made payments in relation to the first and second stage, comprising a five per cent deposit, and an amount claimed in a progress payment on completion of the concrete slab. The respondent thereafter continued the building work and contended that it brought the property to the stage of 'practical completion' so as to be entitled to the entire contract price. The appellant denied that the property was in a state of practical completion and further alleged that there were significant defects in the construction, including of the concrete slab. Those opposing positions brought the parties to litigation.

2 The respondent commenced proceedings in the District Court, claiming an amount of $77,641, being the amount alleged to be outstanding under the contract. A quantum meruit claim was also pleaded. In his Defence, the appellant denied the respondent's claims. The appellant also brought a cross-claim in which he alleged faulty workmanship and claimed for the cost of rectification work in an amount of almost $300,000. The appellant also made a claim under the penalty clause of the contract, together with a claim for rent due to the respondent's failure to complete in accordance with the contract.

3 The matter was heard in the District Court by Sorby DCJ. The appellant represented himself. Sorby DCJ ordered a verdict for the respondent in the sum of $77,641 plus interest, together with costs. The appellant's cross-claim was dismissed except for two items, totalling $225. Sorby DCJ ordered the appellant to pay the respondent's costs of the cross-claim.

4 The appellant appeals against his Honour's orders on four essential bases. First, he contended that practical completion had not been reached in accordance with the terms of the contract, so that the respondent was not entitled to payment of the moneys claimed in the certificate of practical completion. Secondly, the appellant contended that the respondent had not satisfactorily completed stages two and three of the contract, so as to be entitled to progress claims in respect of those stages. Stages two and three related to the completion of the concrete slab and the erection of the house frame respectively. On this argument, if those stages had not been completed in accordance with the contract, it followed that practical completion had not been achieved. Thirdly, it was submitted that his Honour erred in dismissing the cross-claim in finding that there was no evidence to support the claims when there was evidence and the weight of that evidence supported his claim. Fourthly, the appellant contended that he was denied procedural fairness in the manner in which his Honour heard the matter. This latter submission was directed, in the main, to the manner in which his Honour conducted the hearing, in circumstances where the appellant was unrepresented.

The contract

5 The contract was a fixed-price contract with a specific provision relating to variations. Pursuant to para A of Schedule 1, cl 1 of the conditions of the agreement, the contractor was to complete the building work "*in a good and workmanlike manner and comply with [all] law and the requirements of all statutory authorities with respect to that work*" and, pursuant to para B, the owner was to pay the contract price in the manner specified in the agreement. Clause 9 provided for the payment of progress claims in accordance with Schedule 5, the Progress Payments Schedule, within five working days "*after being notified in writing by the Contractor that the stages of work have been satisfactorily completed*".

6 Although the price was affected by subsequent variations, the contract provided a Progress Payment Schedule for the following stages of work:

"* *Contract Price $90,359.00*

1. 5% Deposit payable on building approval $4,518

2. On completion of concrete slab $18,072

3. On completion of the erection of frame $18,072

4. Lock up stage $18,072

5. On commencement of internal linings $22,590

6. Payment on Practical Completion $9,036"

7 Clause 11 provided for variations in the following terms:

"This Agreement and the Building Works may only be varied in WRITING AND signed by the Contractor and the Owner.

The Contractor shall only be paid for those variations submitted to the Owner in writing and signed by the Owner prior to the variation being undertaken by the Contractor.

The Contractor is allowed to suspend the Building Work if the Owner verbally requests a variation BUT has not signed a variation form.

The Contractor is not required to commence or complete the variation until the Owner signs the variation form.

The Contractor shall deduct the cost of all deletions from the Building Works from the Contract Price AND add the cost of all extra work to the Contract Price together with Builders Margin, to be paid as follows:

the Owner shall pay the Contractor within ten (10) working days after receipt of the Contractors invoice for the variation
OR
at the time of payment by the Owner (or the Lending Authority) of the next Progress Payment."

8 Clause 19 provided for practical completion. Its terms were as follows:

"Upon Practical Completion (as defined in Clause 2) the Contractor shall give the Owner a Notice of Practical Completion stating that the Building Works are Practically Complete AND a progress claim for Payment on Practical Completion. This progress claim shall be paid within five (5) Working days of receipt by the Owner.

Also within five (5) Working days the Owner may give (if necessary) the Contractor an Owner's Notice setting out those matters and things required by this Agreement still to be completed. The Contractor shall complete such matters and things as soon as is practicable but otherwise within five (5) Working days of receiving the Owner's Notice. The Contractor shall give to the owner notice in writing of completion of the said matters where upon the works shall be deemed to be practically completed upon the date of such notice and the Defects Liability Period shall commence to run from the date of such notice. Defects Liability Period of thirteen (13) weeks.

Upon payment of the progress claim by the Owner, the Contractor shall give the Owner the keys to the Building Works. By accepting the keys, the Owner is;
1. Acknowledging responsibility for the Building Works in terms of insurance; and,
2. Acknowledging that the Building Works have been completed.

It is the responsibility of the Owner to obtain the Building Certificate Form 3 from the Local Council Authority.

If the Local Council Authority refuses or fails to issue the Certificate due to a failure by the Contractor to perform any works or supply any material under this Agreement, then the Contractor will attend to those works or supply those materials to enable the Certificate to be issued.

Payment of the progress claim by the Owner is not dependent upon the Owner obtaining a Building Certificate Form 3 from the Local Council Authority.

Within ten (10) Working days of Practical Completion the Contractor shall give the Owner a Final Account (as defined in Clause 2 of this Agreement)."

9 Practical Completion was defined in cl 2 to mean: *"… the time when the Contractor has completed the Building Works in accordance with this Agreement except for any minor omissions and/or defects."*

10 Pursuant to cl 30, the contract provided for the warranties required under the statutory regime which governed building contracts of this nature (the terms of the legislation are not relevant for the resolution of this matter). In particular, the respondent gave the following warranties:

"(a) A warranty that the work will be performed in a **proper and workmanlike manner** and in accordance with the plans and specifications set out in the contract or, if not contained in the contract, agreed to by the parties.

(b) A warranty that all materials supplied by the licence holder or Contractor will be **good and suitable for the purpose for which they are used** and that, unless otherwise stated in the contract, those materials will be new. …

(e) A warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result to the extent of the work conducted in a dwelling that is reasonably fit for occupation as a dwelling." (Emphasis added)

Practical completion

11 The appellant paid the deposit plus the progress claim in relation to stage two of the Progress Payments Schedule, being the completion of the concrete slab. The progress payment was paid notwithstanding that the appellant had complained the slab was defective. His case was that he paid the progress claim on the respondent's understanding that it would rectify the slab. In fact, some rectification work was carried out by the respondent in October 1998. This is referred to later.

12 No further amount was paid, although the respondent issued further progress claims. Notwithstanding the non-payment of these progress claims, the respondent continued with the building work to the point where it contended that practical completion had been achieved.

13 On 21 December 1999, the respondent issued a certificate of practical completion.

14 The appellant refused to pay the amount claimed under the certificate, on the basis that the works were not practically complete.

15 There is no dispute between the parties that if the works were not in fact practically complete, the respondent is not entitled to payment of the monies it claims are due under the contract. The appellant contends that the works were not practically complete for two reasons. First, and the one that was immediate at the time that the certificate was issued, was that at the time the respondent issued the certificate of practical completion, it had not installed certain items in the house, in particular, the water system, the stove and the range hood (which I will refer to collectively as the appliances).

16 Secondly, the appellant had contended from an early stage that the building work was defective, so that the building work was not completed in accordance with the terms of the contract which required that the work be performed in a "*proper and workmanlike manner*"; and that all materials supplied would be "*good and suitable for the purpose for which they are used and, that unless otherwise stated in the contract, those materials will be new*". It was the contended failure to comply with these terms that underlay the appellant's reasons for not paying the progress payment claims three to five.

Non-installation of practical completion items

17 The appellant tendered a number of reports of building and engineering consultants in support of his contention that practical completion had not been achieved and in support of his cross-claim. Those reports were not the subject of objection by the respondent and no point was taken that they were not expert reports. I refer to these reports in detail below. The respondent did not require any of the experts to be present for cross-examination. On the appeal, the respondent submitted that these reports did not constitute 'expert evidence' and the Court would have no regard to their contents. That submission should be rejected for the reasons already given. But in any event, they were clearly reports of duly qualified experts. One report relating to damages was rejected by his Honour and I deal with that later.

18 The respondent called evidence from Mr Gleeson, a Chartered Engineer and building consultant, who gave evidence that the omission to install the appliances could not be considered as minor, but said that practical completion had, nonetheless, been achieved, because there was a practice in the building industry not to install such appliances until the day of handover. Mr Gleeson expressed the opinion that as the respondent intended to install the items on the day of handover, practical completion had been achieved as at the date of issue of the certificate.

19 The trial judge found that: "*… because of the evidence [the respondent] produced, in particular, the expert evidence of Mr Gleeson, [the respondent] has made good its claim against [the appellant] and is entitled to the relief sought.*"

20 In reaching this conclusion, the trial judge had referred in some detail to the evidence relating to the alleged defects in the building works. However, his conclusion also related to the evidence of Mr Gleeson, that although there were defects that were not minor, there was an industry practice that meant that practical completion had been reached.

21 The appellant submitted that, having regard to the definition of practical completion in the contract, practical completion had not been achieved, because according to Mr Gleeson the omission to install the appliances could not be considered as "*minor*". He contented that the contract being a "*Plain English Building Agreement*", was not one which was susceptible to the implication of terms such as might have been said to arise from common industry practice, but, that in any event, the conditions for the implication of a term were not satisfied.

22 A term may be implied into a contract by reason of custom or usage in a market. Whether a term is so implied is a question of fact: *Nelson v Dahl* (1879) 12 Ch. D. 568 at 575. The principles governing the implication of such a term are conveniently gathered in the judgment of the High Court in ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*** (1986) 160 CLR 226 at 236-238. While it is not essential that there be universal acceptance of a custom or that a party has knowledge of it, there must be evidence of actual market practice. In order to prove that a term is implied in a particular contract, evidence needs to be adduced that the custom or usage is so well known and acquiesced in that everyone making a contract in those circumstances can reasonably be expected to be presumed to have imported that term into the contract: ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*** at 236; see also ***Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd*** (1973) 129 CLR 48.

23 However, even where custom or usage is established, a term will not be implied into a contract where it is inconsistent with the express terms of the agreement: *Summers v The Commonwealth* (1918) 25 CLR 144 (affirmed PC (1919) 26 CLR 180). In this case, there was no evidence of a custom or usage known by house owners who entered into building contracts which would provide a basis for the insertion of the implied term. The evidence, in my opinion, related to the practice of builders. In any event, the implication of such a term would here be contrary to the express terms of the agreement entered into by the parties. Accordingly, I would reject the respondent's submission that there was the implication of such a term.

24 The respondent contends that the appellant should not be able to rely upon this further basis for contending that practical completion had not been reached, because it was outside the appellant's Notice of Appeal and was also not part of the appellant's case at trial. The appellant concedes that he needs leave to amend his Notice of Appeal, but resists the suggestion that the matter was not raised below and submits that the matter of the non-installation of the internal fittings was raised in the Scott Schedule and was the subject of Mr Gleeson's evidence. The respondent also complains that if it had known that the question was to be in issue at trial, it would have been open to it to adduce evidence in relation to industry practice as to a "*builder's election*" not to install such fittings until handover, by reason of the risk of theft. It was submitted that such evidence would have been relevant to the question of whether such term was implied into the contract by convention, and secondly, as to whether the failure to install the fittings was properly characterised as a "*minor defect*".

25 I have already referred to the question of the implication of the term. In relation to the second point, that the respondent might have called evidence that the failure to install fittings was a "*minor defect*", the fact is, the non-

installation of the fittings was raised, and the respondent called evidence on that point, namely, that of Mr Gleeson. His evidence was that it was not a "*minor defect*". Indeed, it is that evidence that the appellant has relied upon in support of his contention that practical completion was achieved.

26 In my opinion, the respondent is not prejudiced and the appellant should have leave to amend his grounds of appeal to include this claim. The respondent's own evidence established the matter upon which the appellant relied. It did so in circumstances where the respondent needed to establish the existence of a custom as giving rise to an implied term in order to prove that it was entitled to give a certificate of practical completion. For the reasons I have given, the claim has been made out and for that reason alone, practical completion had not been achieved as at the date that the certificate of practical completion was given.

27 However, as the second basis upon which the appellant contended that practical completion had not been achieved was the basis upon which the trial was conducted, and is relevant to some of the matters raised on the cross-claim, it is appropriate to deal with that basis at this point.

Failure to satisfactorily complete the earlier stages of the work

28 In addition to Mr Gleeson's evidence, his Honour referred to a report prepared by Stephen Mateffy, Consultant Engineer, who had provided an expert report to the respondent, but which was tendered by the appellant. His Honour also referred to a report of Mr Phillips, who had provided a report to the appellant, as a "*key document*" for the appellant. Mr Phillips had provided a report to the appellant in which he specified a number of minor and major defects and omissions in respect of the building work that had been carried out by the respondent. The trial judge found (at [64]) that he preferred the report and conclusions of Mr Gleeson, based upon his expertise and the evidence that he gave before his Honour, to the evidence adduced on behalf of the appellant. In this regard, his Honour observed that Mr Gleeson, in his report, had found the "*defects*" identified by Mr Phillips as being largely non-existent.

29 The two matters which were of particular complaint by the appellant were the construction of the concrete slab and the frame.

The concrete slab

30 The evidence in relation to the concrete slab was as follows. Schedule 2 cl 3 of the contract provided that the Agreement consisted of, relevantly for present purposes: *"The attached Approved Plans and/or drawings, together with the Conditions of Approval from BLUE MOUNTAINS Council – marked with the letter 'A'".*

The Schedule further provided that in the event of discrepancy between any of the contract documents, the following order of precedence would apply:

"*1. Approved Plans, Drawings and Council Condition of Approval;*
2. Specifications;
3. Conditions of Agreement;
4. Other Documents."

31 The final construction drawing approved by the City of Blue Mountains Council gave details of the slab and piers. The slab for the construction was a raft slab. The drawings specified "*piers required under beams when raft slab is constructed on consolidated fill*". That was the condition of the appellant's land so that piers were required. The drawing detail showed the piers extending to rock level.

32 On 30 January 2002, Michael Jaroszewicz, of Structural Building Design Pty Limited, provided a report to Mr Peter Smith, Director of the Home Building Division, Department of Fair Trading, in respect of Mr Jaroszewicz's inspection of the works on 18 January 2002. The report dealt with three issues, including the footings and ground slabs to the house and garage. In relation to the slab to the south-east corner of the house, he reported that there was a lack of adequate bearing to the footing/slab to the pier, and that the construction did not comply with the design intent shown upon the drawings and specifications. Mr Jaroszewicz specified that rectification would include:

"*1. Dry packing top of pier to underside of footing with a non shrink grout to ensure full load transfer between slab and pier.*
2. Construction of a rectification underpinning pier from the underside of the footing at the southern face to found to rock (600Kpa). Special attention would be required in the construction of the pier by leaving a gap of 70mm between top of pier and underside of slab to be filled with a non shrink grout to ensure full load transfer between slab and pier."

33 In relation to the north-east corner, Mr Jaroszewicz concluded that, likewise, there was a lack of adequate bearing of the footing/slab to the pier and that the construction did not comply with the design drawings. He stated there was a lack of support to the external brick skin. He detected that the bottom 9-11 brick coursers had been built out of plumb with the rest of the brickwork. This led him to conclude that it was likely that the stud frame had been constructed projecting out from the slab edge. He noted that there was cracking of brickwork due to the problems he had observed and that the slab footing concrete was of poor quality. He considered that rectification for these problems would include:

"*1. Dry packing top of pier to underside of footing with a non shrink grout to ensure full load transfer between slab and pier.*
2. Build up of external footing edge by 40mm by application of Sika Monotop 615 HB or similar in accordance with manufacturers specification.

3. Remove brickwork from north east corner to window (approx 800mm) for full height and rebuild vertical and in alignment with rest of wall. Verify stud framing vertical and in satisfactory condition."

34 Mr Jaroszewicz found similar problems in relation to the south-west and north-west corners. At para 3.1.5 of his report to the Department of Fair Trading, he stated:

"Our main concern is the excavated profile and the lack of support to the footings supporting the brick piers to the front of the house. Excavation depths were approximately two metres below existing ground level, (top of footing level) refer to photograph 31. As reported by [the appellant], the founding pier was at a depth of 1.2 metres below the footing to the pier. Assuming that the footing is 400mm deep, as per structural details, then the pier is founded to a level of 1.6 metres below top of footing level. This approximates with the blue metal gravel level at the line of the retaining wall refer to photograph 31. The material at this level is not bedded as a sandstone but is a clay mixture. We do not consider this to be a suitable founding material for the piers.

Furthermore, the cut face is nearly vertical and such an excavated profile is not suitable for the type of material. A more suitable excavated profile would have been 1 in 1 horizontal to vertical to give a 45 deg batter. ***Currently we consider such an excavated profile to be a safety hazard and temporary works should be carried out to stabilise the face****. The final solution would be to build a retaining wall similar to that of the wall behind the garage, refer to photograph 32." (Emphasis added)*

35 As to the house ground floor slab, he observed the existence of cracking, which the appellant had described to him as having been recent. In those circumstances, Mr Jaroszewicz considered that to be an indication that the cracking was unlikely to be due to shrinkage, but was of a structural nature, but that a more detailed investigation was necessary.

36 Probing underneath the garage indicated that no piers were evident and there was a cracking of the slabs, which was reported as being recent. Mr Jaroszewicz gave as possible explanations for such cracking: *"…the varying founding material for the garage and lack of adequate deep edge beam on the southern side or alternatively piers founded to rock as per the structural details."*

37 Mr Stephen Mateffy, of MPN Group Consulting Engineers, prepared an expert witness report at the request of the respondent. Mr Mateffy has been continuously engaged in the profession of structural and civil engineering since 1957, and in private practice since 1965. His report is not dated, but he states that he made a site visit to the property on 4 June 2002. The primary purpose of his visit was to view the alleged construction defects set out in Mr Jaroszewicz's report of 30 January 2002 and: *"… to form an opinion about the nature of the specific conditions about which the complaints are based and an overall view of the rectification requirements."*

38 Mr Mateffy's inspection confirmed that there were visible gaps between the top of the pier and the underside of the slab at the outer edge of both the south-east and north-east corners. He did not consider that the problem was as critical as others who had inspected the property had reported and whilst rectification work was required, Mr Mateffy considered it was more of a cosmetic nature and that there was no indication of inadequate bearing. He made a similar comment in respect of the north-west corner. His investigation of the south-west corner produced a different response. Whilst Mr Mateffy did not agree with the extent of the problems identified by Mr Jaroszewicz, he stated at para 20 of his report: *"I was unable to establish the location, or indeed the presence of any piers. (Note, however, Donovan Associates Structural Certificate of 21 September 1998 which states all piers as present and inspected.)"*

39 This latter observation was wrong. The structural certificate given by Donovan Associates only certified that the pier holes had been inspected and that they had been "*dug to rock in accordance with the approved engineer's details*". There was no structural certificate in evidence that related to an inspection of the piers. The respondent, during the course of the appeal, supplemented the appeal documents with the provision of further structural certificates from Donovan Associates. None of that additional material related to the piers subject of the present issue.

40 Mr Mateffy stated that "*[t]here were no signs of distress, either externally or internally, in either the house or the garage*" but noted that the concrete work exhibited "*somewhat less than best practice*". Mr Mateffy said: *"Set-out of the piers appears to have been inaccurate beyond normal builders tolerance. Forming of edges also shows less than good workmanship*".

Mr Mateffy then added: "*On the other hand, most of the faults are cosmetic and have no structural inadequacy implications. The* ***one exception*** *is the near vertical cut in front of the entry which requires structural attention.*" (Emphasis added)

41 On 20 February 2001, Gary Varcoe, Consulting Civil Engineer, provided a report to the appellant following an inspection of the property on 14 February 2001. He had been asked, inter alia, to establish what kind of concrete slab was constructed. He said that from an examination of construction photographs provided by the appellant and from the structural plans, the slab was a reinforced concrete raft slab founded on concrete piers. There is no dispute that this was so. He then stated:

"During the inspection, whilst attempting to identify whether piers were provided under the slab in the fill zone, it was noticed that the piers under the south western and south eastern corners of the dwelling are located approximately 250-300mm from the corner of the slab. This indicates that the slab edge beams are not fully bearing on the pier and

depending on how the slab was formed, may only be bearing on 25% of the pier. This should be the subject of a further investigation to determine the extent and ramifications of the pier misalignment."

42 Photographs attached to Mr Varcoe's report, to the extent that they demonstrate what Mr Varcoe said in his report, indicate that the piers are either non-existent, or were built in such a way as not to provide adequate structural support for the building.

43 The appellant had complained at an early time about the adequacy of the building work and, relevantly, the slab, and some rectification work was done on the slab in October 1998. At about that time, the appellant commissioned a report from Waterson Building Consultancy Pty Limited. Mr Waterson inspected the premises on 24 October 1998. He observed that at the time of inspection, the concrete slab for the dwelling and garage had been poured, that the ground floor timber wall frame was standing and the floor joists to the top floor had been installed. The wall frame is a separate issue and will be dealt with later. Insofar as the concrete footing is concerned, Mr Waterson said that he: *"… could not accurately determine whether the footing had been adequately tied to the concrete floor slab reinforcement. The footing did not appear to be enlarged to facilitate the posts used to apart [sic] the upper floor.*"

He recommended that there be liaison with a structural engineer to determine whether a satisfactory inspection had been carried out of this portion of the building.

44 There was also evidence that, quite apart from either the non-existence or, alternatively, the wrong placement of the piers so as to render any subsequent construction structurally unsound, there was also evidence that there were other problems with the construction of the piers and slabs, particularly in relation to the south-east and north-east corners. As I have already said, Mr Jaroszewicz gave evidence that there was a lack of adequate bearing of the foot/slab to the pier on each of the corners of the house. Mr Varcoe also gave evidence of inadequate bonding of the slab and the footings, notwithstanding that it was apparent that rectification work had been carried out. I do not propose to repeat all of this evidence. It is sufficient in respect of Mr Varcoe's evidence to note one aspect only. He referred to the remedial work carried out at the south-western corner of the slab, but observed that that work had subsequently separated and an adequate bond between the slab and the new work had not been achieved. He stated that that portion of the slab was therefore "*structurally inadequate to support the brickwork*".

45 In addition to the above, there was evidence of other inadequacies, some of a clearly structural nature, in relation to the slab, the piers and the footings. For example, there was a report of Mr Anwar Menashi, Chartered Professional Engineer, of Ishtar Constructions Pty Limited. He provided a report dated 20 February 2001. He advised in his report that the purpose of his inspection was to examine the rectification of the footing at the south elevation and at the south-west corner, as well as the front porch footing and the retaining wall. In relation to the footing rectification and front porch footings, he concluded that the rectification for the brickwork was considered structurally inadequate, and an examination of photographs taken during the pouring of the footings suggested that the porch footings were poured in two stages, which was structurally unacceptable.

46 Mr Gleeson, in his report of April 2000, did not refer to the slab or the piers of the house. He commented upon problems in respect of seepage from behind the garage, which, on his assessment, was due to an insufficient height level being left as between the finished ground level and the slab. He said that rectification work would involve hand digging an approximate 5 metre square area and to a further depth of 140mm. He described this defect as minor and readily rectified. He also observed water penetration into the house at ground level. Mr Gleeson considered that was due to a flashing or cavity bridging having taken place. He stated that "*destructive investigation of the internal plasterboard lining will be required to examine the actual cause of the water penetration*".

47 Mr Gleeson did not comment upon the slab or the piers in this report but was cross-examined on the issue by the appellant. The appellant asked whether, having inspected the property on two occasions, Mr Gleeson had observed "*any defects in regards to the concrete slab*". Mr Gleeson responded that no specific defects had been identified to him, but he did look at the concrete slab for signs of the deficiencies. He said: *"I didn't see anything that would constitute a defect, no. There might have been very sorry*".

48 The appellant then asked whether Mr Gleeson had seen any cracks. Mr Gleeson responded: *"As far as I was concerned at the first inspection I didn't see any defects that would have – at that point of time – have changed my opinion as to whether practical completion had been reached. There might have been very minor defects on the edge – for example, on the edge of the slab. In other words, for example, a bit of mortar or something like that, a chip or whatever it might be, but those sorts of defects in my opinion are not serious defects, yeah. It isn't my job, further to that, to dig up under the slab, for example, to start excavating under the footing beam or to look for problems. The only time I ever do that is if I saw a problem, for example, if I saw a cracked building and I felt there could be a footing problem, then I would start looking. I saw no evidence of any foundation movement. I saw no evidence of any aesthetic or cosmetic problems with the slab, and I was told that you were concerned about some dishing in the slab when I was there.*"

49 The significance of this answer, on the appellant's case, is that although Mr Gleeson said he did observe problems with the slab warranting investigation, he did not undertake the investigative work carried out by Mr Jaroszewicz and Mr Mateffy.

The frames and trusses

50 The appellant also relied upon the structural inadequacy of the frames and trusses as being a further basis upon which practical completion had not been achieved.

51 Mr Waterson, in his report of 7 November 1998, commented that he observed that some of the wall frame members, the timber roof trusses, and particle board flooring were stored on the building site. Only some of this material had been covered. The stored material was laid on the ground surface and a significant portion was covered with silt. He cleaned off the silt to find that the wall frame members were wet and that there were splits of up to 1mm width in the timber. Mr Waterson also observed evidence of rot to the end grain of some of the timber. The wall frame members were grey in colour. An examination of the wall frames that were standing on the floor slab were in a similar condition. They were grey coloured, splits were observed to several, and there was evidence of rot. He considered that it was apparent that the material had had prolonged exposure to the elements. Likewise, with the roof trusses, Mr Waterson observed that some were bowed, some had splits and some were grey in colour, again, all being evidence of prolonged exposure to the elements. An enquiry he made of the manufacturer of the wall and roof frames elicited the information that they had been delivered to the site about seven months previously. Mr Waterson stated:

"Concern is raised with regard to the long term adequacy of the wall frames and roof trusses, due to the prolonged period of time the members have been exposed to the elements. The existence of splits, colour of the timber, cupping and rot are, in our opinion, evidence of deterioration … Further concern is raised with regard to the members holding moisture due to covering by silt from the disturbed portions of the allotment. The timber members being in contact with the ground surface for a prolonged period of time increases the risk of termite attack to the members.

The situations outlined above could have affected the long term structural adequacy of the timber wall frames and roof trusses. …

I am of the opinion that the condition of the timber wall frames and roof trusses is inferior to that expected for a new dwelling …"

52 On 15 January 1999, a Certificate of Timber Inspection was issued to the respondent by Mr S Larner of State Forests under the *Forestry Act* 1916 (NSW). Mr Larner reported in his certificate that several timbers were rejected. In a later note in respect of an inspection carried out in August 1999, Mr Larner stated: *"Two former wall studs in the hall ground floor level were rejected, and two bottom chords to the 1st truncated roof truss were also rejected …"*

He also stated that: *"… rectification work carried out since the inspection in January 1999 to roof trusses and wall frame stud and first floor joists were not reinspected as details were not available at the time of the inspection."*

53 In addition to the certificates and notations issued by Mr Larner, there was photographic evidence of the frames and trusses being stored on the wet ground. Further, on 15 October 2001, the Blue Mountains City Council requested the respondent to submit: *"… a report from a structural engineer or other suitably qualified person certifying that all split and moisture and fungal damaged timbers identified in the State Forest Timber Inspection Reports dated 18 January 1999 and 19 August 1999 have been rectified."*

54 There was no evidence that such certification had ever been provided.

55 Mr Andrew Phillips, Building Consultant and Inspector, inspected the property on 19 May 2000, and provided an extensive report of the defects in the property. Some of these defects were clearly of a minor nature, or were irrelevant – for example, the existence of animal droppings in many rooms of the property, and some scratching of glass. Others could not be so considered. So far as is relevant to the present topic and to mention only a few matters, Mr Phillips observed that in bedroom one, the joinery timbers had been damaged and had not been adequately sanded and stopped. It is to be inferred from his report that this was not a "*minor*" defect, as his report elsewhere made specific reference to "*minor*" discrepancies. For example, in relation to his observation that the joints to the joinery timbers had opened up, he ascribed the word "*minor*". In relation to the walls in each of the rooms, he reported that timber frame walls had not been adequately plumbed and squared prior to the fixing of the gypsum plaster board wall linings and the joints to the joinery timbers (skirtings and architraves) had not been carried out in a good and tradesman-like manner. There were undulations to the floor, movement and deflection, the floors were out of level, the joints to the floor were not flush and there were large gaps at the construction joints.

56 Mr Gleeson responded to this report with a report dated 22 February 2001, in which he expressed the opinion that the defects almost in their entirety did not exist, and to the extent that they did, it was because they were the responsibility of the appellant, or were related to work that could not be finalised until after the appellant had attended to matters that were his responsibility under the contract. Neither Mr Waterson nor Mr Gleeson commented upon the condition of the frames themselves.

Trial judge's reasoning on practical completion

57 In determining whether practical completion had been achieved, his Honour referred to Mr Gleeson's report dated April 2000, and his other evidence, as well as to the report of Stephen Mateffy. His Honour also referred to Mr Phillip's report as a "*key document*" for the appellant. His Honour found at [64] that he preferred the report and conclusions of Mr Gleeson, based upon his expertise and the evidence that he gave, to the evidence advanced by the appellant. His Honour referred to Mr Gleeson's view that the "*defects*" identified by Mr Phillips were largely non-existent.

58 In relation to the concrete slab, his Honour referred to Mr Mateffy's report which he noted had been obtained by the respondent in response to the report by Mr Jaroszewicz.

59 His Honour referred to the evidence which is set out at [38] above and commented: *"There is no evidence that this defect could not be rectified or that it would lead to a conclusion that practical completion had not been reached."*

60 His Honour next referred to the appellant's submissions in relation to the frames. In this regard, he noted that the appellant alleged that "*defective, old, decayed, rotten, moisture deteriorated and second rate material*" had been used. His Honour observed, however, that the appellant had "*produced no evidence to justify this assertion*" and stated that it was his view that these matters were "*not relevant to the claim of [the respondent]*".

61 His Honour then referred to a number of submissions that the appellant had made, including his submission on "*the completion stage*". One of the submissions made by the appellant in relation to completion, as recorded by his Honour, was:

> "7.2 [The respondent] could not claim FINAL PROGRESS CLAIM as the claim was premature due to the Contract Agreement between the parties."

62 His Honour said: *"I have addressed the issue of practical completion, the essence of [the respondent's] claim earlier and these submissions do not address that essential issues [sic] as raised by [the respondent's] expert, Mr Gleeson, whom I accept."*

63 Having made that comment, his Honour continued to refer to the appellant's submissions in relation to practical completion including the appellant's submission that the project remained "*incomplete*" and "*[was not] free from defects*". His Honour said, however, that these matters were not relevant to the question of when practical completion had been met "*as is meant in the contract*". He said that the further submissions of the appellant revealed his lack of understanding of the nature of the contract. In referring to these submissions, his Honour referred, inter alia, to para 8.3 of the appellant's written submissions, which stated:

> *"The [respondent's] construction has not been satisfactorily completed and is NOT fit for its intendant purpose. It has major omissions and defects that do prevent its use."*

64 His Honour said: *"Without more it is very difficult to understand what this submission means."*

65 At this point it is necessary to return to the terms of the contract to determine whether the work had reached practical completion to ascertain whether the appellant had made out his case on this issue. Under the express terms of the contract, practical completion was reached when the contractor had completed the building works "*in accordance with this Agreement except for any minor omissions and/or defects*". The respondent warranted that the work would be performed in a "*proper and workmanlike manner and in accordance with the plans and specifications set out in the contract*" and the materials supplied would be "*good and suitable for the purpose for which they were used*": (cl 30).

66 The appellant's primary case was that the work was defective, in a substantial way, at earlier stages in the contract, so that practical completion, as provided for in the contract, could not have been reached at the time that the respondent gave the certificate of practical completion. I have set out above in some, although not entire, detail the evidence relating to the slab and the piers, as well as the evidence that related to the frames and trusses. There is an overall complaint that his Honour failed to deal with the expert evidence in a manner required by the authorities: see ***Wiki v Atlantis Relocations* (NSW) Pty Limited** (2004) 60 NSWLR 127; [2004] NSWCA 174. Leaving that matter to one side for the moment, the respondent contends that his Honour's determination cannot be disturbed, because of his stated preference for the evidence of Mr Gleeson to that of the appellant's experts, including the building report of Mr Phillips. Accepting that Mr Gleeson's evidence was to be preferred, it could only be preferred in respect of those matters about which he gave evidence. As the above evidence demonstrates, Mr Gleeson did not give any relevant evidence about the structural adequacy of the slab having regard to either the non-existence of piers, or the inappropriate location of piers. There was ample evidence that there was structural inadequacy of the slab and to that extent the works had not been carried out in accordance with the terms of the contract, which included the approved plans and specifications. The work was not, therefore, carried out in a proper and workman-like manner, so that the respondent had not been entitled to issue the earlier progress claims. Alternatively, and even leaving aside whether as a matter of strict construction, it was sufficient to require payment under those claims for a progress claim to have been issued by the respondent stating "*that the [relevant stage] of work had been satisfactorily completed*", the respondent was not entitled to give a notice of practical completion unless and until the work had been performed in accordance with the contract. The only evidence in relation to the slab and the piers was that that work had not been performed in accordance with the contract.

67 Likewise, Mr Gleeson's evidence did not touch upon the condition of the frames and trusses. Regardless of the condition in which the timber might have been when it was delivered, the evidence was irrefutable that by the time it was used in the building, it was not "*good and suitable for the purpose for which it was used*". It followed that there was a breach of the warranty in relation to materials and, in any event, the use of materials which were defective or in a state of deterioration, would not permit the completion of the work in a "*proper and workmanlike manner*".

68 His Honour stated there was no evidence to justify the appellant's assertion that the respondent had used "*defective, old, decayed, rotten, moisture-deteriorated and second-rate material*". That, as I have said, is a wrong

finding and itself demonstrates error. His Honour further stated that in any event that assertion was not relevant to the respondent's claim for full payment under the contract on the basis that practical completion had been reached. For the reasons I have already given, this also is wrong.

69 It follows from what I have said that the evidence was that practical completion had not been achieved as at the date of the giving of the certificate of practical completion. Indeed, it still has not been reached. In those circumstances, the appeal must be allowed and judgment should be entered for the appellant on the respondent's Statement of Claim.

Appellant's cross-claim

70 The appellant cross-claimed in the District Court, alleging that there were approximately 135 items of defective work. The pleading in the cross-claim was not strictly legally accurate. Nonetheless, his Honour correctly understood it as being a claim for defective work. Notwithstanding the extensive itemisation in the cross-claim, the Scott Schedule specified 15 items and his Honour dealt with the cross-claim on that basis. It was appropriate for him to do so. Of those, nine are the subject of appeal. Those items are the slab and piers; the frames; the trusses; electricity; land sliding, which is dealt with in the judgment under "*Fall of Land*; *Fence Damage*"; retaining walls; land clearing; storm water drainage; and the internal fittings. However, the item relating to the floors, although not subject of a specific ground of appeal, is related to and directly dependent upon the outcome of the appeal, relating to the slab and piers and the frames. The claim for fittings appears to have been accepted: see [18] above.

Slab and piers

71 His Honour recorded the appellant's claim that the concrete slab was not passed by Council and was structurally defective and inadequate for the task. His Honour found that there was no evidence provided by the appellant to support this latter allegation. As to the former, he referred to the engineering certificates from Donovan Associates for the concrete slab of 21 September 1998 and 24 March 1999. His Honour erred in both these findings. I have already referred to the evidence that supported the appellant's claim in respect of the slab. Accordingly, this was not a case of there being no evidence; there was much evidence. Indeed, the uncontradicted evidence in relation to the slab was that it was structurally defective and inadequate for the task. As to his Honour's finding in relation to the engineering certificates, I have already referred to the certificate of 21 September 1998. It related to the pier holes and not to the slab. So far as the certificate of 24 March 1999 is concerned, it related to the porch strip footing and the slab around the entry. It had nothing to do with the slab for the house proper.

Frames and trusses

72 The appellant made a number of claims in respect of the frames and trusses. The first related to the state of the timber. His Honour found that there was no evidence to support the appellant's allegations. That finding is incorrect, for the reasons I have already given. There was unrefuted evidence of the matters of which complaint is made. However, the respondent relied upon a letter from City of Blue Mountains Council, dated 5 November 2001, stating that:

"Council has advised Henley Homes that the house is now satisfactory, subject to the installation of the cleat and that the work may then progress on the internal fitting-out of the building".

73 His Honour found, therefore, that the claim failed. In my opinion, his Honour has in part failed to address the nature of the appellant's claim. The appellant's claim was that the respondent had not carried out the work and provided materials in accordance with the contractual requirements. The mere fact that the Council, as a matter of structural adequacy, was prepared to approve work which might have overcome the structural problems, does not mean that the respondent had not breached the contract. What damages flow from the breach is a different matter. Accordingly, I consider that his Honour erred in his finding in relation to the defective roof trusses.

74 His Honour next referred to the appellant's claim in relation to the wooden frames for the dwelling and, in particular, to the claim that they were made of rotten, deteriorated and moisture-laden timber. The appellant also claimed that the work was defective because the timber of the wall frames and trusses was not of a quality to be expected of a new dwelling; that the frames and trusses were not plumb and square and within acceptable standards and that the timber was not new.

75 I have dealt in detail with the wooden frames and trusses. For the reasons already expressed, this claim has been made out. There was also evidence that the timber of the wall frames and trusses was not of a quality to be expected of a new dwelling as discussed above, and there was no evidence to the contrary. His Honour erred in rejecting that aspect of the claim. However, in relation to the allegation that the frames and trusses were not plumb and square and to acceptable standards, his Honour was entitled to accept the evidence of Mr Gleeson in that regard and, accordingly, I would reject that aspect of the claim. However, it must be said immediately that his Honour's rejection of that aspect of the claim may be a pyrrhic victory for the respondent. If the underlying structure was not in accordance with the contract and is such that it needs to be replaced, then there will be a real question in due course as to what will be the appropriate type and extent of rectification work. It could be that at least partial demolition will be the only possible result, so that the issue of whether walls are plumb and square will become irrelevant.

76 It appears that during the course of the construction and, it would seem, following the Forestry Commission report as to the state of the timbers, the respondent engaged Multinail Australia Pty Limited to inspect the property on

24 August 1999 for the purposes of assessing the "*rectifications carried out*". Multinail provided a "*suitably qualified and experienced Structural Engineer*" to carry out the inspection and Mr Reece Martin of the respondent was present at the time of the inspection. The report listed nine items that were the subject of report and inspection. In respect of at least four items, items 1.3, 1.5, 1.6 and 1.9, the rectification work that was carried out was stated to be inadequate or did not address the problem. For example, in respect of item 1.6, the report states that as the timber had been rejected by State Forest "*for a split to the bottom chord*", the rectification undertaken was outside the scope of the "*Domestic Truss Web and Chord Rectification*" and that additional bolting was required in accordance with the sketch which it attached to the report. In respect of the other items which did not indicate that further work was required, the report states that the rectification work carried out was such that the result was "*structurally stable*".

77 In respect of two of those items, the report notes that the rectification had been carried out on site "*as best able*" in accordance with Multinail's standard rectification specification. The report did not state whether the rectification work which had been carried out and which Multinail accepted as resulting in structural stability for that item, was such as to render the work as being carried out "*in a proper and workmanlike manner*". Nor did it specify that the work comply with the laws and requirements of all statutory authorities with respect to the work. But in any event, when nearly 50 per cent of the rectification work to the trusses that had been carried out remained unsatisfactory and/or incomplete or absent, no conclusion could be drawn that the work in respect of the trusses was satisfactory. The respondent did not adduce any later report relating to the trusses. For that reason, also, I am of the opinion that the appellant has established, on the balance of probabilities that the frames and trusses had not been erected "*in a proper and workmanlike manner*" and with materials of a standard that satisfied the contractual conditions.

78 I would add that the observations made and opinions stated in the Multinail report is further evidence that the frames and trusses were defective and thus controverts the trial judge's finding that there was no evidence to support the appellant's allegations.

Electricity

79 The trial judge dealt with this claim as item 9. He stated: *"The [appellant] claims $1,600 for a 'defect warrant' issued by Integral Energy Australia."*

His Honour then records the respondent's response that there was no "*defect warrant*" associated with the contract works. His Honour found, therefore, that claim failed.

80 The appellant complains that his Honour rejected this claim without providing reasons and contrary to the unchallenged evidence before his Honour. Putting to one side the question of the adequacy of his Honour's reasoning process, it is necessary to look at the evidence which was adduced to support this claim.

81 The appellant complained in his schedule supporting the Scott Schedule that the respondent had failed to adequately and professionally connect the house and the garage to the electrical service and as a result, a "*defect warrant*" was attached to the electric meter box. The appellant supported this allegation with photographs, which, it was said, depicted the defect notice. However, this was not clear on the photographs, although the photographs showed wiring emerging from the ground without any apparent connection. The defect warrant itself was not in evidence. However, in his report, Mr Phillips reported that there was no safety switch to all the circuits of the main switchboard. Mr Gleeson, who, as I have said, provided a report in response to Mr Phillips' report, did not comment upon this defect. Accordingly, there was unchallenged evidence of defective work (and which may well have underlain the defect warrant). In those circumstances, the claim should be upheld.

Land sliding

82 His Honour dealt with this as item 10, "*Fall of Land; Fence Damage*". His Honour's reasoning was in the following terms: *"The [appellant] claims $1,120 for damage due to 'land sliding'. The [respondent] denies these claims saying there is no evidence of 'land sliding' caused by the contract works. The claim fails."*

83 Again, the appellant complains that his Honour failed to give adequate reasons and his determination was contrary to the unchallenged evidence. The evidence relied upon by the appellant in respect of this claim was a letter from the City of Blue Mountains Council dated 24 May 2000, which was in the following terms:

"Council was recently contacted by the owner of an adjoining property … He has expressed concerns that the excavation at the rear of the garage is eroding towards the property boundary and that the dividing fence is in danger of collapse. My recent inspection revealed these concerns to be justified and that urgent attention is needed to stabilise this area.

It is recognised that you are presently involved in dispute resolution with the builder of the dwelling, however some form of temporary shoring or stabilising needs to be installed at the rear of the garage until more permanent retaining works can be carried out.

It would be appreciated if you could attend to this matter as a matter of urgency. If damage occurs to the neighbouring property as a result of landslip originating on your property, you may become liable for such damage."

84 There was no evidence to the contrary.

85 In my opinion, this was independent evidence, which, being uncontroverted, was sufficient to support this claim. His Honour's finding to the contrary was, therefore, in error.

Land clearing

86 In relation to this and the next item, storm water damage, the appellant complains that his Honour failed to provide adequate reasons for rejecting the appellant's case and cross-claim concerning land clearing.

87 His Honour dealt with this as item 7, stating:

"The [appellant] claims $9,900 for this item claiming that building debris such as bricks and broken trusses still remained on the property. There was 'land sliding', it was claimed. All weather access 'rocks and fabrics' still remained and the sediment control barrier was still in place. The [respondent] said there was no evidence produced of 'sliding'. It says that land clearing other than in an area designated for the house and garage was not part of the contract. The [respondent] claimed that all barriers would be removed when and if the dwelling is handed over to the [appellant]. This claim fails."

88 This item, at least in the manner in which his Honour dealt with it, appears to cover a number of matters, including matters relating to land sliding. I have dealt with that item above and indicated that his Honour erred in his finding. That error must, by implication be replicated in this finding. But in any event his Honour does not deal with the issue. Rather, his Honour merely asserts the claim and its refutation and then states his conclusion. Strictly, the respondent's refutation contained an admission of part of the claim. It was not then a sufficient basis for dismissing the claim to accept the respondent's assertion that it would clear up the barriers when and if the dwelling was handed over. The respondent had given a certificate of practical completion, so that a question should have arisen, in his Honour's consideration of the matter, as to whether the clearing away of the barriers was a minor defect. His Honour was required to deal with the appellant's claim for damages, including, if relevant, whether the claim was properly made under the contract. His Honour did not do so. In my opinion, the appellant has established error in relation to this item. It would appear that the claim should be allowed, at least in part. However, as a final conclusion on this claim is consequential upon other items claimed, I will deal with the consequences which should follow the appeal.

Storm water drainage

89 In relation to storm water drainage, it was submitted that his Honour wrongly rejected evidence as to the appellant's damages and should have invited submissions as to prejudice. This submission is somewhat opaque. Nonetheless, I will deal with it as best as is possible on the evidence. A consideration of the background reveals that on 15 October 2001, the City of Blue Mountains Council wrote to the respondent in relation to an inspection of the site which had been carried out by the Council. It listed matters which remained outstanding and which were required to be attended to before the development could be considered as complete. Relevantly for present purposes, it stated at item 11: *"Complete surface drainage to excavated areas of the site, including at the rear of the garage and to the top of the retaining wall in this location."*

90 The respondent did not draw the Court's attention to any response by the respondent to this letter. It was open to infer that there was none.:

91 His Honour dealt with this item as follows *"The [appellant] does not itemise the cost of this part of the claim. He says the concrete slabs do not confirm with the Residential slab and footing code regarding minimum height. The [respondent] acknowledges, as far as the garage slab is concerned that the rear side has been finished 150mm above the adjoining ground and that 'minor excavation of the ground at the rear of the garage was warranted'. It estimated the cost at $135 to rectify the problem. The [respondent] was unable to work out what the [appellant] meant in relation to storm water drainage. This claim succeeds in part."*

92 The claim in relation to the storm water drain is also related to the absence of the drainage clay seal at the top of the retaining wall to allow adequate runoff, as specified by Donovan Associates' structural drawings.

93 Having regard to the evidence, I consider his Honour's reasons do not deal with the whole of the claim as made. There remained outstanding work to be done, although the precise extent of the outstanding work may still need to be determined. For this reason, the appellant's challenge to this part of his Honour's judgment has also been made out.

Retaining wall

94 The appellant pleaded (at 16(f)) that the respondent had failed:
"[T]o complete Completion stage in a good and workman like manner as per Council's Building Inspection Result dated 19.2.2000 by: …
(f) Failure to 'retain excavated areas behind garage and dwelling'"

95 The trial judge's finding in respect of the retaining wall was as follows:

"Under this item the [appellant] says that the retaining walls do not comply with Australian standards and good building practices. He said no Certificates were produced and the excavated areas were not retained effectively.

He claims $4,000 for this item. The [respondent] submitted that the retaining wall constructed had been constructed by the structural engineers Donovan Consultants plan No. E 53291. No evidence was produced by the [appellant] of structural stress or defect to the retaining wall or that the excavation work was not retained effectively. This claim fails."

96 The reference to $4,000 appears to be an error. The claim in the Scott Schedule was $40,000, although immediate doubt about the Scott Schedule amount arises, as it approximates 40 per cent of the contract price.

97 Contrary to his Honour's finding, there was a body of evidence that related to the retaining wall. Mr Menashi, Chartered Professional Engineer, referred to the retaining wall in his report of 20 February 2001. He said:

"Due to the backfilling of the existing retaining wall, I was unable again to examine whether the R.W. was constructed according to engineering details. However, I find that the following points need to be addressed:

- *The existing height of the retaining wall needs to be reconsidered, as it does not retain the bulk of the soil. I suggest you consult the design engineer.*
- *The soil adjacent to the porch piers is considered unstable and need to be retained effectively.* ***Urgent attention to this matter is very important****."* (Emphasis added)

98 There was other evidence. For example, Mr Menashi provided photographic evidence in support of the concerns that he expressed in his report.

99 Gary Varcoe also gave evidence relating to the retaining wall in his report of 20 February 2001.

100 Mr Varcoe observed that the retaining wall had not been constructed in accordance with the plans. In particular, the surface drain which was to be provided at the top of the wall in accordance with the plans, had not been constructed. He also stated that the retaining wall required extension across the front of the dwelling to provide support to the southern pier foundation and to support the extensive cut across the entire frontage. He too, provided photographic evidence to support his claim, which was similar to that provided by Mr Menashi.

101 Mr Jaroszewicz made similar observations in his report of 30 January 2002 to the Department of Fair Trading. He noted that there was "*no drainage clay seal at the top of the wall to allow adequate storm water runoff, or surface drain as specified in Donovan Associates*" structural drawings. Mr Jaroszewicz also considered that further investigation was necessary to determine whether the exact footing system used for the retaining wall "*was the strip footing 400 x 700, or the levelling strip for a rock foundation type footing*". This, as I understand the evidence, was a reference to the requirements of the structural drawings for the retaining wall and Mr Jaroszewicz was raising the question as to whether the footings were in compliance with the plans.

102 Mr Mateffy also commented upon the retaining wall. He stated it wasn't practicable to examine the buried footings of the wall and considered that the height of the wall was generally in accordance with the engineering drawings and that any extra height was to be retained by an additional dwarf retaining wall that was to be built by the owner. Mr Mateffy commented that he agreed with opinions that had been given by other of the structural engineers, that the excavated face south of the porch piers needed to be stabilised. He had referred to this earlier in his report when he was dealing with the front porch brick piers footings. He commented upon the instability of the area around the footings as being "*due to the near-vertical cut and consequent unbalanced lateral pressure on the pier*" and that it would be necessary to install a retaining wall in the front of that cut.

103 Mr Phillips, likewise, commented upon the retaining wall. He reported that there were minor hairline cracks in the retaining walls; that they not been constructed in a good and tradesman-like manner; were not structurally engineered; were leaning slightly, and there was evidence of moisture build-up behind the walls. Mr Gleeson did not, as I understand his report, contradict Mr Phillips on this. If he did, his blanket refutation of it was overwhelmingly outweighed by all of the evidence to which I have referred.

104 This recounting of the evidence in relation to the retaining wall demonstrates that his Honour's reasoning that there was no evidence of structural stress or defect, or that the excavation work was not retained effectively, was erroneous.

105 The respondent contends, however, that, irrespective of whether the trial judge's reasoning discloses error, the claim should be rejected because there was no basis for finding that the respondent had the contractual responsibility to rectify any deficiencies in relation to the retaining wall (assuming such deficiencies were found to exist). The submission has this historical base. Originally, the retaining wall was to have been constructed by the appellant. It appears that there were negotiations between the parties thereafter, because a Contract Variation Schedule dated 5 September 1997 came into existence, relating to, inter alia, the deletion of the original garage and the provision of a detached double garage. That contract variation then contains a note:

"Client is to take into consideration the extensive retaining walls required to house and garage and the subsequent cost involved, prior to accepting and [sic] Contract Variations."

106 On 24 August 1999, the respondent wrote to the appellant in the following terms:

"As per meeting on site with Reece Martin yourself and myself.

Retaining wall is constructed as per Heads/Terms of agreement. (See attached) New details to follows [sic] as site conditions changed footings design."

This was signed by Andrew Mavin, Divisional Building Manager of the respondent.

107 On 7 October 1999, the respondent's construction manager, Mark Roser, wrote to the appellant, informing him that progress payments, stage 2 and 3, were now due. The letter added:

"The only outstanding issue regarding the retaining wall between the garage and main dwelling is the position of the agg line and backfilling. This does not represent any part of progress claim 1, 2 or 3."

108 The respondent does not now contest that it built the retaining wall, but says that there may be some uncertainty as to whether there was a contract in respect of its construction. I do not agree. I have already referred to the reference to the "*terms of agreement*" in the respondent's letter to the appellant dated 24 August 1999.

109 In a letter from the respondent to the appellant dated 12 July 1999, the respondent said:

"RETAINING WALL
i. The agricultural line will be relocated to the base of the retaining wall
ii. As per our heads of agreement reached at mediation on July 16th, 1998, the retaining wall has been constructed in accordance with that agreement. No further works in relation to the retaining wall will be undertaken."

110 On 9 August 1999, the respondent wrote to the appellant in a response to a letter that he wrote, complaining about specific items of work. It states in item 4 as follows:

"The retaining walls as per the executed contract will be completed prior to Practical Completion."

111 When the appellant raised this claim in the Scott Schedule, the respondent did not deny it on the basis that it had no contractual responsibility for it, rather it contended that there was no evidence of defect.

112 Regardless of whether the retaining wall was part of the original contract, it appears that an agreement was reached in respect of the construction of the retaining wall at a mediation between the parties.

113 The respondent contended, however, that even if that be so, the claim in respect of the retaining wall fell outside the scope of the pleaded case. This is not correct, as the retaining wall was referred to in the Scott Schedule. But in any event, as that point was not taken in the Court below, I do not consider that it ought to be able to be raised now. Had that point been raised below, the appellant could have made an application to amend the pleadings. It is doubtful that there would have been any prejudice to the respondent in the pleadings being so amended. The matters had been raised in the Scott Schedule; there were business records of the respondent that related to it and it was dealt with in the expert reports.

114 The respondent's counsel on the appeal could not inform the Court whether or not his client had charged the appellant for the retaining wall. However, at trial, it does not appear that the respondent contended that it was the appellant's responsibility, not the respondent's, to construct the retaining wall; that there was no contract provision that related to it; or that the respondent had not charged for the construction of the wall. Had these points been taken, it is unlikely that his Honour would have treated the matter as he did. Notwithstanding this, counsel for the respondent maintained his submission that there was no basis for a finding that the respondent was contractually responsible for the construction of the retaining wall. He accepted that he would need a Notice of Contention in order to raise that matter.

115 However, even if, contrary to my finding, there was no contractual obligation, the respondent now concedes that it built the wall. There is no suggestion, to put the matter tritely, that the respondent did this by way of gift. Accordingly, even if it had or has some entitlement to be paid for the construction of the wall and has not claimed payment for the construction, it was required to build the wall in a good and workman like manner. Contrary to his Honour's finding that there was no evidence of a structural stress or defect to the wall, or that the excavation work was not retained effectively, there was such evidence. His Honour's finding is, thereby, erroneous and the appellant has made out his claim that the construction of the retaining was defective.

116 The analysis of the evidence undertaken above, (which although somewhat detailed nonetheless is not exhaustive), demonstrates that his Honour's findings that there was 'no evidence' to support the various items of the cross claim was erroneous. There was detailed evidence in relation to most of the claims advanced by the appellant. It follows that the appeal in respect of the cross-claim should be allowed. The question arises, however, as to the order that ought to be made. This consideration leads me to deal briefly with another of the grounds of appeal, namely that his Honour failed to give adequate reasons for decision.

Failure to give adequate reasons for decision

117 The requirements of a trial judge to give reasons for decision are well-known. For present purposes, having regard to the conclusions that I have already reached in relation to the claim and the cross-claim, it is sufficient to refer to them in a most summary way. First, a trial judge must give adequate reasons for decision: see the statements of principle in ***Beale v Government Insurance Office of NSW*** (1997) 48 NSWLR 430: ***Waterways Authority v Fitzgibbon*** (2005) 79 ALJR 1816; [2005] HCA 57. Secondly, in the case of expert evidence, the trial judge must engage in an appropriate intellectual exercise to determine which evidence ought to be accepted: ***Wiki v Atlantis Relocations (NSW) Pty Limited.***

118 Consideration was given to the underlaying basis of the principles which govern the trial judge's obligation by the High Court in ***Waterways Authority v Fitzgibbon***. In that case Hayne J said at [129]-[130]:

"Reference was made in argument to the 'sufficiency' of the primary judge's reasons. When it is said that a judge did not give 'sufficient' reasons for a decision there may be some doubt about what principles are engaged. Reference may be being made to the duty of a judicial officer 'to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal [including] not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision'. To fail

to make or cause to be made such a note may invoke principles of procedural fairness and constitute a failure to exercise the relevant jurisdiction.

In the present case, however, reference to the 'sufficiency' of the primary judge's reasons is not to be understood as seeking to invoke only those principles. Rather, because the primary judge was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Understanding the reasons given at first instance in that way, the error identified in this case is revealed as an error in the process of fact finding. In particular, it is revealed as a failure to examine all of the material relevant to the particular issue."

119 In my opinion, Sorby DCJ erred in both respects, although for present purposes it is the second respect identified by Hayne J which is relevant. Had the trial judge properly engaged in the fact finding exercise, he would have examined the evidence of each expert. Given the extent of the evidence on the specific areas of complaint, some recording of that evidence was warranted. Once having examined and recorded the evidence, it would have been apparent to his Honour that this was not a 'no evidence' case. His Honour would have then been required to examine the extent to which the evidence was uncontradicted and/or unchallenged. This later point is relevant to his Honour's acceptance of Mr Gleeson's evidence to which I refer below.

120 Having given such consideration to the evidence (which coincidentally is likely to have satisfied the judicial obligation discussed in ***Wiki***), his Honour would have reached that stage of the decision-making process whereby he was in a position to make findings of fact on the evidence. As this judgment may demonstrate, this was an exacting exercise and the evidence may not have been well organised for his Honour. Notwithstanding the difficulties, the judicial task to which I have referred needed to be undertaken.

121 That leads me to his Honour's preference of Mr Gleeson's evidence to that of the appellant's experts, including that of Mr Phillips. There is much judicial discussion relating to the question of the acceptance or otherwise of unchallenged evidence. This is not the case to reconsider it in detail. It is sufficient to refer to ***Hull v Thompson*** [2001] NSWCA 359 where Rolfe AJA (Sheller JA and Davies AJA agreeing) said at [21]:

"Prima facie if there is no cross-examination of an expert, (and indeed most witnesses), there is no basis for a Judge not to accept the unchallenged evidence. I say 'prima facie' because there are circumstances in which evidence in a report may be rejected or subject to criticism or doubt. This may occur where, for example, the report is ex facie illogical or inherently inconsistent; or where it is based on an incorrect or incomplete history; or where the assumptions on which it is founded are not established. However, in the absence of some such matters, there is no rational reason to not accept unchallenged evidence."

122 However, as Basten JA observed in ***State Rail Authority of New South Wales v Brown*** [2006] NSWCCA 220 at [68]: *"This statement of principle can only be usefully applied by reference to specific circumstances."*

123 In this case, only one expert, Mr Gleeson, was cross-examined. It was open to his Honour to accept his evidence over evidence that was only before him by way of written report. However, his Honour was only entitled to prefer Mr Gleeson's evidence to the extent that he gave evidence on a particular matter. I have already examined this above and indicated the areas in which it was open to his Honour to accept Mr Gleeson's evidence notwithstanding that the appellant had also adduced evidence on the same matters. There was a substantial body of evidence upon which Mr Gleeson made no comment. There was thus unchallenged expert evidence, which itself was substantially consistent, which therefore should have been accepted by his Honour.

124 Leaving aside Mr Gleeson's response to Mr Phillip's report, to the extent that Mr Gleeson did touch on the substantive matters in the expert evidence relied upon by the appellant, he did so without undertaking the same investigations as were undertaken by those experts. Again, the detail of this is referred to above. His evidence on those matters should not have been accepted over the other expert evidence. Accordingly, given the significant body of material that was available to support most of the items in the cross-claim, his Honour's "*no evidence*" findings and his other minimal findings in relation to the items of the cross-claim, it is apparent that his Honour failed to adequately engage in his fundamental obligation to give reasons in accordance with the principles to which I have referred.

125 For this reason also, it follows that the appeal must be allowed, insofar as it relates to the cross-claim.

Conclusion on the cross-appeal

126 Senior counsel for the appellant accepted that if the appellant's appeal on the cross-claim succeeded, the circumstances favoured an order remitting the assessment of the appellant's claim for damages to the District Court, but informed the Court that the appellant wished this Court to determine the damages but that he would abide by the Court's determination. Counsel for the respondent submitted that all matters should be remitted, including the determination of liability on the statement of claim and all issues on the cross-claim. I have already concluded that the appellant should have judgment on the statement of claim.

127 Pursuant to Pt 51 r 23 of the *Supreme Court Rules* 1970 (NSW), the Court may not order a new trial, unless it appears that some substantial wrong or miscarriage has been occasioned. For the reasons I have given, a miscarriage was occasioned in this case. In the normal course, in circumstances where the trial judge failed to deal with an appellant's case or substantial part thereof, an order remitting the cross-claim for reconsideration would be the proper outcome of the appeal. The question is whether a new trial should be ordered and if so, on what

issues. It will be apparent that up to this point, I have made no reference to the manner in which the appellant sought to prove damages.

128 At trial, the appellant sought to adduce evidence in respect of the cost of the rectification by way of the tender of a letter dated 27 April 2000, from Philway Constructions. It stated:

"We advise having inspected the above property at your request and agree many items are in need of attention before the home can be handed over to you.

After inspection of various items pointed out by you, in our opinion the costs of rectification could be $70,000 to $100,000. However as stated to you, a qualified building inspector should be engaged to look at the home and give a detailed list of defects and recommended rectification procedures before an exact quotation can be given.

It is apparent, in my opinion, a lack of supervision in the original construction stages has occurred making simple rectifications impossible."

129 The respondent objected to the tender of the letter on the basis of relevance. It did not object to it on the basis that it had not had an opportunity to meet it, or that it had not been served in accordance with the rules. The trial judge rejected the evidence on the basis that it was not relevant. That ruling was not correct. The material was relevant. Whether it was sufficient to establish the damages to which the appellant might be entitled on the cross-claim raises a different issue, namely whether there was sufficient evidence of damage and also gives rise to the difficult question in this case as to whether the cross-claim ought to be remitted.

130 The letter from Philway Constructions as to the costs of rectification was imprecise, in the sense that it was not related to particular items of rectification work. But it was some evidence.

131 There was other evidence of cost: for example, there was a quotation for the retaining wall in the sum of $1,850 plus GST, although such work was quoted on the basis that there was no structural guarantee for it. There was evidence of the cost of cleaning up, which in itself was evidence of some of the individual items for which the appellant had made a claim.

132 Some evidence of other costs could be derived from the tender documents, for example in relation to piering. There was also evidence of the contract price. That might have provided some measure against which damages could have been assessed, given that there is an indication in the evidence that the house is so badly constructed that the rectification work that will need to be undertaken will be substantial.

133 There is another matter which is relevant. The author of the Philway Constructions letter stated that, in his opinion, "*a lack of supervision in the original construction stages has occurred making simple rectifications impossible*". On the other evidence before the Court, this statement has force. It may be, and there are indications in the evidence to support this, that fundamental aspects of the building structure are so unsatisfactory that this building is either not capable of rectification or, alternatively, rectification work would be so expensive, that an alternate course ought to be taken. None of those issues were the subject of evidence or determination in the court below, although they might have been had the Philway Constructions report been admitted into evidence.

134 The question arises therefore as to what order this Court ought to make, in circumstances where the appellant is clearly entitled to succeed on the appeal in relation to the cross-claim, but where the evidence as to damage was not as satisfactory as it should have been.

135 Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provides for breach of contract, an award of damages: ***Chaplin v Hicks*** (1911) 2 KB 786 at 792 per Vaughan Williams LJ; ***Fink v Fink*** (1946) 74 CLR 127 at 143; ***Sellars v Adelaide Petroleum NL*** (1994) 179 CLR 332 at 349 per Mason CJ, Dawson, Toohey and Gaudron JJ. Such damages should not be nominal only, notwithstanding that the award may be difficult to assess: ***State of NSW v Moss*** (2000) 54 NSWLR 536 at 554 per Heydon JA; [2000] NSWCA 133.

136 The Federal Court of Australia has applied the above principles in determining damages to claims under s 52 of the *Trade Practices Act* 1974 (Cth); ***Enzed Holdings Ltd v Wynthea Pty Ltd*** (1984) 57 ALR 167 (Full Court); and for infringement of registered trademarks: ***Sony Computer Entertainment Australia Pty Ltd v Stirling*** [2001] FCA 1852; ***Adidas-Salomon AG v Turner*** [2003] FCA 421.

137 The principles to which I have referred are sometimes stated loosely in terms that a court must do the best it can to assess damages. However, in ***Placer (Granny Smith) Pty Limited v Thiess Contractors Pty Limited*** (2003) 196 ALR 257; [2003] HCA 10 Hayne J at 266 pointed out that at least in some cases, it is necessary or desirable to distinguish between a case where a plaintiff *cannot* adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff *has not* adduced such evidence. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter.

138 As I have already said, the appellant did not adduce the evidence that would normally be adduced in a building case. Accordingly, even had his Honour found for the appellant on the cross-claim, there would have been some difficulties in the assessment of damages. This Court would be confronted with the same difficulties if it embarked upon its own assessment. This gives rise to a consideration of what order the Court ought to make. In this respect it is necessary to have regard, not only to Pt 51 r 23 of the *Supreme Court Rules*, but also to s 56 of the *Civil Procedure Act* 2005 (NSW) which provides that the overriding purpose of the Act and Rules of Court "*is to*

facilitate the just, quick and cheap resolution of the real issues in the proceedings": s 56(1). Subsection (2) then provides: *"The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule."*

139 There is some tension in this case in giving full weight to the injunction in s 56 and in making an order that would normally follow in a case such as the present which would involve a retrial. If this Court were to determine damages it would do so in circumstances where there has not been a proper determination as to the extent of the defects of which the appellant complains. To remit the matter for a retrial however may lead to another lengthy and expensive hearing which the Court should strain to avoid, if it is possible to do so without causing injustice.

140 The case involves the construction of a residential home for a price of less than $100,000, pursuant to a contract executed in 1997. The present appeal is brought by way of rehearing, pursuant to s 75A of the *Supreme Court Act* 1970 (NSW). If it is possible for the Court to make final orders disposing of the proceedings, it should do so. In relation to damages, arguably this Court is in as good a position as the trial judge to determine questions of quantum. If the Court cannot do so, it is because the appellant failed to provide sufficient evidence at trial to allow the quantification of his claim and, even had he succeeded, no damages would have been awarded. In those circumstances, arguably it would be appropriate for this Court to dismiss the appeal, and uphold the final order made by the trial judge dismissing the cross-claim "*with the exception of two items totalling $225.00*", which were conceded by the builder.

141 That result would be unjust in circumstances where it is apparent that the appellant has suffered a significant loss and there was more evidence available to the trial judge than the damages involved in those two items conceded by the builder. Accordingly, a damages order of $225 would itself be erroneous.

142 Whilst the onus lay on the appellant to prove his damages, there were difficulties with the way the trial was conducted. Clearly, the cost of rectification depended to a large extent on the precise nature of the defects established by the evidence. This was a case which might well have benefited from a separate determination of liability, prior to assessing the costs of rectification. Alternatively, each of the experts who identified defects should have been asked to identify the cost of rectification of the defects which they identified. That was not done, and it was known to the parties and the Court that that approach had not been taken, prior to the commencement of the trial.

143 It may be said that the appellant had himself to blame in neither presenting complete evidence in the sense suggested, or, alternatively, in not seeking a separation of liability and assessment of damages. However, the strength of that criticism depends upon one further factor, that being the qualification to which I have referred above, and an understanding of the appropriate approach, in terms of case management, to a self-represented litigant.

144 The further factor concerns the rejection of the evidence presented by way of the letter from Philway Constructions. As I have already said, objection was taken to the terms of the letter on the basis of "*relevance*". The following exchange between the trial judge and appellant followed:

"His Honour: Yes. How can this get in, this letter?

Uszok: My solicitor advised me to contact qualified people with licence to provide the rectification costs.

His Honour: They suggested you get a building inspector to do that. Did you get a building inspector to do that?

Uszok: My solicitor advised me on that.

His Honour: This document goes out. I put a line through it. Any other document?

Uszok: Your Honour, accordingly, he then sent me a letter –

His Honour: Who?

Uszok: My solicitor, when he advised me and he spoke to me –

His Honour: This letter goes out from Philway Constructions, A4. It's not relevant."

145 The objection and the ensuing discussion with the trial judge were both opaque. A global assessment of the costs of rectification may well have been based upon the proposition that the defects were so fundamental that it would be necessary to rebuild the house to a large extent. An opinion to that effect could hardly be said to be irrelevant. If the objection were that the basis for the opinion had not been explained, the appellant, if so advised, might well have been in a position to offer to call the author of the letter to explain his opinion.

146 Although the tender of oral evidence in such circumstances might be unorthodox, with an unrepresented party, it is not implausible that the trial judge applying proper principles would have acceded to the application. Further, if it had been pointed out that such an approach might only be justified on the assumption that the major defects in relation to the slab and trusses were upheld, there might well have been an application to defer such evidence until a ruling was made on the question of liability, identifying those defects which had been established.

147 This leads to a further question as to what was required of the trial judge in dealing with a claim presented by an unrepresented party.

148 This issue arises most frequently in relation to tribunals, which are under a duty to accord procedural fairness to an applicant. A tribunal will frequently have to take affirmative steps to ensure that it understands the issues

presented to it and that the applicant understands the nature of and limitations on its powers. These principles may operate differently in the context of adversary litigation, but they remain apposite.

149 In ***Neil v Nott*** (1994) 68 ALJR 509, the High Court considered the refusal of an application for extension of time by Mr Neil who sought an order for contribution from the estate of his deceased wife. One question was whether the claimant had known of his rights within the relevant limitation period. However, his application had been refused by Tadgell J at first instance because his Honour had thought that the application was misconceived and would have failed, even if the extension had been granted. The High Court noted (at 510): *"[T]he question before this court is whether the reasons for judgment of Tadgell J reveal an error of principle which vitiates his Honour's exercise of the discretion to extend time. It is not an easy question to answer, for Mr Neil's advocacy has often been directed to irrelevant issues, as the reasons of Tadgell J reveal and as his argument in this court confirms. A frequent consequence of self-representation is that the Court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy. It has been so in this case."*

150 The need for a trial judge to ensure that an unrepresented party understands the procedural options available to him or her has also been considered in the context of the criminal trial. In ***MacPherson v The Queen*** (1981) 147 CLR 512, the High Court considered the view of the Court of Criminal Appeal that "*there was no obligation on the trial judge to advise the applicant that he might object to the confessional evidence, and might seek to test its admissibility on a voir dire*": at 523, per Gibbs CJ and Wilson J. Their Honours continued:

"*It was suggested that a judge who advised an accused person in this way would be assuming the role of an advocate, and that in any case he could not effectively advise the accused on such a matter, and that if the accused were persuaded to seek a voir dire the result might be to his disadvantage.*"

151 Their Honours rejected that approach at 524: *"However, there should be no difficulty in explaining to an accused person (in the absence of a jury) that it is necessary for the judge to hear evidence in the absence of the jury to enable him to decide whether the evidence of the confession should be admitted, that the accused may cross-examine the Crown witnesses and give and call evidence himself on the issue of voluntariness, that if he does give evidence he may be cross-examined, and that his answers on cross-examination may be used against him on the trial. It would be wrong to think that a judge who explained to an accused person the choices open to him would be playing the part of an advocate – he would be performing his duty as a judge by informing the accused of his rights in relation to the conduct of the trial."*

152 Mason J in *MacPherson* expressed a similar view (at 534): *"Giving full weight to the adversary character of a criminal trial and the difficulties of advising an accused who is not represented, I nevertheless consider that the trial judge is bound to ensure that an accused person has a fair trial. To that end he is under a duty to give the accused such information and advice as is necessary to ensure that he has a fair trial. Once an issue as to the voluntariness of a confession arises fairness to the accused suggests that he should be acquainted with his right to a voir dire hearing. If he is left in ignorance of it he loses a valuable opportunity of testing the admissibility of the evidence, an opportunity which is often availed of by counsel for the accused. A trial in which a judge allows an accused to remain in ignorance of a fundamental procedure which, if invoked, may prove to be advantageous to him, can hardly be labelled as 'fair'."*

153 This statement was adopted by Aickin J at 537 and a similar view was expressed by Brennan J at 546-547. The same principles were reiterated in ***King v The Queen*** (2003) 215 CLR 150 at [95]; [2003] HCA 42 by Kirby J.

154 In ***Minogue v Human Rights and Equal Opportunity Commission*** (1999) 84 FCR 438 at [29], the Full Court of the Federal Court considered the duty of a trial judge to an unrepresented litigant and suggested that the duty might have a more extensive scope in criminal proceedings than in civil proceedings. The Court (Sackville, North and Kenny JJ) affirmed principles stated by Samuels JA (at 14) in this Court in ***Rajski v Scitec Corporation Pty Ltd*** (Court of Appeal, 16 June 1986, unreported) to the following effect:

"*In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored … An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts.*"

These principles were recently applied in ***Nipperess v Military Rehabilitation and Compensation Commission*** [2006] FCA 943 at [50]-[54] by Cowdroy J.

155 The passage from the transcript extracted above failed to provide an explanation to the appellant of the problems with the evidence he sought to tender and the means that might be available for rectification of the problems. The objection by counsel and the response of the trial judge reflected obscurantism rather than elucidation. It is not the only area of complaint made by the appellant in respect of the manner in which the trial was conducted. As I explain further below, this will have consequences in respect of the extent of the relief that this Court should give.

156 In other circumstances, a failure to prove a critical element of the appellant's claim at the first trial might have led to a rejection of the appeal, whatever errors the trial judge may have made. However, in my view, the conduct of the trial revealed sufficient unfairness to demonstrate a miscarriage which would justify allowing an opportunity for the appellant to correct any absence of evidence with respect to the assessment of damages, in circumstances

where defective work had been adequately established. Likewise, the respondent will be entitled to call evidence as to the extent of the defects and the cost of rectification and to otherwise meet the appellant's claim for damages in any way it sees fit.

157 These considerations lead me to conclude that the matter should be remitted for the assessment of damages on each of the items in the cross-claim that were subject of the appeal, including the claim in relation to the floor which is closely connected to the issues relating to the slab and the frame. The basis of the remittal is that the appellant having succeeded on establishing that the respondent breached the contract by defective work on the items raised on the appeal, as well as the item relating to floors, will be permitted to establish the extent of the defects on those items and the damages to which he is entitled, either by way of cost of rectification or such other basis as he may seek to establish as the appropriate measure of damage. The remittal will permit both parties to call such other or further evidence as they may think fit.

158 There is a further factor relating to the cross-claim that needs to be raised. The appellant was entitled to liquidated damages at the rate of $14 per day if the contract was not completed within 26 weeks of the date of commencement. He made a claim for this in his cross claim as well as a claim for rent that he had lost as a result of not being able to lease the property from that time. Neither claim was dealt with although it may be that the latter claim is, as a matter of law, encapsulated in the former. This was not dealt with by the trial judge, who dealt with the cross-claim only on the basis of the items raised in the Scott Schedule.

159 Strictly, both claims should have been dealt with. On his Honour's determination on the respondent's claim, both would have been dismissed. On this Court's determination, the claim for liquidated damages would be allowed, although the outer limits of the claim may be an issue. Although neither claim was itemised in the cross appeal, the Notice of Appeal and its amendment is sufficiently wide in its claim for relief to encompass these claims. This is a trial that miscarried for the reasons that I have given and in the circumstances I am of the opinion that in remitting the matter for the assessment of damages, these two claims should also be remitted.

160 Accordingly, I propose the following Orders.

1. Appeal allowed;
2. Verdict, judgment and orders of the trial judge set aside;
3. Order that there be judgment for the appellant on the Statement of Claim;
4. Order that there be judgment for the appellant on the cross-claim with damages to be assessed;
5. Remit the matter to the District Court for assessment of damages in respect of the items, (including floors) specified in paragraph [70] of this judgment, together with the claim for liquidated damages and rent;
6. Order the respondent to pay the appellant's cost of the hearing at first instance and on the appeal, the respondent to have a certificate under the *Suitors' Fund Act* 1951 (NSW) if so entitled.

161 **BRYSON JA**: I have had the benefit of reading in draft the judgment of Beazley JA. I respectfully agree with the substance of Beazley JA's judgment from paragraphs 1 to 125, but in my opinion it does not follow from what her Honour has said that the appeal should be allowed in so far as it relates to the cross-claim. I respectfully dissent from their Honours' conclusion that it is appropriate to remit Mr Uszok's cross-claim for further hearing. He had his opportunity to bring forward at first instance admissible and relevant evidence on the quantum of damages which he should recover on such of the items in the Scott Schedule as he succeeded in establishing, and it is my judgment that he does not have any just claim to be given a further opportunity to assemble and tender evidence.

162 In my opinion Sorby DCJ was right to reject the Philway Constructions letter dated 27 April 2000, with which Beazley JA deals at [128]. The Philway Constructions letter is too vague and indefinite and too lacking in particularity to be the foundation of a finding on rectification costs for any or all of the Scott Schedule items of which there are grounds for further consideration. The letter does not deal with any identifiable item, but with the "cost of rectification" overall. Its own terms show that it is not exact and that it is pre-final. No defensible conclusion about the damages for any cross-claim item on which the appellant was successful could have been founded on that letter if it had been admitted into evidence. As Sorby DCJ said, the letter was not relevant. More could have been said, but what his Honour said was correct, in my opinion.

163 I respectfully say that I see no substance in the view that the appellant's difficulty arose from any shortcoming or failure in the conduct of the trial by the Trial Judge. The Trial Judge had a full opportunity to observe the appellant and the appellant's forensic capacity, and was in a position which the Court of Appeal cannot attain to judge the need for and the utility of giving the appellant explanations of what he should do and how he should present his case. The choice whether to intervene, in what way to intervene and in how much detail is largely discretionary and decisions of this kind can rarely be open to appellate review. It would in my view have been an inappropriate intervention and an error for the Trial Judge to embark on explaining the nature of the evidence which the appellant needed to call and how he should go about obtaining it, or to confer on him any opportunity by way of adjournment of a long hearing to do something which Mr Uszok should already have done in his own interest. It is wrong and unjust to turn self-representation into a procedural advantage.

164 The shortcomings which, as the judgment of Beazley JA shows, exist in the trial judge's disposition of some cross-claim items do not in my opinion justify the conclusion that there should be a new trial as to any or all of the cross-claim. In my opinion the appellant should have lost at trial on the cross-claim because he did not produce any evidence upon which findings could be based about the damages which should be allowed for each particular cross-claim item on which he was successful. I do not regard the quotation for a retaining wall, altogether lacking in detail, or the amounts for particular items in tender documents, or the contract price overall as of any value in

assessing the quantum of damages for particular Scott Schedule items. They simply do not deal with the measure in money of the loss to the appellant caused by the respondent's breaches of its contractual obligations in respect of those items. There has been no substantial wrong or miscarriage in the appellant's not succeeding in these cross-claims; this was the correct conclusion which the Trial Judge should have reached, and it is no less correct because he reached that conclusion on very different and erroneous grounds.

165 There are reasons for disquiet about the outcome. If the appellant's case at first instance had been conducted in a better way it may be – it seems likely - that he would have shown an entitlement to much more than damages for a few Scott Schedule items. Practical Completion was not achieved for reasons which include that the respondent had not satisfactorily completed stages two and three relating to the slab and the timber frame. When such basic parts of the work are not satisfactory the whole structure may well require demolition. In his own interests, if the structure ought to have been demolished, the appellant should have presented evidence of the damages on the basis that that was to happen. He did not do so. The Court of Appeal should not attempt to conduct his litigation for him, and should not confer on him a second procedural opportunity when, or because he did not use the first opportunity properly.

166 In my opinion the appellant should succeed on appeal to the extent only on setting aside, with costs, the judgment which the respondent obtained against him in the District Court.

167 **BASTEN JA**: I agree with the orders proposed by Beazley JA and with her Honour's reasons.

F Corsaro SC; P Glissan (Appellant) instructed by Baker & McKenzie
H Stowe; M Holmes (Respondent) instructed by Blake Dawson Waldron