

**J-CORP LTD v GILMOUR
[2005] WASCA 136**

Supreme Court of Western Australia Court of Appeal – 27 July 2005

FACTS

Ross Stewart Gilmour (“Gilmour”) entered into a building contract with J-Corp Ltd (“J-Corp”), the builder, to construct a house in Chidlow, Western Australia.

The structural engineer inspected the site and on the information from the inspection recommended footing details for the house. In his inspection certificate he stated that “if clay is encountered the footing detail will need to be amended appropriately.” Although clay was encountered, the footing detail was not amended. This resulted in significant cracking of the floor slab and the walls of the house. Further, although Chidlow is in a seismic zone, the house was not constructed to the necessary standards for earthquake loads.

Due to the defects, Gilmour sued J-Corp in the Local Court for breach of Contract, the trial Magistrate holding that the damages payable to Gilmour were the cost of the house to be demolished and reconstructed (reinstated).

J-Corp appealed to the District Court, and then to the Supreme Court on the grounds that the house did not require demolition and reinstatement, contending that it was unreasonable to require J-Corp to pay the cost of making the house conform to the building contract and that damages should be assessed on the basis of the cost to carry out the rectification works.

ISSUE

Whether the damages should be assessed on the basis of demolition and reinstatement.

FINDING

The Court held that the house, as constructed, did not comply with the minimum criteria for the protection of life by minimizing the likelihood of its collapse in an earthquake.

Accordingly, the Magistrate was correct in concluding that J-Corp should bear the cost of bring the works into conformity with the building contract which requires demolition of the house and reinstatement.

QUOTE

McLure JA held at paragraph 47:

I am satisfied that the rectification works proposed by Mr Ferritto do not give [Gilmour] the equivalent of substantial performance of the building contract. They are not a practical alternative solution. [J-Corp] seeks to transfer to [Gilmour] the risk of continued cracking of the house and the reduced protection in an earthquake. Reasonableness does not require [Gilmour] to carry those risks. The cost of reinstatement is not out of proportion to the benefit to be obtained. [J-Corp] says [Gilmour] will receive a “windfall” if he chooses not to demolish and rebuild. That is not an impediment to recovery: *Bellgrove* at p 620; *De Cesare* at p 34 – 35. In any event, the departures from the contractual requirements are of such a nature and magnitude that they are more likely than not adversely affect the market value of [Gilmour’s] property.

IMPACT

This case confirms the position that the owner of a property built defectively may be entitled to damages on the basis of demolition and reinstatement, even though the owner may receive a “windfall” if he/she decides not to rebuild.

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