VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D146/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building, Contract, Defective and Non Compliant work, Damages.

APPLICANTS	Wayne Robert Taylor, Jennifer Louise Taylor
FIRST RESPONDENT	Trentwood Homes Pty Ltd (ACN 107 759 642)
SECOND RESPONDENT	Darko Gorupic (withdrawn from proceeding as of the 9/12/11)
WHERE HELD	Melbourne (On site on 7 February 2012)
BEFORE	Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	6, 7, 8, 9, 10 February 2012 Final written submissions received 20 March 2012
DATE OF ORDER	24 April 2012
CITATION	Taylor v Trentwood Homes Pty Ltd (Domestic Building) [2012] VCAT 520

ORDERS

1. The First respondent must pay the Applicants $33,717.50.
2. Costs reserved. I direct the Principal Registrar to list any application for costs before Member M. Farrelly.

MEMBER M. FARRELLY

APPEARANCES:

For the Applicants	Mr B Reid of Counsel
For the First Respondent	Mr A Beck-Godoy of Counsel

REASONS

1 The applicants ("the owners") are the owners of a home constructed by the respondent ("the builder") at Wodonga, Victoria ("the home"). The home was completed in October 2009. The owners seek damages in the sum of $252,572 in respect of various works alleged to be defective and / or non compliant with requirements under the building contract.

BACKGROUND

2 The owners and the builder entered a new home building contract on 23 March 2009 ("the contract"). The contract incorporated the builders' final letter of offer to the owners dated 4 March 2009 which identified various works as included under the contract, including:

- *T2 treated frame and trusses*
- *Bamboo strip flooring natural (as nominated on plans) supplied and laid with underlay and trims*
- *Vaulted ceiling to meals*.

3 The builder commenced works in around late March 2009 and completed them by around the end of October 2009. There is no dispute that the owners made full payment of the contract price. In May 2010 the owners arranged for an inspection and report on the home by Archicentre Limited. The resulting report of Mr Pringle dated 17 May 2010 ("the Archicentre report") raised a number of issues as to alleged defective works or works being non compliant with the contract requirements.

4 In their points of claim dated 20 September 2011 the owners have claimed damages of $248,638.53 made up of:

- $225,428.50 as the cost of rectification of defective / non-compliant works
- alternative accommodation cost for the period of rectification,12 weeks at $1,155 per week for a total sum of $13,860; and
- removal and storage costs of $9,350.03.

THE HEARING

5 The matter came before me for hearing on 6 February 2012 with five days allocated. Mr Reid of Counsel appeared on behalf of the owners and Mr Beck-Godoy of Counsel appeared on behalf of the builder.

6 Lay evidence was given by the owners. Mr Tucker, director of Town and Country Timber Flooring, Wodonga,("Town and Country") attended to give evidence in answer to a witness summons issued on behalf of the owners. Mr Gorupic, a director of the builder and his two sons, Jarrod Gorupic and Tyson Gorupic, both employees of the builder, gave evidence for the builder.

7 Expert evidence was provided by Mr Lorich of Buildspect & Co Pty Ltd, Mr Stringer from the Australian Timber Flooring Association Ltd and Mr Cross of Bayside Building Surveyors Pty Ltd. Reports provided by Mr Lorich and Mr Stringer were filed on behalf of the owners. Reports provided by Mr Cross were filed on behalf of the builder.

8 During the hearing reference was made to the Archicentre report although the author of the report, Mr Pringle, was not called to give evidence at the hearing.

9 A view of the property at Wodonga was conducted on the second day of hearing ("the view"). The hearing concluded on 10 February 2012 and counsel for both parties subsequently provided final written submissions.

DEFECTIVE WORKS

Bamboo flooring. Claim $28,173.50

10 The contract provided for installation of bamboo style clip lock flooring throughout the main living areas of the home (the kitchen, family/meals area, rumpus room, entry and passageways).

11 The builder recommended to the owners that they attend Town and Country to select a bamboo floor product. The owners, however, had sourced a bamboo flooring product, "Style Limited uni clip bamboo floating floor" ("the Style product"), which was supplied by the local Wodonga Bunnings store and they asked Mr Gorupic to assess the suitability of this product. The main differences between the Style product and an alternative bamboo floor product which could be supplied by Town and Country were:

- the Town and Country product was 14mm thick and came in lengths of 1830mm whereas the Style product was 10.5 mm thick and came in shorter lengths of 600mm and 1200mm;
- the Style product was significantly cheaper. At a supply cost of $43 per square metre compared with $92 per square metre for the Town and Country product, and a floor area of around 130 square metres, the Style product was around $6,370 cheaper.

12 Mr Gorupic inspected the Style product and, despite holding some misgivings, confirmed to the owners that it was a suitable product. Mr Gorupic says that he told the owners *"I am happy with that product"* and *"Yes, I can lay this floor*." Conscious to save on building costs, the owners chose the Style product. Mr Gorupic confirmed in evidence that he accepted that the owners relied on his ability to lay the Style product.

13 The Style product was installed by the builder in around early to mid October 2009. Within several weeks the floor began showing signs of lifting/peaking.

14 In late November 2009 Mr Gorupic attended the property at the request of Mr Taylor to inspect the floor. As stated in his witness statement, Mr

Gorupic considered that "*the boards had had a bit of moisture take up from use of the evaporative coolers and had expanded and lifted a bit as a result*". He says he suggested to Mr Taylor that "*we should give the flooring a bit of time to adjust to the internal conditions and that once the boards had settled that I would come back and address any issues*" and that "*if necessary, I could install 2 or 3 expansion joints at particular points, which would allow the boards more room for expansion if necessary.*".

15 Mr Gorupic again inspected the floor in mid December 2009 and, in an attempt to rectify the lifting of a few board ends at the entry of the living room, applied a line of glue along the trim where the boards ended. He says that he also suggested to Mr Taylor that the floor be given a little further time to settle before considering the installation of expansion joints. Mr Taylor says that at this second inspection he requested that Mr Gorupic remove skirting boards and install expansion joints but Mr Gorupic did not wish to carry out such works (at least at that point in time).

16 The flooring continued to expand and lift throughout the latter part of December 2009 and early January 2010. In early January 2010, while Mr Gorupic was on holidays with his wife, Mr Taylor informed Mr Gorupic by phone text message that the floor was lifting further. Mr Taylor removed several boards which had lifted and were creating a hazard.

17 Shortly after his return from holidays on18 January 2010 Mr Gorupic sought advice in relation to the floor from Mr Tucker of Town and Country. Mr Gorupic says that Mr Tucker recommended the installation of 3 expansion joints. It is the builder's primary argument, in respect of the flooring, that by 18 January 2010 it had recommended to the owners that 3 expansion joints be installed and that such works would resolve the problem of the expanding and lifting floor. The builder says that the owners refused to allow such works and instead demanded that the builder replace the entire floor. The owners dispute this and say that the builder failed to install expansion joints as required by the Style installation instructions with the result that by February 2010 the floor was a "*catastrophic failure.*"

18 There is dispute between the parties as to the nature and timing of discussions in respect of remedial action proposed to rectify the floor. During the course of the hearing (and after he had been cross examined on the evidence in his witness statement) Mr Taylor produced, for the first time, a number of documents which had not previously been discovered. One of those documents was an alleged contemporaneous note he had made following a telephone discussion with Mr Gorupic on 16 February 2010. The note, signed and dated 16 February 2010, records (with my underlining /emphasis added):

> "16 Feb 10 14.15 L Teleon with Darco
>
> Darco called and said that he had just been talking to Lindsay @ Town & Country about getting assistance with installing expansion joints. He said that Lindsay had advised him that it had gone beyond that. I said to Darko

that the only way forward was to lay all the cards on the table. I once again asked Darko to look at the floor. We organised a time of 16.30 **that day** 16 Feb 10.

This **was the first time I had spoken** to Darco reference the floor no longer be repairable on advice from Lindsay @ Town & Country"

19 The underlined sections of the note employ past tense language which cannot, in my view, be reconciled with the alleged contemporaneous nature of the note. I do not accept Mr Taylor's evidence that the note was made by him shortly after (on the same day as) an alleged telephone conversation with Mr Gorupic. I do not accept that the note represents an accurate record of a conversation between Mr Taylor and Mr Gorupic. Mr Taylor's production of the note for the first time during the hearing casts a shadow over his credibility as a witness, particularly in relation to his recollection of important conversations. I found Mr Gorupic, on the other hand, to be a credible witness who gave straightforward, honest answers when giving evidence. For the reasons set out below, I find that the flooring is defective and will need to be replaced. My finding in this regard is founded on the evidence other than that given by Mr Taylor.

20 In early February Mr Gorupic arranged for Mr Tucker to inspect the floor with Mr Taylor. Mr Taylor claims that Mr Tucker expressed the view that the floor was "not salvageable". Mr Tucker denies using the terms "*not salvageable*" or "*not repairable*". However, he also gave evidence that while the floor might be repaired, the repair would, by reason of the poor quality of the Style product, not succeed. He also said that the floor would continue to expand and "*would ultimately fail*."

21 On 17 February 2010 the builder lodged an insurance claim under its contract works policy with Vero Insurance Ltd seeking indemnity in respect of the damaged bamboo floor. The insurance claim form describes the damage as having occurred because "*installation of required expansion joints were overlooked during the construction causing floor to expand and break in various areas*."

22 By letter to the builder dated 31 March 2011, Vero confirmed its denial of liability in respect of the insurance claim. The Vero decision letter included the following comments:

- It has been confirmed that the installation instructions provided with the product were not complied with and therefore expansion joints of up to 15mm were not incorporated when installing the flooring. We have been advised that this is the first instance that this product had been used.
- We have queried why the installation instructions were not complied with and have been advised that there was an assumption made the installation of this product was consistent with similar products and therefore no reference was made to the installation instructions provided with the product.

23 Mr Gorupic gave evidence that, while he had installed many clip lock floating timber flooring systems, he had never before installed bamboo flooring. He says *"I didn't expect bamboo to be any different*" and *"I did not install expansion joints in the body of the floor itself because I had never done that in the installation process with any of my previous floors"*.

24 Mr Taylor says that in mid February Mr Gorupic told him that he intended to make a claim to Bunnings in respect of the Style product. Under cross examination Mr Gorupic confirmed that he spoke to Bunnings however Bunnings denied any liability by reason of the builder's failure to install expansion joints in accordance with the product's installation guidelines.

Expert evidence on flooring

25 In January 2011 the owners engaged the Australian Timber Flooring Association Ltd ("ATFA") to inspect and report on the floor. The ATFA inspector, Mr Stringer, inspected the floor on 31 January 2011 and provided his report to the owners on 14 February 2011. In his report Mr Stringer opines that:

- moisture meter readings (using a tramex concrete encounter moisture meter) indicated high concrete sub floor moisture in excess of 6%;
- the floor was lifting in numerous locations;
- insufficient expansion allowance had been provided and there were no intermediate expansion gaps in the floor;
- the floor underlay was not taped at joins;
- moisture ingress to the bamboo flooring was occurring;
- remedial works to this type of floor would generally entail pulling up sections of the floors and adding expansion gaps every 6 metres as the floor is relaid "*however it is considered that due to the high degree of movement, peaking, lifting and tenting, as well as the lack of expansion allowance that this may fail and that in fact it may be better to totally remove this floor and install a flooring system that has its installation instructions followed as well as assessing the site further for its suitability for that type of flooring system due to the moist slab"*.[1]

26 In his report dated 3 July 2011 Mr Cross:

- opines that Mr Stringer's slab moisture reading is unreliable to the extent that the moisture reading obtained (in excess of 6%) was not possible;
- states that "*it is likely the floorboards swelled after their installation due to an uptake of moisture following the opening of the floorboard packs. The absence of expansion joints in the floor across the entire building has caused the boards to lift when they initially expanded …*

[1] Stringer report, paragraph 8

in my view, keeping the flooring units original taped packaging with the boards stacked and without access to their surrounding environment would provide limited opportunity for the boards to acclimatise. This is the most likely cause of the early rapid expansion exhibited in the floor throughout".[2]

- considered the installation instructions of the manufacturer (Style) to be "*confusing, inadequate and inconsistent to properly instruct installers on appropriate requirements for the installation, width and frequency of expansion joints".*[3]
- concluded that "*in the absence of adequate manufacturer's installation instructions it is my view that the builder is required to calculate the possible expansion and contraction of a particular timber floor product. In this case, the builder did not calculate the expected expansion of the floor, and relied on the manufacturer's instructions, and provided a 10mm gap at the walls which proved to be inadequate*".[4]

27 In his report dated 9 September 2011 Mr Lorich opines that the Style product "*is of poor quality, cannot cope with the humidity levels generated by the evaporative cooling system installed in this dwelling*".[5] In evidence Mr Lorich confirmed his view that the flooring product was a "*poor product*" and "*at the bottom end*" of the range of available floating timber floor systems.

28 Mr Lorich, Mr Cross and Mr Stringer agree that bamboo is more volatile than timber in respect of its reaction to moisture. Mr Cross and Mr Stringer also agree that pre-laying acclimatisation of the bamboo product was largely irrelevant as the product would continually acclimatise to its surrounding conditions. The surrounding conditions at the time of laying the floor would necessarily be quite different to the conditions after the owners moved into the property and commenced using heating/cooling systems.

29 Mr Cross and Mr Stringer agree that it was important to make sufficient allowance for expansion at the time of laying the floor and, while the builder had made some provision for expansion by leaving an expansion gap of approximately 10mm where the exterior edging of the floor met the walls, such provision was inadequate. Mr Stringer and Mr Cross agree that adequate expansion provision for this type of flooring would require, in addition to external edge expansion allowance, the provision of further ***intermediary*** expansion joints throughout the body of the floor. Mr Cross identified 6 locations for such intermediary expansion provision. Mr Stringer says that suitable intermediary expansion provision would require

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2 Cross report, paragraphs 38 and 41.
3 Cross report, paragraph 55
4 Cross report, paragraph 57
5 Lorich report, item 1.

the installation of expansions joints throughout the flooring such that each area of the floor (kitchen/meals, family, entry, rumpus and hallways) would effectively be "isolated" as discrete areas protected by a perimeter boundary of expansion joints.

30 Mr Stringer also notes the importance of ensuring that areas of expansion provision be free of any weight bearing which would restrict or prevent the expansion. In this regard Mr Stringer was critical of the installation of the flooring under the double glazed doors leading from the meals area to the exterior. At the view Mr Stringer pointed out that the doors were sitting on the floor and not allowing lateral expansion to occur with the result that boards, under pressure, were peaking / lifting.

Floor rectification

31 Mr Cross says that the floor is now fully acclimatised and may be re-laid, with adequate provision for expansion, at a cost of $4,118. I do not accept Mr Cross' opinion. I note that his opinion (as provided in his report) that the floor has now fully acclimatised seems to be at odds with his evidence given at the hearing that the bamboo product will continue to acclimatise to the surrounding conditions.

32 I have viewed the floor and I prefer the evidence of Mr Tucker, Mr Lorich and Mr Stringer. Mr Tucker was firm in his view that the Style product should not be re-layed as it is a poor quality product that would ultimately fail .

33 Mr Lorich holds, in my view, justifiable doubt as to the suitability of the Style product for large areas of flooring. The manufacturer's installation guidelines indicate that the product may expand as much as 10mm per metre. This means that the expansion provision required for large areas of floor (such as the owners' home) will be impracticable and unsightly.

34 As noted above, Mr Stringer is of the view that "*due to the high degree of movement, peaking, lifting and tenting as well as the lack of expansion allowance … it may in fact be better to totally remove this floor"*. He confirmed in evidence that he could not be sure that the floor was repairable.

35 I am satisfied that the flooring is not salvageable and it will need to be entirely replaced.

Findings on the bamboo floor

36 On all the evidence I am satisfied that:

(a) in selecting the Style product, the owners relied on the builder's assessment that the product was suitable;

(b) the builder had no prior experience in installing bamboo flooring and little, if any, knowledge as to the particular volatility of bamboo to moisture as compared to timber. The builder wrongly assumed that a

bamboo clip lock floating floor system such as the Style product would be no different to timber clip lock floating floor systems the builder had previously installed;

(c) the builder installed the Style product with little regard to the manufacturer's installation instructions;

(d) by reason of moisture ingress from the slab and the surrounding atmospheric conditions the flooring has expanded significantly and, with inadequate expansion provision, the boards are lifting, buckling and peaking;

(e) the installation of 3 expansion joints, as recommended by the builder, would not have prevented the damage;

(f) the flooring is not salvageable and will need to be entirely replaced;

(g) the Style product is an inferior product not suitable for large areas of flooring in a home.

37 I find that in approving the suitability of the Style product and by failing to install the floor with adequate expansion provision the builder has breached the builder's warranties in clause 11 in the contract (such warranties also being mandated by section 8 of the *Domestic Building Contracts Act* 1995 ("the Act"))in that:

(a) the materials used were not good and suitable for the purpose for which they were used

(b) the works were not carried out in a proper and workmanlike manner

(c) the works were not carried out with reasonable care and skill

38 The builder's breach of the warranties amounts to a breach of contract entitling the owners to damages which, insofar as money can , will place the owners in the position they would have been in if the breach had not occurred. In my view the appropriate sum of damages is the reasonable cost of removing and replacing the entire floor although the owners are not entitled to the extra cost of a superior floor product. Although I find that the Style product is unsuitable, that does not mean that the sum of damages should include the extra cost of a superior floor product. Had the owners selected a superior and more expensive product in the first instance, they would of course have borne the extra cost. The award of damages must put them in the same position. That is, to the extent rectification includes the extra cost of a superior product, the owners bear that extra cost.

39 The builder has provided a costing in the sum of $11,881.85 for removal and replacement of the floor. I note the builder produced a copy of the Bunnings invoice dated 8 October 2009 in respect of the purchase of the Style product in the sum of $5,688.54 (including GST).

40 As part of the insurance claim the builder also supplied to Vero Insurance a quotation dated 17 March 2010 for the removal and replacement of the

floor in a sum of $23,768. Mr Gorupic says the quotation allowed for a superior flooring product, however he did not identify the type or supply cost of the product. The quotation is essentially a lump sum quotation with no detail as to material cost.

41 Town and Country provided a quotation in March 2010 for removal of the flooring and replacement with a "New Style" bamboo flooring in the sum of $19,807.84 (not including GST). Mr Tucker confirmed that the "New Style" bamboo flooring was the superior product supplied by Town and Country (referred to in paragraph 11 above) which was 14mm thick and came in lengths of 1,830mm. As noted in paragraph 11 the supply cost of this product was (in 2009) $6370 more than the Style product. The quotation allows a sum of $14,182 as the cost of supply and installation of the product. The quotation includes a note that it does not allow for floor preparation which, if needed, will result in an additional charge of $75 per hour for grinding, $55 per hour for levelling and $45 per bag for levelling compound. It is unclear whether the quote allows for the cost of new underlay.

42 Mr Lorich allows the sum of $28,173.50 (inclusive of builder's margin and GST) which he assesses as the cost of removing and replacing the flooring with a product (not identified) of similar supply cost to the Style product. His estimate includes an allowance of $14,300 (not including builder's margin and GST) for the supply and installation of the floor product including underlay.

43 I prefer, with some adjustments, the Town and Country quotation as it has been provided by a flooring specialist and, in my view, is the more reliable assessment of the reasonable cost to remove and replace the flooring. The adjustments I make to it are:

(a) for the reason referred to in paragraph 38 above, I deduct a sum of $6,370 being, as noted above, the difference between the cost of the Style product and the superior product allowed for in the Town and Country quotation;

(b) I allow $300 for underlay cost, this being the charge for supply of the original underlay referred to in Town and Country's invoice to the builder dated 8 October 2009;

(c) I make a modest allowance of $200 for levelling compound and labour charges which may be required and which, as noted in the Town and Country quotation, would be additional charges;

(d) The above adjustments bring the price to $13,937.84. To this sum I add 5% - $697 - as a reasonable adjustment approximating the consumer price index in the 2 year period since the quotation was provided;

(e) Finally I add GST to bring the total to $16,097.84.

44 I allow $16,098 as a reasonable and fair sum of damages in respect of the defective flooring.

Downpipes/guttering. Claim $9570

45 The owners claim that the downpipes and guttering are insufficient to meet the stormwater demands of the roof.

46 Mr Lorich says that the downpipes provided do not meet the requirement of the Building Code of Australia (BCA) that they be spaced no more than six metres apart. He says two new downpipes are required. He also says that the overflow provisions of the BCA have not been met and rectification will require:

> "complete removal and re-fitting gutters to comply with stand-off brackets to comply with the relevant codes and good practice".[6]

47 Mr Cross disagrees and says that the downpipes and guttering are acceptable save that one extra downpipe is required in the area of the roof valley above the meals area. In support of his opinion, Mr Cross produced at the hearing his calculations as to the catchment area of the roof and the number of downpipes required to meet the requirements set out in Australian Standard AS3500.5:2000. Meeting that Australian Standard, says Mr Cross, satisfies the "deemed to comply" provisions under the BCA and in this regard his evidence was not challenged.

48 I note that at the view no one was able to point to any sign of water damage.

49 I am satisfied that Mr Cross has given more thorough consideration to this issue than Mr Lorich. I accept Mr Cross' evidence that the guttering and downpipes are adequate and compliant with legal requirements, save for the need to install one further downpipe.

50 I also accept Mr Cross' allowance for the cost of supply and installation of the downpipe (which will include removal and replacement of a small section of the front deck) in a sum of $989.

51 I allow $989 for this item.

Brickwork articulation. Claim $5,486

52 Mr Lorich says that the brickwork articulation joints have not been constructed in accordance with good building practice and the requirements of AS3700, Masonry Code, in that the joints are only 1-2mm wide and have not been caulked. Mr Lorich says the joints should be 10mm wide and caulked.

53 Mr Cross says that as the site soil classification is class S there is no requirement for articulation joints pursuant to the BCA. Mr Lorich agrees with Mr Cross however he also says that as the contract provided for

[6] Lorich report, item8.

articulation joints they ought to have been constructed in accordance with industry standards.

54 Mr Cross agrees that the joints should be caulked to prevent water ingress.

55 Mr Lorich says that, by reason of the joints being so narrow, it would be very difficult to caulk them adequately and there is a likelihood that slight movement in the brickwork will cause the caulking to break down. Mr Cross disagrees and says that there will be no difficulty caulking the joints. He further says that the caulking, being polyurethane, will not break down as Mr Lorich suggests.

56 At the view, no one could point to any signs of brickwork movement or damage.

57 I accept Mr Cross's evidence that there will be no difficulty in caulking the articulation joints and that the caulking will not break down as suggested by Mr Lorich.

58 I accept Mr Lorich's evidence that the articulation joints do not meet the requirements set out in the BCA. By reason of this, the builder has not met the warranty in clause 11 of the contract which requires the works to be carried out in compliance with all laws and legal requirements. However, save for the reasonable cost of having the articulation joints caulked, I find the owners have suffered no loss or damage arising as a result of the breach.

59 I accept Mr Cross's evidence that the cost of caulking the joints is, at approximately $6.00 a metre, a total of $192.00 plus margin. I allow a sum of $250 as the reasonable cost of carrying out the caulking to the joints.

Damp proof course. Claim $9,242.50

60 Mr Lorich and Mr Cross agree that the damp proof course installed generally to the dwelling brickwork is defective in that it is short of the external face of the brickwork by around 15-40 mm. The builder concedes that the damp proof course is defective and requires rectification. I accept the evidence of Mr Lorich and Mr Cross who agree that the appropriate rectification cost is $8,300.

61 There is no dispute that a section of the damp proof course installed to the garage brickwork (the east facing wall/pier) is defective and requires rectification. In costing the rectification works, Mr Lorich allows 10 hours labour at $65 per hour plus builder's margin and GST for a total rectification cost of $942.50. Mr Cross considers this cost to be excessive and he allows a sum of $305. Doing the best I can, I consider a sum between the two estimates to be reasonable and I allow a sum of $624.

62 Accordingly, in respect of defective damp proof course to the dwelling and the garage, I allow damages in the sum of $8,924.

Slab overpour. Claim $6,844

63 There is no dispute that the slab was poured incorrectly resulting in an "underpour" of approximately 250 mm along the section of wall abutting the alfresco area on the rear elevation and a 250 mm "overpour" along the section of wall abutting the family room on the front elevation.

64 After discussing the matter with the owners and Mr Wallace of SJE Consulting Engineers (the engineer responsible for the structural design of the home) the builder attended to rectification in accordance with Mr Wallace's instructions. An additional strip of concrete was added to the underpoured section of the slab. In respect of the overpoured section, Mr Wallace confirmed to the builder in a memorandum dated 6 May 2009 that construction of the wall 250 mm inside the perimeter of the slab was acceptable provided adequate waterproofing was carried out. Mr Wallace provided instructions as to the adequate waterproofing requirement.

65 The builder sought approval from the relevant building surveyor, Mr McLinden of MBA Building Services Pty Ltd and Mr McLinden responded with a letter to the builder dated 13 May 2009 confirming his directions that:

> 1. An alcore flashing is to be provided to the edge of the slab ensuring drainage from the cavity over the flashing to the external ground.
> 2. The flashing is to be positioned so as to collect and discharge drainage from the bottom track of the sliding door.
>
> The above is to be completed and inspected prior to cladding for the framework.

66 There is no dispute that the above works were carried out, inspected and approved by Mr Mc Linden.

67 In addition to carrying out these works, the builder also offered to construct a timber deck at the front of the property, at no charge to the owners, to conceal from view the overpoured section of the slab. The owners accepted the offer.

68 The owners' concern is that there may be inadequate waterproofing around the section of the slab overpour. Mr Lorich, whilst acknowledging that Mr McLinden approved a series of alterations carried out by the builder, says that there remains:

> "waterproofing issues which can only be rectified by a modification of the external slab section outside of the brick wall (located under the deck). I propose that the deck be removed and a level is created on the exposed concrete of about 15 degrees then this is coated with two coats of Emerclad to seal the slab edge. The deck can then be reinstated." [7]

[7] Lorich report, item 4.

69 Mr Lorich costs such works at $6,844, the bulk of which is made up of the removal and reinstatement of the deck.

70 Mr Cross says that the relevant building surveyor has already approved the alcore flashing installed by the builder. According to Mr Cross, Mr Lorich is effectively suggesting an alternative solution in lieu of the alternative solution already carried out and approved.

71 I note that at the view no one was able to point to any sign of water damage.

72 The building surveyor has specifically addressed the waterproofing issue and directed that certain works be carried out and then inspected and approved the carrying out of such works. There is no evidence of any water damage. I am satisfied that the works are not defective.

73 The owners' claim in respect of this item fails.

Waterproofing and brickwork to rear garage wall. Claim $1,986.50

74 The owners' complaint in respect of the rear garage wall is two-fold. First, they say that the single skin brick wall is not waterproof. While acknowledging that there is no legal requirement for the wall to be waterproofed, Mr Lorich says that the garage cupboards which abut the internal side of the wall are made of MDF and will, in time, deteriorate by reason of water ingress through the wall.

75 Second, Mr Lorich says that the external face of the brick wall is defective in that the mortar perpends vary greatly in width from around 2mm to 10mm. While this presents no structural concern, Mr Lorich says the wall is unsightly and does not meet the requirements of AS3700, Masonry Code.

76 Mr Lorich says that both issues (the waterproofing and the perpends) can be rectified by rendering and surface coating the wall. He allows the sum of $1,986.50 for such work and says that this represents a pragmatic solution to two problems and is cheaper than reconstructing the wall. The owners make the claim for $1,986.50.

77 At the view there was no dispute that the mortar perpends varied in width as said by Mr Lorich.

78 Mr Gorupic says that the garage cupboards are constructed, not of MDF, but of moisture resistant white board which is the same material used in all shelving and bathrooms, kitchen, robes and linen cupboards throughout the home. He says it will not deteriorate in time as suggested by Mr Lorich.

79 In respect of the perpend widths, Mr Cross says the unsightliness is minimal, particularly in view of the fact that the rear garage wall is the most remote part of the building.

80 In my view the remoteness of the garage wall does not excuse sloppy brickwork. I accept Mr Lorich's evidence and find that the rear brickwork, by reason of the variance in perpend widths, has not been carried out in a proper and workmanlike manner in breach of the warranty in clause 11 of

the contract. I also accept the pragmatic solution suggested by Mr Lorich (and the claim as put by the owners) that the wall be rendered and surface coated.

81 Accordingly I allow $1,986.50.as damages in respect of this item.

Brickwork colour match. Claim $150

82 The builder installed a spa bath which had been supplied by the owners. Following handover of the home to the owners, Mr Taylor contacted Mr Gorupic and told him that the spa bath was not working and that he thought there may have been some error with the installation carried out by the builder. Mr Gorupic attended the home and removed 3 or 4 bricks to investigate. He found that the spa bath was missing a small plug and that this was the cause of the problem. Mr Taylor subsequently purchased the required plug which Mr Gorupic installed to the spa bath. Mr Gorupic then had his bricklayer return to site to reinstall the 3 or 4 removed bricks.

83 The builder says that the 3 or 4 reinstalled bricks appear different in colour because they have not been acid washed following their reinstallation. Mr Gorupic says that the malfunctioning spa bath was not his responsibility, however he attend to rectification free of charge. He was not prepared to return to the site to complete the acid washing of the reinstalled bricks.

84 Mr Cross and Mr Lorich agree on a cost of $150 to rectify the brickwork.

85 Mr Taylor says that the builder bears responsibility for the malfunctioning spa as it should have been "*operationally checked prior to the hob and brickwork being completed*".

86 I accept the evidence of Mr Gorupic. I find that the builder's contractual obligation was to install the spa bath as delivered to site. I do not accept that the obligation extended to "road testing" the spa bath prior to installation. There is no evidence to support a contention that the builder was responsible for the missing plug.

87 I find that the builder had no obligation to bear the cost of rectifying the malfunctioning spa bath. The owners obtained the benefit of certain rectification works carried out by the builder free of charge. I find the builder is not obligated to carry out any further works.

Wall plaster cracks. Claim $250

88 The builder accepts responsibility in respect of some minor internal plaster cracking and the parties agree that an appropriate allowance for rectification is $250.

NON-COMPLIANT WORKS

Roof Trusses. Claim $136,485

89 The contract provided that the frame and trusses were to be termite ("T2") treated. The owners say this was a very important inclusion for them.

90 There is no dispute that untreated trusses were delivered to site on around 1 May 2009 and that, on the day of delivery, Mr Gorupic telephoned Mr Taylor to discuss the matter.

91 Mr Gorupic says that prior to discussing the matter with Mr Taylor, he rang and spoke to a representative of the supplier of the trusses, Mr Ray Macintosh of "Dahlesens". Mr Gorupic says that Mr Macintosh confirmed that Dahlesens did not accept responsibility for the incorrect trusses. Mr Gorupic says he was told by Mr Macintosh that Dahlesens supplied a chemical product similar to the chemical used on trusses pre treated for termite protection and that Mr Macintosh suggested that he purchase the product and apply the chemical to the trusses on site. Mr Gorupic also says that Mr Macintosh told him that Dahlesens could arrange for a sample of the timber treated with the chemical to be tested for the purpose of obtaining certification that the treatment provided adequate termite protection.

92 Mr Gorupic says that, following the above conversation with Mr Macintosh, he rang Mr Taylor and:

- told Mr Taylor that untreated trusses had been delivered to site; and
- offered a credit to the owners of $2,500 if Mr Taylor was prepared to accept the untreated trusses;
- alternatively, offered to apply the chemical treatment on site as suggested by Mr Macintosh.

Mr Gorupic says that Mr Taylor agreed to proceed with the option of chemically treating the untreated trusses on site.

93 Mr Taylor says that Mr Gorupic offered a credit of $600 (not $2,500) if he was prepared to accept the untreated trusses.He says further that he accepted the option of on-site chemical treatment of the trusses subject to the condition that the owners would receive the same manufacturer's 25 year guarantee that came with pre treated trusses. Mr Taylor says in his witness statement: "*The builder informed me that he could spray the trusses on site, we would get the same certificate/guarantee i.e. the same 25 years; everything would remain the same. I went over these details a number of times with the builder*: *guarantee, certificate, etc and I said if you can guarantee that everything will remain the same including the manufacturer's 25 year guarantee and certificate, go ahead"*.

94 Mr Gorupic says that there was no mention of a 25 year manufacturer's guarantee in the discussion or indeed at any time during pre-contract negotiations or during the entire period of construction of the home.

95 I questioned Mr Taylor as to when, during the contract negotiation and construction process, the matter of a 25 year guarantee in respect of the trusses was first raised in communications with the builder. Mr Taylor says that he could recall no mention of it at or around the time of signing the contract. He went on to say that it would first have been raised during his

conversation with Mr Gorupic on the day the untreated trusses were delivered to site.

96 I think it very unlikely that the builder would give assurances that *everything will remain the same including the manufacturer's 25 year guarantee* in respect of trusses not T2 treated by the manufacturer. Also, as noted above, I found Mr Gorupic to be a more credible witness than Mr Taylor and I accept Mr Gorupic's evidence that there was no discussion or communication between the builder and the owners as to any 25 year guarantee in respect of the trusses. I accept Mr Gorupic's evidence that it was not until after the commencement of this proceeding that he first became aware of the owners' claim in respect of the trusses.

97 I find that the owners, through Mr Taylor, agreed to the on site chemical treatment of the trusses by the builder in lieu of pre-treated trusses and that such agreement was not subject to any conditions whether as to a 25 year guarantee or otherwise.

98 Having found that the 25 year guarantee was not discussed, it is not necessary that I make a determination as to whether or not and to what degree the termite protection provided by pre-treated T2 trusses (with a 25 year guarantee) may be superior to that provided by trusses chemically treated on site.

99 I am satisfied that the builder carried out the agreed works. On the evidence presented, I am not satisfied that the owners have demonstrated any loss arising as a result of the works, as agreed, carried out by the builder.

100 The owners claim in respect of the trusses fails.

Vaulted ceiling in meals area. Claim $13,238.50

101 The ceiling has been constructed with a partially exposed ridge beam evident at its apex. The owners say the ceiling should have come to a V point with no visible exposed beam at its apex. The owners say they brought the matter to the attention of Mr Gorupic shortly after the ceiling was constructed. They say Mr Gorupic told them that the ceiling was constructed in accordance with the builder's usual practice and that it could not be altered as any alteration would result in a mis-alignment between the ceiling pitch and the external eave pitch.

102 Mr Gorupic says the drawings incorporated in the contract provided no detail as to the manner in which the ceiling apex was to be constructed. He agrees that he told the owners that he constructed the vaulted ceiling in the same way he always constructed vaulted ceilings.

103 Jarrod Gorupic gave evidence that he was an architectural draftsman (albeit not registered as such) and that he was responsible for preparation of the concept drawings and the architectural drawings. He said he had many discussions with the owners during the design stage and, although those discussions included the owners' wish for a vaulted ceiling, the owners

never communicated to him that the ceiling should come to a point at its apex without an exposed beam. He says that if the owners had specified a different finish to the ceiling he would have detailed it in the drawings. He says further that the owners' principal wish in respect of the vaulted ceiling was to maximise the size of the highlight glass window with the edge of the window following the same line as the roof line. He says the construction of the vaulted ceiling was in accordance with the owners' instructions.

104 Mr Taylor says that he would expect to have seen a dotted line in the architectural drawing (number 2 of 7 in the contract drawings) if a ridge beam was called for. There is no such dotted line in the drawing.

105 Mr Lorich and Mr Cross say that the drawing shows no detail as to the precise manner of construction of the ceiling and, as such, it cannot be said that the method of construction employed by the builder is non-compliant with the drawing. I accept the evidence of Mr Lorich and Mr Cross.

106 The owners say that they made their intention clear to Jarrod Gorupic. In particular they rely on emails with attached photographs forwarded to Jarrod Gorupic on 11 December 2008. At that time the owners had intended that their home would include vaulted ceilings to both the entrance portico and the entrance hallway to match the vaulted ceiling in the meals/dining area. (As a cost saving measure they subsequently decided not to proceed with the intended vaulted ceilings to the entrance portico and hallway).The emails included two exterior photographs of a house with a vaulted ceiling entrance. The owners say that the photo depicted what they wanted for their home at that time. They say that they told Jarrod Gorupic of their wish to have a "flow-through" effect, meaning in their minds that the interior vaulted ceiling should look like the entrance ceiling. Although they did not proceed with the entrance vaulted ceiling, they say the interior meals area ceiling ought to have been constructed to look like the entrance vaulted ceiling in the photographs.

107 The email accompanying the photographs says:

> "*Please view the attached examples of the exterior of our plan/house*"

108 Jarrod Gorupic says that the email and photographs were sent to him to illustrate the owners' wish that the windows (which were being discussed at the time) should rake with the ceiling line. He says that the photographs also provided a general image of the type of "look" the owners wished for the façade of their new home.

109 I accept the evidence of Jarrod Gorupic. There is nothing in the email to suggest it was sent to him to illustrate the finished look of the vaulted ceiling in the meals/dining area. I accept his evidence that the owners did not advise him that they wished the vaulted ceiling to come to a V point with no visible beam at its apex and that if they had done so he would have designed it as such.

110 I accept the evidence of Mr Lorich and Mr Cross that the ceiling as constructed is not contrary to the contract drawings and it is not defective.

111 Accordingly, I find the owners' claim in respect of the vaulted ceiling fails.

The front door. Claim $5,220

112 The owners say that, contrary to the contract requirement, the front door has not been situated in the centre of the front portico and that the its off centre positioning is very noticeable and aesthetically unpleasing. They say it should be rectified to accord with the contract requirement.

113 Mr Gorupic and Mr Taylor agree that they discussed the off-centre position of the door a couple of weeks prior to completion of the home. Mr Gorupic says he told Mr Taylor that the door was positioned slightly off-centre to allow for full and half-cut bricks (rather than an unsightly "zipper" line of bricks) to the walls at each side of the door. Mr Gorupic says that Mr Taylor accepted the explanation and accepted the positioning of the door.

114 Mr Gorupic also says that the door is off centre by approximately 40 millimetres only.

115 Mr Taylor says that when the door was constructed he noticed that it was quite obviously not central between the portico pillars. He says that when he discussed the matter with Mr Gorupic he was told that there was nothing that could be done as it was too difficult to move the door. Mr Taylor says he and Mrs Taylor remain very concerned with the negative visual impact of the door which Mr Taylor describes as "a thorn in my side".

116 At the view it was immediately apparent when approaching the home entrance that the front door was significantly off-centre in comparison to the entrance portico brick pillars. It looks odd. The degree to which it is off centre is far greater than 40 mm. It became apparent at the view that the builder's reference to 40mm is a reference to the off-centeredness of the door only when viewing it from the *inside* entrance hall. When viewed from the exterior of the home looking towards the door, it is very noticeable that the door is significantly, far more than 40mm, off centre in relation to the the portico pillars.

117 Mr Lorich, Mr Cross and Jarrod Gorupic all agree that the contract drawing floorplan indicates the positioning of the door as being in the centre of the exterior entrance portico pillars and very slightly off-centre between the internal entrance hallway walls.

118 In my view the builder has provided no satisfactory explanation as to why the door is so obviously off-centre in comparison to the front portico pillars. His explanation of seeking to avoid an unsightly zipper line of uneven length cut bricks does not explain the large degree to which the door is off centre.

119 I am satisfied that the builder has failed to position the front door centrally between the exterior entrance portico pillars as required under the contract

with the result that the owners have a very noticeable and aesthetically unpleasing entrance to their new home. I am not satisfied that the owners accepted the positioning of the door as constructed. The builder's failure constitutes a breach of the warranty provided in clause 11 of the contract , such warranty also mandated by clause 8(a) of the Act, which requires the builder to carry out works in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.

120 The breach of warranty amounts to a breach of the contract. The general rule with respect to damages for breach of contract is that where a party sustains a loss by reason of the breach , that party is, in so far as money can do it, to be placed in the situation he would have been had the contract been properly performed.[8]

121 It has also long been recognized that the general rule is subject to the qualification that in some cases circumstances may exist such that it would be unreasonable to rigidly apply it. Mr Reid and Mr Beck-Godoy both provided thoughtful submissions on this issue with reference to a number of decided cases including the decisions of the High Court in *Bellgrove v Eldridge*[9] (*"Bellgrove")* and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[10] *("Tabcorp")*. I concur with the approach of Senior Member Walker who, in *Clarendon Homes Vic Pty Ltd v Zalega*[11], commented :

- Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract (*Bellgrove*).
- The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt (*Bellgrove*).
- Reasonableness is a question of fact (*Bellgrove)* and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position (*Tabcorp per Rares J.)*
- In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole. The decision in *Ruxley* suggests that account can be taken of the following matters at least:
    (i) Whether and to what extent the work, although not in conformity with the contract, is nonetheless serviceable;

8 Robinson v Harman (1848) ALL E.R. 383 at 385
9 (1954) HCA 36; (1954) 90 CLR 613
10 (2009) HCA 8; (2009) 253 ALR 1
11 (2010) VCAT 1202

(ii) Whether and to what extent the defect has affected the value of the work or the building as a whole;

(iii) The cost of rectification, the proportion that the breach bears to the cost of rectification and whether the cost of rectification would be wholly disproportionate to the real damage suffered by reason of it;

(iv) The likelihood that, if rectification cost is awarded, the sum so ordered will actually be spent on rectification. Obviously, a successful plaintiff can spend his damages as he sees fit but this may be a useful indicator of whether the amount sought is greater than the real loss suffered.

122 I am not satisfied that, in respect of the front door, it would be unreasonable to apply the general rule in assessing damages. Although the door as constructed is quite serviceable, it does, as I have noted above, look odd. It is very noticeable, when approaching the entrance of the home, that the door is peculiarly off centre. It is not an obscure or unimportant door. It is a feature of the main entrance to the home. I accept Mr Taylor's evidence that it *"impacts on the presentation of our home"* and in my view the impact is significant. Further, I find that the builder has provided no reasonable justification for the positioning the door contrary to the plans.

123 In my view it is reasonable that damages be assessed as the sum required to rectify the positioning of the door so that it complies with the contract.

124 The Archicentre report quantifies the cost to rectify the front door at $910. As noted above, the author of the Archicentre report was not called to give evidence at the hearing and I am not satisfied that this costing is reliable.

125 Other than the Archicentre report, the only evidence as to the cost of repositioning the door is the evidence of Mr Lorich who has assessed the cost at $5,220. I accept Mr Lorich's evidence and allow that sum.

Front entry gable verge overhang. Claim $5,147.50

126 The owners say that the verge overhang to the front entry gable is, contrary to the contract drawings, 200 mm shorter than required with the result that it does not match the overhang of the meals area gable and is aesthetically unpleasing. Mr Lorich says that the plans clearly show the same verge overhang for both gables at around 400 mm when scaled off drawing number 2 of 7.

127 Mr Cross agrees with Mr Lorich that the verge overhang at the front entry is approximately 200mm shorter than the verge overhang at the meals area, however Mr Cross says the plans are not clear on the dimensions of the overhang. Mr Cross also says that *both* gable faces as constructed do not match the construction plans, indicating that the owners and the builder reached some agreement to alter them. Mr Cross also opines that it is unreasonable to expect that both verge overhangs should be of similar length in circumstances where the gable spans are significantly different

with the meals area gable span being almost twice that of the front entry gable span. In his report Mr Cross states:

> "Had the verge overhangs been equal, it is my view that the entry gable would have looked foreboding and overbearing in proportional terms, albeit a subjective architectural judgment."[12]

128 Mr Gorupic says the construction of the front entry gable face differs from that indicated in the plans because he constructed it in accordance with the wishes of the owners as discussed on site. He says that he would ordinarily construct the face of a gable with AC sheet and that this was what he allowed for in the contract. He says, however, that after works had commenced the owners requested that the gable be constructed of brick instead of AC sheet. He says he agreed to the change at no extra charge and that this variation is confirmed in the variation order number 3 dated 26 October 2009 and signed by the owners. The variation order cites the variation as:

> "Brickwork to front of portico gable no charge."

129 Mr Gorupic says that the variation order confirms that discussions were held on site with the owners in respect of the gable and that what was constructed was exactly what was agreed.

130 Mr Taylor says that the exterior of the house, including the gable faces, was always to be constructed of brick. He says that the variation order number 3 is a reference to the owners' request that the bricks to the face of the gable be recessed back from the brick piers in order to allow for some settlement movement between the gable face and the piers.

131 At the view, I saw nothing odd in relation to the front entrance gable whether looking at it in isolation or looking at it in comparison to the meals area gable.

132 Whatever interpretation is put on the variation order, it is clear that the front entry gable was the subject of discussion between the parties which resulted in the signed variation order. In my view Mr Gorupic's evidence (that the variation recorded the change of material to brick) sits more comfortably with the words used in the variation order than does Mr Taylor's evidence. For this reason and because, as noted above, I find Mr Gorupic to be a more credible witness than Mr Taylor, I accept Mr Gorupic's evidence that the gable was constructed in accordance with the owners' instructions as discussed on site during the course of construction.

133 I find there is no breach of contract and the owners' claim on this item fails.

Wall insulation. Claim $$2,697

134 The owners claim that a section of the wall between the garage and bedroom four has no insulation sarking installed. The only evidence in

[12] Cross report, paragraph 100.

support of this claim was Mr Taylor's evidence that he noticed, during the course of construction, that sarking had not been installed.

135 I accept Tyson Gorupic's evidence that, as a carpenter employed by the builder, he installed the sarking to the relevant wall section. The owners' claim on this item fails.

Spa pump cover. Claim $338

136 The owners supplied the spa and pump which the builder installed. The owners say the builder has failed to supply and install a cover over the spa pump. I accept the builder's evidence that it had no obligation under the contract to supply and fit a spa pump cover. The owners' claim fails.

Alternative accommodation, removal and storage. Claim $23,210.03

137 As noted above, in their Points of Claim the owners nominated sums for alternative accommodation ($13,860) and removal and storage ($9350.03) as further damages for the period when rectification works are to be carried out. As no evidence has been provided in respect of these claims, I find the claims must fail.

Damages total

138 In summary, I allow damages as follows:

(a) Flooring	$16,098
(b) Downpipe	$989
(c) Articulation joints	$250
(d) Damp proof course	$8,924
(e) Garage wall	$1,986.50
(f) Wall plaster cracks	$250
(g) Front door…….	$5,220
TOTAL	**$33,717.50**

139 I order that the Respondent must pay the Applicants $33,717.50. I will hear any application for costs the parties wish to make.

MEMBER M. FARRELLY