

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D54/2014

CATCHWORDS

DOMESTIC BUILDING: Breach of warranties; Section 8 of the *Domestic Building Contracts Act 1995*; Section 10 *Domestic Building Contracts Act 1995*; Accord and Satisfaction; Anshun (issue) Estoppel.

APPLICANT	Ralph Alphonso
RESPONDENT	P & JM De Leo Pty Ltd (ACN: 005 361 697)
WHERE HELD	Melbourne
BEFORE	J Pennell, Member
HEARING TYPE	Hearing
DATE OF HEARING	30 May 2016
DATE OF ORDER AND REASONS	26 August 2016
CITATION	Alphonso v P & JM De Leo Pty Ltd (Building and Property) [2016] VCAT 1459

ORDER

- 1 The respondent must pay to the applicant the sum of \$100,072.30.
- 2 The respondent must reimburse the applicant the application fee of \$428.90
- 3 Costs reserved with liberty to apply. I direct the Principal Registrar to list any application for costs before Member Pennell for 2 hours.

J Pennell
Member

APPEARANCES:

For Applicant	Mr D McDonald of Counsel
For Respondent	Mr A Blair of Counsel

REASONS

- 1 The applicant owner is the registered proprietor of a property in East Melbourne ('the property') which he purchased in or about 2005.
- 2 On or about 12 December 2006 the owner and the builder entered into a domestic building contract whereby the builder agreed to construct two adjoining double storey townhouses on the property in accordance with the plans and specifications prepared by the applicant's Architect, John Lockhead of Architecture Works ('the contract'). I refer to each of the townhouses as unit 1 and unit 2 respectively.
- 3 The contract for the construction of both townhouses was for a fixed price with works to be completed by 7 September 2007. A full set of tender documents was provided with the contract that included all Architectural and Engineering drawings and specifications.
- 4 The owner was the contract administrator of the project. Mr Bernie Meehan acted as the respondent's contract administrator.
- 5 In accordance with the terms of the contract, construction commenced on or about 21 January 2007 and the final inspection was conducted on 6 December 2007. The occupancy permit was issued in January 2008.

The Claim

- 6 In his Points of Claim dated 21 January 2014, the owner claims that the builder has breached the warranties contained in the contract and pursuant to section 8 of the *Domestic Building Contracts Act 1995* by failing to perform the domestic building works:
 - a in a proper workmanlike manner and in accordance with the plans and specifications;
 - b by supplying materials that were not of a good and suitable standard;
 - c in accordance with the Building Code of Australia; and
 - d with reasonable care and skill.
- 7 In particular, the owner alleges the following defects:
 - a Rotational movement at the north east corner of the property.
 - b Warping of the interior lining of the north wall of the property.
 - c Rust damage to the gutter box due to it being installed with an incorrect fall.
 - d Gaps to the top and south edge of the garage of the property including the south wall being out of plumb.
 - e Heating cables ruptured and damage to concrete floor.
 - f Installation of unsuitable bases for solar water panels resulting in failure of the bases.

- g Deflection over sliding doors to deck of unit one.
 - h Deflection in timber floor at north end of kitchen of unit one.
 - i Stormwater damage to plaster and skirting boards to rear rooms of the property.
 - j Crack in the ceiling over living room of unit one
 - k Water leak from range hood flu in unit one.
- 8 The owners Particulars of Loss and Damage dated 31 August 2015, claims a total amount of \$255,768.60. This amount includes a claim for loss of rent and associated tenant's costs to be incurred by the owner as a result of performing internal rectification work.
- 9 During the course of the hearing I was provided with witness statements by the owner and Mr Deleo on behalf of builder, in addition to the following reports:
- a Archicentre report dated 31 October 2012;
 - b Barry Gale Engineers report dated 24 April 2014 ('the Gale report');
 - c Tim Gibney & Associates Pty Ltd report dated 6 August 2015 ('the Gibney report');
 - d Roy Harding & Associates report dated 5 August 2015 ('the Harding report');
 - e John Merlo & Associates report dated 14 July 2014 ('the July Merlo report'); and
 - f John Merlo & Associates report dated 5 October 2015 ('the October Merlo report').
- 10 During the hearing, the owner, Mr Deleo and each of the experts provided oral evidence.
- 11 I attended a view of both townhouses on 31 May 2016.

Previous Proceedings Terms of Settlement

- 12 Section 93 of the *Victorian Civil and Administrative Act 1998* ('the VCAT Act') provides that:
- (1) If the parties agree to settle a proceeding or any part of it at any time, the Tribunal may make any orders necessary to give effect to the settlement.
 - (2) The Tribunal's power to make an order under subsection (1) is exercisable by any member including, if the settlement is achieved through mediation conducted by a member, that member.
- 13 In or around 2009 the builder issued VCAT proceeding D284/2009 by which it claimed from the applicant \$42,515.00, being the balance of the contract price together with interest.

- 14 Although the owner did not lodge a defence or counterclaim to the builder's claim, he contended that the builder was not entitled to the amount claimed by reason of the fact that there were numerous defects and/or incomplete works.
- 15 In or about July 2009 the owner and the builder entered into terms of settlement ('the terms of settlement').
- 16 The terms of settlement provided:
- (4) Subject to compliance by the Applicant with these terms of settlement and in consideration thereof, and subject to the matters set out in paragraph 5 below, the respondent (i.e. Alphonso) agrees to release and forever discharge the Applicant from all actions, claims, demands suits whatsoever being the subject matter of this proceeding or any way connected therewith.
- (5) Save for the items of alleged defect and/or incomplete work referred to in the documents attached as Schedule 1 hereto, and save for any other items of defect and/or incomplete work of which the applicant is aware or ought reasonably be aware, these terms of settlement do not otherwise affect or settle the respondents rights to claim from the builder or its insurer for defects of the kind for which the builder is otherwise required to be insured under Part 9 of the Building Act 1993.
- 17 While paragraph 4 of the terms of settlement is drafted in broad terms, it is limited by paragraph 5 to those alleged defects and/or incomplete works referred to in Schedule 1 of the terms and to those defects that the owner was aware or ought to have been aware.
- 18 The builder's position is that the present dispute arises out of substantially the same subject matter of proceeding D284/2009 and that by signing the terms of settlement the applicant has granted the builder a release and discharge from any further claims arising from the building contract.
- 19 In *Grant v John Grant & Sons Pty Ltd* [1954] 91 CLR 112 Dixon CJ, Fullagar, Kitto and Taylor JJ stated:¹
- 'The principle which it is thus sought to apply was expressed by Lord Westbury in *London & South- Western Railway Co v Blackmore* (4) as follow: 'The general words in a release are limited always to that thing or those things which were specifically in contemplation of the parties at the time when the release was given'(1). It was expressed by Taunton J in *Upton v Upton* (2) in this way: '...the general words of a release may be limited by the particular matter out of which the release springs and the particular intent of the parties by whom the release is executed''
- 20 Their Honours concluded that a release should be construed as not including liabilities that were not the subject of any dispute between the actual releaser and the actual releasee.²

¹ *Grant v John Grant & Sons Pty Ltd* [1954] 91 CLR 112

- 21 Schedule 1 of the terms of settlement³ included outstanding items identified in the Architecture Works Reports dated 14 December 2007, 11 March 2008 and 19 June 2009. Included in these reports were the following defects in relation to the sliding doors ('the sliding door defects'):
- a out of alignment at the junction,
 - b not plumb
 - c not having sufficient weather seals; and
 - d having a bow at the head and handles which did not line up with each other.

Accord and Satisfaction

- 22 The builder says that owners cause of action against it has been extinguished by reason of the fact the terms of settlement represent an accord and satisfaction between the parties. That is, a mutual release between them in consideration of payment of the settlement sum by the owner (in the present case) and the release from the builder (in the present case).
- 23 The builder's position is that it has performed the necessary satisfaction of the accord, by consenting to the striking out of the application (with a right of reinstatement), releasing the owner and substantially refraining from prosecuting any right, claim or demand against him.
- 24 The elements of an accord and satisfaction were described by Dixon J in *McDermott v Black* (1940) 63 CLR 161⁴ as follows:
- 'The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the actor thing promised. But, whatever it is, until it is provided and accepted the cause of action remain s alive and unpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. ...'
- 25 There is no special form of words required to achieve an effective release.⁵ What must be demonstrated is an intention to discharge some right of action or to give up some claim.
- 26 The normal rules of interpretation apply to such releases. Generally, interpretation of a release will have regard to the circumstances in which it came into existence but, will not be extended to facts that grantor had no knowledge.⁶

² *Grant v John Grant & Sons Pty Ltd* [1954] 91 CLR 112 @ 123-4

³ Tribunal Book p.533

⁴ *McDermott v Black* (1940) 63 CLR 161⁴ per Dixon j @ 183-185

⁵ Contract: General principles, The Laws of Australia, Second Edition edited by JLR Davis p.635.

⁶ *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766

27 Relevantly, section 10 of the Domestic Building Contracts Act 1995⁷ provides:

A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in section 8 is void to the extent that it applies to a breach other than a breach that was known, or ought reasonably to have been known, to the person to exist at the time the agreement or instrument was executed.⁷

28 In this case the owner, in consideration of the builder striking out his claim for the balance of the contract price, agreed to release the builder from only those defect which he was aware or ought to have been aware.

29 The owner says that he only become aware of the claimed defects in late 2009 and early 2010 as a result of water leaks occurring above the stairs in unit one and gaps emerging between the northeast column and the northern wall of unit one. Save for the sliding door defects, there was no evidence that the owner was aware or ought to have been aware of the claimed defects at the time of signing the terms of settlement.

30 Accordingly, the owner is not prevented from bringing this proceeding against the builder for defects of the kind for which the builder is otherwise required to be insured under Part 9 of the Building Act 1993 and to which he was not aware and ought not to have reasonably been aware.

Anshun (issue) Estoppel

31 Alternatively, the builder says that as a result of entering into the terms of settlement in proceeding D284/2009 the owner is now estopped from bringing this proceeding and as such an order dismissing the proceeding must be made.

32 Anshun estoppel⁸ dictates that a party may be estopped from raising a claim or defence if he or she, through negligence, inadvertence or even accident, failed to raise it in prior proceedings when, given its relevance, and the identity between the parties, to the earlier proceedings, that failure was unreasonable.⁹ That is, it operates only where the new litigation involves a point that was not properly included in the previous proceeding. In these circumstances the appropriate order is a stay of the proceeding.¹⁰

33 For the reasons as stated above, save for the sliding door defects and slope in the floor, I accept that the owner was not aware of, nor ought he to have been reasonably aware of, the claimed defects and as such is not estopped from bring this proceeding.

⁷ Domestic Building Contracts Act 1995 section 10.

⁸ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589

⁹ *O'Brien v Tanning Laboratories In* (1988) 14 NSWLR 601 @ 613 Per Kirby J

¹⁰ *Macquarie Bank v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 @ 558.

Floor Level Discrepancies

- 34 Both townhouses have been constructed on a single engineered designed Class 'P' slab-on-ground footing system, sharing a common central party wall. The site is on the west side of the street and the front door faces north. The site falls 860mm from the rear south-western corner to the front north-eastern corner of the property. It has poor drainage along the western rear wall of the site, where the slab is cut into the site.¹¹
- 35 A retaining wall has been constructed along the rear western boundary of the property, with a reinforced block wall and timber sleeper wall being used to retain the soil at the rear of the site. The existing drainage of the site is poor on the northern side as the slab has also been cut into the site and the sub-surface drainage is likely to be a localised problem.¹²
- 36 There were no significant trees although there are small shrubs and Bamboo along the southern side of number 25.
- 37 There is no significant cracking in the slab floor although the slab surface varies significantly across a 3m straight edge from the middle of the northern slab party and well away from any localised edge effect such as tree drying or edge heave.¹³
- 38 The spot levels in drawings prepared by Mr Gibney in his report indicate that the discrepancies in both the ground floor slab and the timber first floor exceed the acceptable tolerances as detailed in Item 12.5 of the Building Commissions Guide to Standards and Tolerances.¹⁴ While the Building Commissions Standards and Tolerances are a guide and not prescriptive, it was Mr Gibney's opinion that the existing floor levels generally represent the 'as built' status at the time of construction.¹⁵
- 39 This is not accepted by the builder. He says that floor levels have been affected by slab heave caused by poor drainage to the site with class H soil.¹⁶ The builder says that the sites poor drainage design is evidenced by the fact that it has been flooded on 'several occasions' which has contributed to the slab movement.¹⁷
- 40 The ground floor slab comprises of an exposed aggregate polished concrete finish and contains heating within the slab. The ground floor slab levels vary up to 90mm with variations occurring virtually in all directions and in every room. Although the slab floor is defective due to the discrepancies in finished floor levels any reconstruction of the floor levels is not considered practical, warranted or economically justified.

¹¹ Report of Tim Gibney & Associates Pty Ltd dated 6 August 2015 ('the Gibney Report') @ p.3

¹² Ibid @ p.3

¹³ Ibid @ p.5

¹⁴ Building Commissions Guide to Standards and Tolerances 2002 @ Item 12.5.

¹⁵ Roy Harding & Associates Report dated 5 August 2015 @ p.11

¹⁶ John Merlo & Associates Report dated 5 October 2015 p.2

¹⁷ OpCit @p.3

- 41 As to the first floor of unit one, strip flooring has been laid over particleboard fixed to posi-strut joist framing. The strip flooring is Blackbutt timber that has been glued and nailed to the particleboard flooring. The floorboards are laid in an east-west direction and are at right angles to the posi-struts.
- 42 The floor has a visible slope from the top of the staircase in the living room on the north-west corner of the property toward the kitchen in the south east corner of the unit. The spot levels taken by Mr Gibney show the floor falling 60mm over 5.7m in a north to south direction from the top of the stairs and falling 82mm from the stairs to the kitchen. In addition in bedroom one there is a 40mm fall from north to south over 3.8m against the bedroom window.
- 43 Given the floor has a significant slope and Mr Gibney's evidence is that it generally represents the as built condition of the floor, then this is a defect that was known or ought to have reasonably been known by the owner at the time of entering into the terms of settlement, and covered by the Release. Therefore, it cannot be claimed in this proceeding.

The Claimed Defects

Rotational movement at the north east corner of the property.

- 44 The façade columns of the property are not in alignment. The alignment of the column in the east west direction has a 3-4mm lean to the east for the base to within 500mm of the first floor. Above this point the column leans further to the east by an additional 5mm. The overall lean from the base to the first floor is 8mm.
- 45 A noticeable gap has opened up between the portal frame and the external wall cladding above the first floor level at the north-east corner of unit one looking southward. The cement sheet wall cladding adjacent to the column is fractured at its lower eastern corner where the movement has occurred. The gap between the column and the cladding together with external cracking of the external wall sheeting is clearly visible.
- 46 The builder contends that the movement in the façade columns, and in particular the column on the north east corner of the building, are a result of heave in the north west corner of the concrete slab. It says that the slab heave is as a result of poor design and failure by the applicant to carry out proper surface and subsurface drainage.
- 47 It says that the heave of the slab has cause the wall to lift and move toward the column causing damage to the wall and the pushing the column out of alignment.
- 48 However, while Mr Gibney accepted that some heave may have occurred at the north western corner of the slab due to the poor drainage along the western boundary he said that it was not the likely cause of the damage to the wall or movement in the column.

- 49 The owner says that the movement in the column has been caused by settlement and inadequate footing system beneath the column at the north-east corner.¹⁸
- 50 The owner states that prior to the works commencing he had engaged contractors and co-ordinated electricity, telecommunication, water and gas to the site. The builder knew the final position of the pits for the services prior to clearing the site. Photos produced by the applicant showed the service pits having been installed at the time that builder commenced the ground works for the footings on 21 January 2017.¹⁹
- 51 The owner states that the builder conducted the ground works for the footing in stages. The trench was excavated to the required depth for the footings and blinding concrete was poured to bring the level up to the base slab. He then says that he witnessed the blinding concrete being poured in the north-east corner where the pad for the column was to be positioned.
- 52 The slab was prepared with reinforced mesh, under floor electrical cable, plumbing and other services. The slab was inspected by the building surveyor and was poured on 23 January 2007. The photograph of the slab being poured shows the line pipe which appeared to have had the under floor electric cable attached.²⁰
- 53 It was agreed that the footing in the north - east corner supporting the steel columns were not constructed in accordance with the engineer's specification drawings. The steel column was installed onto the pad of binding. During the course of his evidence Mr Deleo on behalf of the builder, confirmed that there was no reinforcement bars connecting the slab to a pad on which the steel columns was placed in accordance with the engineering drawings.
- 54 By an email dated 7 March 2007 the owner advised the builder's contract administrator that any changes or variations to slab's construction needed to be cleared by the owners engineer. The builder never obtain the engineers approval for any variation in the construction of the building.
- 55 Mr Deleo says that the footing constructed for the column was a 600 x 500mm pad. He states that the pad was tied to the slab by starter bars of approximately 12mm diameter which where drilled into the slab. He provided a diagram that showed the manner in which he said the pad was tied to the slab but did not provide any independent evidence relating to the construction of the column pad. In particular, as to whether the starter bars were an appropriate manner to tie the pad footing to the slab.
- 56 It was the builder's view that by drilling the starter bars into the slab it should have made the pads stronger than those designed by the applicant's

¹⁸ Hayes report @ p.30; Gales report @ p.6

¹⁹ Tribunal Book P.547-550

²⁰ Tribunal Book pp. 547-550

engineers - Mr Gale disagreed. In Mr Gale's view, by drilling the starter bars into the slab the pad was likely to move by twisting under the column.

- 57 Mr Merlo states²¹ that the builder is not responsible for any issue concerning the floor slab by reason of the fact that the Building Surveyor responsible for the inspections issued the certificate of final completion confirming that all work had been correctly carried out by the builder.²² He also notes that a certificate of occupancy was also issued confirming that the building was suitable for health and safe occupation. I do not accept this.
- 58 It is the builder's responsibility to ensure that the building is constructed in accordance with the architectural and engineers plans and specifications. In this case the builder has clearly failed to construct the slab and footings in accordance with the engineers design.

Warping of the interior lining of the north wall of the property.

- 59 This relates to bowing of plaster above the main door to unit 21 located on the north side of the building. The builder says that the problem is caused by slab heave. That is, plaster is being squeezed and bowing out as a result of the lifting of the concrete slab against the weight of the first level floor.
- 60 The owner states that the bowing in the plaster is as a result of frame movement and possibly as a result of inadequate fixings to the stud walls. It was not possible to view how the plaster had been fixed to the frame.
- 61 The builder says that issue is as a result of slab heave caused by poor drainage design.²³ He says that the slab has moved approximately 40.mm over 1700mm due to the applicant's failure to install proper drainage. Mr Gibney in his report acknowledges that a degree of local heave may have attributed to the issue but is of the opinion that it is the responsibility of the builder.²⁴
- 62 While accept there may have been some slab heave I do not accept that it would have occurred to the extent as described by the builder and Mr Merlo. I prefer the evidence of Mr Gibney in relation to the condition of the slab and as such find that the warping to the interior of the wall is defect caused by the builder's failure to perform the works in a proper manner.

Incorrect fall of the gutter box casing rust in the base of the gutter.

- 63 The western box gutter at the northern end has corroded and appears not to be draining correctly.
- 64 The builder states that this issue was caused by slab heave from west to east caused by inadequate design of the slab and the failure of the applicant to install proper surface and subsurface drainage at the property.

²¹ John Merlo & Associates Report 14 July 2014 p.3

²² OpCit p.5

²³ John Merlo & Associates Report dated 14 July 2014 p.6 (Tribunal Book p.483)

²⁴ Gibney report item 4.1.3

- 65 Mr Gibney noted that the gutters have a very small fall and may be affected by heave of the slab. However, while he acknowledges that some minor heave may have occurred, his conclusion was that the building was constructed out of level. On the balance of probabilities it is more likely that the gutter has been constructed out of level due to the fact that the incorrect fall of the gutter corresponds to the discrepancies in ceiling and floor levels rather than any heave of the slab.
- 66 Therefore, I conclude that the builder is responsible for the gutter having incorrect fall and the subsequent damage caused.

Deflection over sliding doors to deck of Unit 1.

- 67 The applicant says that there is a deflection in the member supporting the pair of sliding doors leading onto the balcony on the west side of unit 1 and that the doors are out of line and do not close correctly.
- 68 The Gale report states that the door head frame supporting the sliding doors appears to have been installed with a skew²⁵ and that it is possible that the door frame has deflected between the glazed panels if not fixed correctly to the roof level beam that supports the frame. The Gale reports notes that the design maximum deflection of the roof level beam supporting the doorframe is 8 mm or 1 in 820, being within normal practice.²⁶
- 69 The defect concerning the sliding doors was identified by the owner at the time of entering into the terms of settlement and is covered by the Release. It is therefore a matter that was known at that time, and cannot be claimed in this proceeding.

Deflection in timber floor at north end of kitchen of Unit 1.

- 70 The general floor levels identified in the Gibney report indicate that the overall slope of the floor from the northern wall to the southern wall in alignment with the window/door opening is 71mm. From the southern edge of the northern fixed glazed pane to the centre of the doorway, the floor slopes north to south approximately 5mm. For the remainder of the door opening in a southward direction, the floor slopes approximately 28mm.
- 71 This indicates that there is a general fall of the bottom track to the doorway in a north south direction and a differential bow upwards (albeit uneven) centrally to the opening.
- 72 In the kitchen area there is a measured slope on the floor between the northern wall and the common wall of approximately 1 in 666. The slope in the area of the walk in rob is approximately 1 in 220.
- 73 The slope is pronounced and appears to be across the room. As such it is reasonable to conclude that either the posistruts were installed on a slope or

²⁵ Gale Report p.10

²⁶ Gale report @ p.10

that there has been some movement in the connection of these members.²⁷ Any movement in the connections would likely to have resulted in cracking in the adjoining plaster or wall plaster. No such cracking was observed.²⁸

- 74 It is therefore more likely that the posistruts were installed on a slope. However, the slope could have been aggravated by deflection of the posistruct. This appears to be the case by reason of a gap that has developed between the ceiling and the top of the wall in the Kitchen.
- 75 Once again if the first floor roof was constructed on a slope then it is a defect that ought to have been known at the time the owner signed the terms of settlement and therefore comes within the release and cannot be claimed in this proceeding.

Crack in the ceiling over living room in Unit 1

- 76 The ceiling in the living room of unit 1 is cracked and water damaged to its central western portion between the upper roof and balcony. The Archicentre report and the Gale report suggested that this damage was caused the by solar roof framing not being designed to support the solar panels that were installed by the builder. The owner gave evidence that the leaks are continuing.
- 77 The Harding report refers to item 30 of the Building Commissions Guide to Standard Tolerances which states that:
- ‘Roofs, gutters, flashings, sky lights window frame joints or window seals which leak under normal weather conditions for the particular terrain, will be considered a defect’²⁹
- 78 According to Mr Harding the roof leaks and cracking to the plasterboard are as a result of the roof panels installed by the builder. Accordingly the builder is responsible for the damage.

Water leak from range hood flu in Unit 1.

- 79 Drip leaks are occurring through the range hood and have caused a stain to the kitchen bench top and caused the kitchen cupboards and kick board to swell. It is believed that the leak is occurring around the range hood flu. According to the Hayes report the range hood flu penetration flashing has been poorly carried out and not in accordance with the manufacturer’s recommendations. The owner’s evidence was that the leak through the range hood flu was continuing. I therefore find that the installation of the range hood has not been completed in a proper manner and constitutes a defect for which the builder is responsible to rectify.

²⁷ Gale report @ p.11

²⁸ Ibid

²⁹ Harding report p.61

Roof Cappings and Flashings, Roof spreaders and Cracking External Wall Sheeting

80 The following matters were identified in the Harding report as defects for which he says the builder is liable:

- a The longitudinal roof cappings and flashing are not secured at a minimum 500m centres in accordance with the manufacturers requirements and BCA table 3.5.1.3;
- b The roof spreaders have not been installed to the base of the down pipes where upper roofs discharge onto lower roofs in accordance with clause 2.4.5 of the AS/NZS 3500.3.2; and
- c External sheeting around the highlighted windows to upper roof section is cracked

81 In the absence of any evidence from the builder in relation to these items I find that the builder is liable for rectification works to ensure that the defects are made good and are compliant.

Under Floor Heating

82 The builder has accepted liability for the damage to the underfloor heating and agreed to the rectification costs incurred by the applicant of \$924.00.

Claim for rental loss and other tenant costs

83 The property is currently leased. As such the owner makes a claim for loss and rent and costs for the removal and storage of the tenants' chattels in unit 1 during the rectification works. In addition he claims the costs of negotiating variation of leases with the tenants' and their accommodation costs during the rectification works.

84 The applicant has provided a copy of the leases for unit 1 and unit 2.

85 As to unit 1, it is currently rented for the amount of \$5,850.00 per month. The lease commenced on 1 February 2015 for a period of 36 months, ending 1 February 2018.

86 As to unit 2 it is currently rented for the amount of \$5,214.00 per month. The lease commenced on 22 October 2014 for period of 18 month ending on 26 April 2016. I am not aware of any new lease that has been executed between the applicant and the tenants in relation the property. Accordingly, it appears that the property is currently leased on a month-to-month basis.

87 I accept that the rectification works will result in a disturbance to the tenants during the rectification works. However, given that I have found that the owner was aware or ought to have been aware of the deflection in the floor of unit 1 at the time of entering the terms of settlement any disturbance to the tenant quite enjoyment of the unit is reduced. It may be in order to repair the footings that the tenants would be required to vacate the premises in order to allow the works to be performed. If this is the case the tenants would be entitled to have the payment of the rent suspended for the

the period of time the works are performed together with some storage and/or reallocation costs.

- 88 Unit 2 is on a month to month tenancy and able to be terminated upon giving 60 days' notice. There is nothing to suggest that the owner will have difficulty in reletting the property upon completion of the rectification works. As a result, I make no allowance for relocation costs. However, I accept that even if the lease is terminated the owner will suffer a loss of rent for the period of time it takes to rectify the defects.
- 89 The owner provided some evidence of storage and other costs that would be incurred in the event that the tenants were forced to move for the units. These were provided in an email for Mr Glen Barnett of Dawson Moving & Storage. This evidence was not challenged by the builder.

Damages

- 90 The applicant engaged Mr Daniel Fleming of Kadaabra Group to provide him with a quotation to perform the rectification works on the property. Mr Fleming is a registered builder.
- 91 On 19 August 2014 Mr Fleming provided a quotation for rectification works based on the Gale Report dated 24 April 2014
- 92 Subsequently, on 11 August 2015 Mr Fleming prepared further quotations for the rectification works based on the Harding Report. For the purposes of preparing these quotations Mr Fleming inspected the property in August 2015. The owner has not engaged Mr Fleming to perform the works at this time and as such, save for the repair to the slab floor heating, no works have been performed.
- 93 The quotations provided in August 2015 include all those items identified in the Harding Report. Mr Fleming's evidence, consistent with this witness statement, was that the quotations provided were based on an hourly rate of \$60.00 per hour together with all necessary material and supervision costs of each item. These amounts are provided as a lump sum in reference to the works identified to be carried out in the Harding Report.
- 94 The builder did not lead any expert evidence as to quantum nor did it challenge Mr Fleming in relation to his quotation for carrying out the work for each item. However, in cross examination Mr Fleming did concede that his quotations contained 'a bit of fat' due to the fact that he was having to reinstate works for which he had not been responsible.
- 95 Mr Fleming's quotations to rectify the defects were as follows:
- a Bowed and distorted plaster finish in Unit 1- \$5,000.00. This figure appears to have been rounded down from the total of \$5,050.00 calculated by Mr Fleming at 32 hours labour totalling \$1,920.00, material at \$2950.00 including GST and supervision costs of \$180. Mr Fleming has based his quotation on items 105-107 in the Harding Report which includes exposing all framing and ensure that it

structurally adequate, remove and reinstate plaster and repaint. In the absence of any evidence by the builder to the contrary I accept these costs.

- b Remove and reinstate the box gutter including replace all damaged lining to roof over rear veranda and beneath the box gutter and water damaged wall linings \$8,500.00³⁰. These works are based on items 124-128 of the Harding report being remove and dispose of existing gutter, reinstate the gutter with proper falls to main head and downpipe, provide an overflow to all roof box gutter rain heads, replace all water damaged linings to roof soffit, repaint wall linings. He has allowed 60 hours labour, material of \$2,500.00, and plumbing work of \$2,000.00 and supervision costs of \$500.00. In absence of evidence for the builder accept these costs.
- c As to the cost of repair and replacement of all roof flashings, downpipes and wall sheets Mr Fleming quoted a price of \$29,500.00.³¹ This was based on items 204, 204.1 212, 216, 218 and 220 in the Harding report. That is, carry out flu penetrations through roof decking to allow roof trays to drain, replace roof flashings and capping where necessary, alter down pipes where necessary, replace wall sheeting where necessary and make good flashings. The cost of material and labour identified by Mr Fleming in his witness statement does not equated to the quoted amount. For the works to be completed he allowed 65 hours labour, material of \$1,100.00 plumbing work of \$1,500.00 and supervision cost of \$500.00. This equates to \$4,540.00.³² In the absence of any evidence to the contrary I therefore allow \$4,540.00.
- d Footings and portal frame column repair \$70,000.00.³³ This quotation is based on items 90.01, 90.03, 91.01 to 91.07, 92.01 to 92.07 and 93.01 of the Harding report. It includes obtaining engineers design for new work, removing the blinding concrete between slab and the column, all excavation, installation of new blinding construction of pad, reinstate column, replacement of cracked sheeting. Mr Fleming has allowed 80 hours labour, material of \$22,000.00 hire of equipment 15,000.00, excavation \$8,500.00, all safety measures \$7,500.00 engineers costs \$2,500.00 supervision \$5,500.00 permits \$6,500.00. Based on Mr Flemings costs and in the absence of any direct evidence to the contrary I will allow the amount claimed.
- e As to the owners claim for rental loss and other associated tenants costs to be incurred by him as a result of the rectification works, Mr Fleming' evidence was that to perform all rectification works as claimed it would take about 16 weeks. Taking into account the fact

³⁰ Fleming quotation No 0010

³¹ Fleming quotation 0011

³² Daniel Flemings witness statement paragraph 9

³³ Fleming quotation 00012

that the rectification works in relation to the sliding door and levelling of the first floor in unit one are part of the release provided by the applicant, I will allow 10 weeks for the rectification works. Therefore, as to rental loss and other costs I will allow the following:

- i unit 2 at rental of \$5,214.00 per month (\$1,203.00 per week) I allow \$12,032.30;
- ii unit 1 at rental of \$5,850.00 per month (\$1,350.00 per week) I allow \$13,500.00.
- iii as to other tenant's cost of unit 1 I will allow \$3,580.00³⁴

96 The builder must therefore pay the applicant \$117,152.30 calculated as follows:

- a Bowed and distorted plaster finish in Unit 1 \$5,000.00;
- b Remove and reinstate the box gutter \$8,500.00;
- c Repair and replace roof flashings, downpipes and wall sheets \$4,540.00.
- d Footings and portal frame column repair \$70,000.00.
- e Total loss of rent and storage costs \$29,112.00.

ORDERS

1. The respondent must pay to the applicant the sum of \$117,152.30.
2. The respondent must reimburse the applicant the application fee of \$428.90.
3. Costs reserved with liberty to apply. I direct the Principal Registrar to list any application for costs before Member Pennell for 2 hours

J Pennell
Member

³⁴ Email dated 12 August 2015 from Mr Glen Barnett Dawson Moving and Storage.