VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D58/2009

CATCHWORDS

Domestic building, variations, delay, time extension and liquidated or agreed damages, alleged defects, cost of rectification

FIRST APPLICANT	Noel Connick t/as N.L.&.K.L. Connick (Builders)
SECOND APPLICANT	Katherine L. Connick
RESPONDENT	Mrs. T. Israeli
WHERE HELD	Melbourne and on site 27B Bethell Street Ormond
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	19 and 21 August and 7 September 2009
DATE OF ORDER	2 October 2009
CITATION	Connick tas N.L.&.K.L. Connick (Builders) v Israeli (Domestic Building) [2009] VCAT 1979

ORDER

1 The proceeding is determined in accordance with the decision in D96/2009 which follows.

2 Costs are reserved and there is liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	Mr and Mrs Connick in person
For Respondent	Mr Kennedy of Counsel

APPLICANT	Tamara Emily Israeli
RESPONDENT	Noel Connick t/as N.L.&.K.L. Connick (Builders)
WHERE HELD	Melbourne and on site 27B Bethell Street Ormond
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	19 and 21 August and 7 September 2009
DATE OF ORDER	2 October 2009
CITATION	

ORDER

1 The Respondents must pay the Applicant $30,094.13 forthwith.

2 Interest and costs are reserved and there is liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr Kennedy of Counsel
For Respondent - Builders	Mr and Mrs Connick in person

REASONS

1 When the two proceedings before me were commenced, Mr Connick sued Mr and Mrs Israeli, and Mrs Israeli sued Mr and Mrs Connick. At the end of the second day of the hearing on 21 August 2009 I made orders concerning the proper parties to the proceedings. Mr and Mrs Connick agreed that they both trade as NL & KL Connick, so I added her as an applicant to D58/2009. I refer to Mr and Mrs Connick collectively as "the Builder".

2 I also accept Mrs Israeli's evidence that her husband was not a party to the building contract and that she is the sole proprietor of their family home, 27B Bethell Street, described as unit 1 in the building contract of 19 July 2006. I dismissed the proceeding against him on 21 August 2009.

3 The project was to demolish a home at 27 Bethell Street and build two homes, 27B for Mrs Israeli and the other, 27A, for her parents, Mr and Mrs Alkalai. Two contracts were entered – one for each home. These two proceedings only concern Mrs Israeli's home.

4 The Builder's claim is for the final payment under the building contract of $16,788.00, alleged variations of $6,515.00 and liquidated damages of $250.00 per week "until settlement". In a letter to the Tribunal of 4 August 2009 the Builder gave "itemised particulars of the amount claimed" and quantified the liquidated damages at $14,000.00 being 56 weeks from the date of the certificate of occupancy to the date of the letter. In the letter of 14 August 2009 the Builder also claimed $27,977.77 for "direct business costs incurred by the Builder as a result of not being paid". Mrs Israeli agreed that if the work had been completed on time and in accordance with the building contract, the final payment of $16,788.00 would be payable.

5 Mrs Israeli's claim is for allegedly defective work of $33,157.78, liquidated damages of $7,641.94 and alleged payments made by mistake of $6,812.05. Mr Kennedy of Counsel who appeared for Mrs Israeli provided a comprehensive financial reconciliation as part of his final submissions. He calculated that the nett sum payable to Mrs Israeli is $37,248.92.

ALLEGED VARIATIONS

6 Most of the variations are uncontentious. The parties agree that the first three variations were paid, totalling $24,765.72. $35,204.43 is the nett sum claimed by the Builder for the remaining variations (sometimes described as "variations 4 and 5" although there are multiple items and some are adjustments of prime cost or provisional sum items). It is shown in an undated schedule which the Builder sent Mr and Mrs Israeli on 30 August 2008. This is the total of the nett sums for the two "add" columns on that schedule, which represent the variations to 28 April 2008 and those

after that date. I accept that the amount which should be allowed for variations is the total for all variations of $59,970.15 less any amount Mrs Israeli demonstrates that she should not have paid for them.

7 The items which are in contention are "light fixtures", deck lighting, "sectional roller door", extra tiling and "additional variations". Mrs Israeli submits that she paid $6,812.05 for the first three items as variations that she should not have paid for and has paid for them under the mistaken impression that she was obliged to. The Builder did not identify the variations alleged to total $6,515.00 and I note that the Builder's last progress claim dated 1 September 2008 sought variations (which appear to be additional unpaid variations as per the schedule) of only $532.72. I distinguish Mrs Israeli's claims from those in *Lloyd L Watkins Pty Ltd v Vondrasek* [2006] VCAT 2479 at paragraph 124 where "extras" were not recoverable in circumstances where the owner knew that they could be challenged but had paid "for the sake of peace".

Light fixtures

8 Mrs Israeli gave evidence that she paid $3,927.05 for this item as a variation when it was already included in the contract price. The light fixtures are not listed as a prime cost item. I accept Mrs Israeli's evidence that Mr Connick asked her to speak to Peter Novak, the electrician, who in turn told her to pick the lights from Beacon Lighting. She said that there was no limit to the value of the lights she could choose. I also accept her evidence that the number and general description of lights was on the lighting plan and that she chose to have less lights than appeared on that plan.

9 I accept Mrs Israeli's evidence that the lights were not bought from Beacon Lighting but from another wholesaler who was cheaper and that she received no discount for the reduction in numbers of lights.

10 I reject Mr Connick's evidence, mentioned first on 7 September 2009, that the lighting was an item the parties agreed would not be included in the contract sum in order to keep the amount down to assist Mr and Mrs Israeli in their application to borrow money from their bank. Mrs Israeli denied the allegation and it contradicts the plain meaning of the contract documents.

11 $3,927.05 for the light fixtures must be deducted from the amount for variations claimed by the Builder.

Pendent lights

12 Similarly to the light fixtures, Mrs Israeli claims that she paid $1,088.00 for two pendent lights, which she says was an item that the Builder was obliged to pay for under the contract. The electrical plan shows pendent lights but the arrangement seems to have been a little different to the arrangement regarding the rest of the lights. Mrs Israeli chose pendent

lights from Beacon Lighting that were not available at the electrician's chosen supplier and admitted she said she would "get them and work it out later". Further, the pendent lights were not mentioned in Mrs Israeli's points of claim and only became an item claimed in her reconciliation. On balance, I find the bargain between the parties was that Mrs Israeli would bear this cost. I make no allowance for the pendent lights.

Sectional roller door

13 Mrs Israeli gave evidence that she paid $2,500.00 for a garage door, described in her points of claim as "sectional roller door". I accept her evidence that this item, too, was included in the contract price and should not have been separately charged as a variation. It is not a listed prime cost item and is included in the specifications at item 12.3 as an item to be provided by the Builder. I reject Mr Connick's evidence that the garage door, like the lighting, was an item the parties agreed would not be included in the contract sum.

14 I deduct $2,500.00 from the amount for variations claimed by the Builder.

Deck lighting

15 Mrs Israeli gave evidence that she paid $385.00 for this item as a variation, but it was not supplied by the Builder. Mr Connick agreed that these lights were not supplied but made contradictory claims about why. He said Mrs Israeli had first asked for the deck lighting then changed her mind, that the Builder had installed the cabling for deck lighting but not the lights which he has at his home and that the charge was for the cabling alone. Under cross-examination he agreed that it should be deducted and asserted that it already had been. He could not find the alleged deduction in any of the documents in evidence. He said there was an expanded document that would show the deduction, but never produced it in evidence.

16 In contrast I accept Mrs Israeli's evidence that she wanted the deck lights but was told by the electrician, Peter Novak, that they could not be installed. I accept her evidence that this sum has not been credited or repaid.

17 I deduct $385.00 from the amount for variations claimed by the Builder.

Extra tiling

18 One of the items included as an "add" variation in the schedule for "variation 5" is "Verandah tiles ... $665.00". Mrs Israeli gave evidence that she did not get extra tiles and I note that on the Builder's letter of 25 September 2008, described in the hearing as "version A" as the Builder sent two copies, which were not identical, Mr Connick had struck through this item and written "delete" beside it. $665.00 must therefore be deleted from the claimed variations.

Further "variations"

19 Mrs Israeli's reconciliation seeks the deduction of further "variations" being $385 adjustment for a brick wall, $135 for glass shelving, $2,800 for the landscaping provision and $433 for payment to a locksmith. The Builder admits the first two items. The third, the landscaping provision, has already been taken into account in the nett sum of $532.72 for "variation 5".

Locksmith

20 I accept Mrs Israeli's evidence that $433.00 was the sum paid to Liberty Locksmiths who changed the locks when Mrs Israeli and her family gained access to their home. I note Mr Connick's evidence that he permitted Mrs Israeli to occupy the home and that he provided keys to the front door and a remote control for the garage door, but that the remaining locks had not been "keyed alike" at that time. I accept Mr Israeli's evidence that the arrangement with Mr Connick was that the keys for the other doors would be left in a planter box on 27 June 2008, but they were not and Mr Connick was in Swan Hill when he and Mrs Israeli needed them to move in.

21 The Builder must allow Mrs Israeli $385.00 for the brick wall, $135.00 for glass shelving and $433.00 for the locksmith, a total of $953.00 for "further variations".

Nett sum allowed for variations

22 As mentioned above, the total claimed for variations 1 to 6 is $59,970.15 which I adjust as follows:

Total claimed for variations 5 and 6		$35,204.43
Less:		
Light fixtures	$3,927.05	
Deck lighting	$385.00	
Roller door	$2,500.00	
Extra tile	$665.00	
"Further variations"	$953.00	
		-$8,430.05
		$26,774.38
Plus variations 1-3		$24,765.72
		$51,540.10

Sum paid for variations

23 The evidence about precisely how much has been paid is a little confusing. I accept Mrs Israeli's evidence that she did not pay the nett sum of

$532.72 for "variation 5". When Mrs Israeli gave evidence in chief she agreed that she had paid the whole of "variation 4" of $34,671.71, but Mr Kennedy asked Mr Connick if he had received $34,113 for this variation, being the total of payments of $28,856.36 and $5,317.00. Mr Connick agreed that he had, however these figures total $34,173.36. To add to the confusion, a payment schedule of unknown provenance which forms part of section 12 of Mrs Israeli's Tribunal Book gives the two payments for variation 4 as $28,856.36 and $5,317.00, whereas the reconciliation provided for Mrs Israeli as part of the final submission shows the sums paid as $28,796.36 and $5,317.00.

24 In the absence of better evidence I will treat the sum received as the total of the two payments Mr Connick said he received, that is, $34,173.36. The total payments for variations is therefore $58,939.08; $34,173.36 plus $24,765.72.

BUILDER'S "DIRECT BUSINESS COSTS"

25 The $27,977.77 claimed by the Builder in the letter of 14 August 2009 was for items expended by the Builder to construct Mrs Israeli's home. They are not additional items incurred because of an alleged breach by Mrs Israeli, but are items which the Builder is obliged to pay to tradespeople and sub-contractors which were always going to be paid for by the Builder in the course of completing the contract. There is no allowance for these items.

LIQUIDATED DAMAGES

26 As explained during the hearing, there are three types of delay. There are delays for which the builder under the contract is entitled to a time extension and money, delays for which the builder is entitled to time but not money and delays for which the owner is entitled to money. When there is a pre-estimate of the amount for delay per period (such as $250 per week) allowed for in the contract, that rate is referred to as liquidated or agreed damages.

Builder's claim

27 The $14,000.00 claimed by the Builder for liquidated damages indicates that Mr Connick failed to understand the relevant contract provisions. Clause 15.4 of the contract provides:

> Whenever the progress of the Works is delayed by any act of omission of the Owner or of any person ... for whom the Owner is responsible ... the Builder is, in addition to the appropriate extension of time, entitled to recover the amount included in item 17a of the appendix in respect of each week of delay...

28 The amount claimed by the Builder does not relate to any delay in the works, but to Mrs Israeli's alleged delay in paying sums owing to the

Builder. Interest is a separate right governed by clause 11.10 of the contract.

29 Under clause 15.1 the Builder properly claimed time for five months for a delay caused by work to a sewer, which both parties agree was the fault of neither but an unexpected requirement of the local authority. Having regard to clause 15.4, the delay was not caused by Mrs Israeli or the Builder. Although Mrs Israeli had stated in a letter of 22 September 2008 that she would allow the Builder $5,500.00 for this delay she also stated that she was not responsible for the delay. She is entitled to change her understanding as to the interpretation of clause 15.4. I do not allow the Builder any liquidated damages for this delay.

30 The Builder also claimed $1,500.00 for an alleged delay caused by Mrs Israeli over choice of the air-conditioning system. The claim presents a number of difficulties for the Builder. First, the delay claim was not made in writing, unlike the claim for the sewer delay, until the Builder sent Mrs Israeli a letter dated 25 September 2008. Second, the Builder did not give evidence that the alleged delay in choosing the air-conditioning system caused an actual delay to the progress of the works – other work was being undertaken while the Builder was allegedly waiting for advice regarding the choice. Most importantly, Mr Connick agreed that Mrs Israeli and her husband had chosen an air-conditioning system in a reasonable period, then Mrs Israeli's parents wished to consider another system. Mr Connick's evidence was that he decided to treat the clients as a single group rather than acting on Mrs Israeli's instructions regarding her home. I am not satisfied that delay regarding the air-conditioning system, if any, was caused by Mrs Israeli and I allow no time and no liquidated damages for this item.

Mrs Israeli's claim

31 Clause 18.1 of the contract provides:

> If the Builder fails to bring the Works to Completion by the Completion Date, the Builder will pay or allow to the Owner by way of pre-estimated and Liquidated Damages, a sum calculated at the rate stated in Item 17 of the Appendix for the period from the Completion Date until the Works reach Completion or until the Owner takes Possession, whichever is earlier.

32 Mrs Israeli claims $7,641.94 for liquidated damages, being 214 days at $250.00 per week starting on 28 November 2007. This date is the date to which the Builder claimed an extension of time for the completion date on 11 December 2006 because of problems associated with the sewer. The parties agree that the works were not completed by that date. The period claimed ends on 2 July 2008. I accept that this is the date upon which Mrs Israeli entered occupation of her home.

33 I am satisfied that the "completion date" - the date for completion - was 28 November 2007 and the period for liquidated damages came to an end

(despite some items actually being incomplete) when Mrs Israeli and her family moved in.

34 The Builder must allow her the amount claimed of $7,641.94.

ALLEGED DEFECTIVE OR INCOMPLETE WORK

35 Mr Rob Simpson provided a report and gave evidence for Mrs Israeli. Mr Barry O'Meara, who gave evidence for the Builder, had written a report some months ago concerning bathroom floors only. The experts appeared and gave evidence concurrently on the first day of the hearing. Mr Simpson attended the view on site on 7 September 2009; Mr O'Meara did not.

Evaluation of the cost of rectification

36 Mr Connick said in evidence that he was always willing to return and rectify defects and had not been given access by Mrs Israeli. I do not accept his evidence on this point. Mrs Israeli wrote to the Builder on 2 October 2008 and said in part:

> ... to the works referred to in my letters dated 8 & 22 September 2008. You are required to complete/rectify all the works listed therein;
>
> I note that on at least three occasions you and [Mrs Connick] confirmed time with me to come and rectify the works but subsequently failed to show up ... I now put you on notice that pursuant to the contract you are obliged to nominate concise time for carrying out the works ... In circumstances, access will be only allowed for rectification works one more time ...[sic]

37 I accept Mrs Israeli's evidence that she gave the Builder further access to rectify outstanding items between 5 to 7 October 2008 when she and her family were away from home and that when they returned there were still items that had not been attended to. I conclude that she gave the Builder adequate opportunities to carry out rectification work, and although some work was done, other defects were not rectified, including items that the Builder acknowledged were defective. The measure of Mrs Israeli's loss is therefore the reasonable cost of having someone other than the Builder undertake the work.

38 Mr O'Meara said in evidence that the rates allowed for in Mr Simpson's expert report are high. This would undoubtedly be true if the rates were for a new home or even for a renovation. Mr Simpson allows $96.80 for a supervisor, $84.70 an hour for an electrician or plumber, $72.60 an hour for a carpenter or painter and $60.50 an hour for a tiler or labourer. On top of this he allows 5% for preliminaries and 20% for the builder's margin. However there are a limited number of builders willing to undertake rectification work - conventional wisdom is that builders are concerned both about latent defects in repairing work and also about the tendency of owners who have been involved in litigation to litigate again with the new builder.

39 I have some reservations about the rates adopted by Mr Simpson. They are significantly higher than rates suggested by experts in some other proceedings, but such evidence was not given during the hearing. I consider the test of whether an expert's rates are fair is whether they are the rates that a prudent owner, who has been a party to a legal dispute, would pay out of his or her own pocket. I do not have evidence that enables me to apply this test.

40 Because Mr Simpson's experience of rates charged is recent and Mr O'Meara admitted that he had neither undertaken nor arranged rectification work for some years, in this proceeding I prefer Mr Simpson's evidence about rates to that of Mr O'Meara. I find the percentages for preliminaries and builders margin are reasonable.

Bathroom floor

41 Mrs Israeli complains that the shower floor in the main bathroom has insufficient fall to ensure that the water goes down the waste. Instead, the water travels along the wall and out into the bathroom and the nearby carpeted hallway.

42 The bathroom has not been built strictly in accordance with the drawings. The engineering and architectural drawings show the whole bathroom floor set down 50 mm below the level of the rest of the first floor, whereas the joinery drawings show only the shower area lower than the bathroom floor. The experts agree that the design showing a 50 mm step-down at the bathroom door is poor design because it is a potential tripping hazard both entering and leaving the bathroom. Both Mr and Mrs Israeli said that neither the step-down into the bathroom, nor its elimination were discussed with them.

43 Both parties agree that the original design of this and the other showers in Mrs Israeli's home had shower doors which were eliminated at Mrs Israeli's request before they were constructed. Mr Connick said that he suggested that a "side light" – a small, protruding glass nib wall – still be built, but Mrs Israeli had no recollection of this and as was apparent at the site inspection, even if it had been built it would not have prevented the water from escaping.

44 Mr Simpson recommends that the whole bathroom tiled floor be taken up and retiled to allow sufficient fall to the waste at the cost of $12,375.40 plus preliminaries and margin. Mr Simpson said that the fall to the shower is only 1:150 whereas the experts agree that in accordance with the Building Code of Australia and Australian Standard AS 3740 it should be between 1:60 and 1:80. Mr O'Meara said that the fall does comply. His report advised that the shower door should be installed, but I accept Mrs Israeli's evidence that a shower door would not help. The problem is not the water splashing out before it hits the floor, but running along the floor.

45 Both experts agree that the standard for shower floors is performance-based – water must not pool and must readily discharge through the drain. They agree that the water does not discharge as it should, but they disagree about why. There are a number of showers in the two homes and this is the only one where this problem occurs.

46 Mr Connick and Mr O'Meara both suggested that the cause of the problem might be running the shower too fast. Having viewed the shower running at a moderate pressure for only a minute or so, I am not satisfied that this is an adequate explanation. I further note that the water travelled as described by Mrs Israeli.

47 Mr Simpson also said that there is no evidence of the installation of a "water stop" to prevent any water that penetrates the tiles and grout from spreading beneath them.

48 The site inspection of 7 September 2009 demonstrated that Mr Simpson's measurement of the fall, from a line between the edge of the glass shower screen and the wall, to the floor waste, is in accordance with his measurements rather than Mr O'Meara's. The measurement from the edge of the glass, diagonally to the waste, is approximately 900mm with a fall of only 5mm. From the wall opposite the end of the glass to the waste, the fall is even less – only 2 or 3 mm. If the measurement were taken from the mid-point between the glass and the wall (about half a meter) to the waste, the distance would be approximately 750mm which, if the fall at that point were still 5mm, would be a fall of 1:150.

49 The line from which measurements were taken is the approximate position that would have been occupied by the shower door. The problem is exacerbated by a slight fall away from the shower door line to a low point at the corner of the wall at the other end of the shower area; that is, the end furthest from the shower waste.

50 I am satisfied that Mrs Israeli is entitled to a shower that does not allow substantial quantities of water to escape the shower stall. The fall to the shower waste should have been between 1:60 and 1:80 to be in accordance with standards of reasonable workmanship, and Mrs Israeli was entitled to an outcome that is in accordance with those standards.

51 It is perhaps unfortunate that the Builder kept insisting that the water problem was at least partly caused by Mrs Israeli's decision to delete the shower doors when it was obviously not the case. Mr Connick insisted he had told Mrs Israeli that there were risks involved in deleting the shower doors. Mrs Israeli was equally vehement in her denial of such a conversation. Because I have found that the shower door eliminated from the main bathroom is irrelevant to this type of water escape, I do not need to say whose evidence I prefer. The shower door red herring has added an issue that the parties did not need to pursue in litigation.

52 During concurrent evidence, the experts discussed the possibility of installing a small tiled hob of about 25 mm to prevent water escaping along the floor. This had also been suggested by the Builder in a letter of 25 September 2008. The experts agreed that the cost of installing the hob would be approximately $200. Later, when Mr Kennedy asked clarifying questions of Mr Simpson, he said that water might penetrate the tiles and grout and spread along the tanking. Mr Simpson had said in his report that he saw no sign of a "water stop" – a right-angled piece of metal integrated into the wet area tanking used to prevent water travelling under tiles away from a waste – and there was no evidence of one when we attended the site inspection. Mr O'Meara made no comment about the possibility of water travelling beneath the tiles.

53 Mrs Israeli said during re-examination that she had not expected to have a hob in her main bathroom shower and did not want one. In his final submissions Mr Kennedy referred me to the recent decision in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 in which the High Court considered the rule in *Bellgrove v Eldridge* (1954) 90 CLR 613.

54 In *Bellgrove* the High Court dismissed an appeal by a builder and allowed the owner a judgement based on the cost of demolishing and rebuilding her home. In doing so, they reviewed a number of decisions and said:

> In none of these cases is anything more done than that work which is required to achieve conformity [with the contract] and the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner's loss.
>
> The qualification, however, to which this rule is subject is that, not only must the work undertaken be <u>necessary</u> to produce conformity, but that also, it must be a <u>reasonable</u> course to adopt. [emphasis added]

55 Mr Kennedy quoted *Tabcorp* at 288:

> The example which the Court [in *Bellgrove*] gave of unreasonableness was the following:
>
> > *No one would doubt that here pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of the first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks.*
>
> That tends to indicate that the test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances. The example given by the Court aligns closely with what Oliver J said in *Radford v DeFroberville,* that is, that the diminution in value measure of

damages will only apply where the innocent party is "merely using a technical breach to secure an uncovenanted profit".

56 Mrs Israeli did not bargain for a hob, but neither did she bargain for a floor at the same level as the carpeted hallway, and all parties agree that this would have been potentially dangerous. But for the matters that follow, I might have found that a hob was reasonable and necessary to correct the design flaw.

57 I find that Mrs Israeli is entitled to have the bathroom floor taken up and relaid so that there is an adequate fall to the waste, particularly as there is a fall away from the waste beyond the shower door line, and no water stop. I am concerned about the extent of work called for in Mr Simpson's report. Replacing the whole bathroom floor seems excessive, but in the absence of any evidence about this point from Mr Connick or Mr O'Meara, it is the only evidence before me.

58 The Builders must allow Mrs Israeli $12,375.40 plus preliminaries of $618.77 plus margin of $2,598.83, a total of $15,593.00, subject to the adjustment of time for the carpenter and labourer discussed below.

Articulation joints to lightweight cladding

59 Mr Simpson reported that there are no articulation joints between masonry and lightweight cladding in the three areas where they meet at the rear of the property. I accept his evidence that there should be articulation joints in these positions to prevent uncontrolled cracking. Mr O'Meara agrees that articulation joints in such positions are necessary but first gave evidence that the cost to do so would be approximately $500.00. When it was pointed out that a scaffold is necessary to install the joints at first floor level, he increased his estimate to $900.00. Mr O'Meara had not reported on this item.

60 On site Mr Simpson pointed out the relevant areas and revised his estimate of necessary time down from four hours each for a carpenter and labourer to one hour travelling and 2 hours erecting and moving the scaffold and undertaking the work. Mr Simpson's estimated $1,412.40 (plus preliminaries and margin) in his report, being labour and $880.00 for the hire of the scaffold. I allow $880.00 for the scaffold, three hours for the labourer (including collecting and re-delivering the scaffold) being $121.00 at Mr Simpson's rates and two hours for the carpenter being $145.20. The Builders must allow Mrs Israeli $1,146.20, plus 5% preliminaries ($57.31) plus 20% margin ($240.70), which equals $1,444.21 subject to the adjustment of time for the carpenter and labourer discussed below.

Tabcorp was the tenant and Bowen the landlord in a commercial lease. Tabcorp removed and replaced a high quality floor with one of lesser value without the landlord's permission. It unsuccessfully submitted that Bowen should only be entitled to the diminution of value of the building rather than the substantially greater cost of replacement.

Timber floors

61 There are large, jagged cracks in one board which runs parallel with the north window, smaller cracks in a few other boards and excessive gaps in the ground-floor timber floor. The most serious cracks are beside the north and west windows, but gaps have also appeared away from the windows in the family room, in the entrance hall and kitchen. Mr Simpson said that the cracks and gaps are evidence that the boards were not sufficiently acclimatised before being laid, so their moisture content was too high, allowing them to shrink as they lost moisture. He costed replacement of part of the floor then re-sanding and re-polishing the whole floor.

62 Mr Connick said in evidence that the main damage to the floors is adjacent to windows and that the damage is attributable to that. As noted in the *Guide to Standards and Tolerances* published on 1 July 2002 at 12.1:

> The effect of sunlight, heating or other heat generating appliances are to be taken into consideration and if determined that they have contributed to the higher rate of shrinkage then it is not considered a defect.
>
> A gap of more than 2 mm between adjactent boards will be considered a defect.

63 I note that Mrs Israeli installed blinds on these windows in November 2008 but that she and Mr Israeli first noticed gaps between the boards in that area some months earlier in September. Had the only damage been gaps, not cracks, adjacent to the windows, I might have found in accordance with the Guide that there was no defect for which the Builder was responsible.

64 Mr Simpson acknowledged that some of the affected floor is adjacent to northern and western windows but said in his report:

> Whilst it is recognised that the area at the north west corner of the family room is in proximity to the windows, the Project Specifications determine that energy efficient glass was to be used and as such, the effects of sunlight on the floor should not be affecting the timbers.

65 The experts agreed in concurrent evidence that it is not in accordance with competent building practice to finish a new timber floor with two-pack (epoxy) polyurethane because of the risk that the boards will edge bond, so movement in the floor is likely to cause boards to split or the gaps to be wider. The Builder polished the floor using two-pack polyurethane. This was in accordance with the specification, but the specification had been provided by the Builder. It is likely that the cracking and excessive gapping has been caused or contributed to by edge bonding as the boards between those which have gapped have not opened up at all.

66 Mr Simpson estimated the total cost for the rectification of the floors is $11,192.00. He allowed 40 hours each for a carpenter and labourer, 8 hours for a painter and 4 hours for a supervisor.

67 Mr O'Meara had not inspected the floors but said that he thought 40 hours for the labourer and a whole day for the painter (who would not be undertaking the polishing of the floor) would be excessive. As he had not seen how extensive the damage is, his comments about this defect are of limited assistance.

68 I accept Mr Simpson's evidence about the cost of rectification of the floor of $11,192.00 plus preliminaries of $559.60, plus builder's margin of $2,350.32; a total of $14,101.92 which I allow Mrs Israeli, subject to the adjustment of time for the carpenter and labourer discussed below.

Cavity Sliding door

69 Mrs Israeli gave evidence, which I accept, that the heavy glass sliding door between the kitchen and hallway has never worked properly and cannot be moved more than half way out of its housing cavity. Mr Connick admits the door does not work properly and must be rectified . He offered to do so, however as discussed above, he has had adequate opportunity to rectify defects and has failed to rectify this one.

70 Mr Simpson estimates the cost to rectify at $1,134.40, plus preliminaries of $56.72, plus builder's margin of $238.22; a total of $1,429.34 which I allow Mrs Israeli, subject to the adjustment of time for the carpenter and labourer discussed below.

Laundry floor waste

71 Mr Connick agrees that the overflow pipe from the laundry floor waste, which discharges outside the laundry door, should have a flap installed to prevent insects entering the home this way. Mr Simpson's estimate of the cost to repair is $201.50 before margins are added. Half the cost is the supervisor's time, which I do not allow. I allow $104.70, plus preliminaries of $5.23, plus builder's margin of $21.98; a total of $131.91

Adjustment of time for carpenter and labourer

72 Mr Simpson allowed a total of 88 hours for each of the carpenter and labourer. During concurrent evidence he and Mr O'Meara agreed that if the carpenter and labourer undertook all the tasks Mr Simpson had described, they would each work for a total of about 80 hours. In the items above I have allowed 86 hours for the carpenter and 87 for the labourer. I therefore deduct the value of a further 6 hours for the carpenter at $72.60 being $435.60. I also deduct 7 hours for the labourer at $60.50 being $423.50. The total adjustment is $859.10.

Rectification

Bathroom floor	$15,593.00
Articulation joints	$1,444.21
Timber floor	$14,101.92

Sliding door	$1,429.34
Laundry floor waste	$131.91
	$32,700.38
Less adjustment of time for carpenter and labourer	$859.10
To Mrs Israeli for rectification:	$31,841.21

RECONCILIATION

	To Mrs Israeli	To Builder
Contract sum		$335,571.50
Variations		$51,540.10
		$387,111.60
Liquidated damages	$7,641.94	
Rectification	$31,841.21	
Paid:		
Contract sum	$318,783.50	
Variations	$58,939.08	
	$417,205.73	
Less total due to Builder	$387,111.60	
The Builder must pay Mrs Israeli	$30,094.13	

COSTS AND INTEREST

3 I reserve the question of costs and interest, with liberty to apply. The parties' attention is drawn to s109 of the *Victorian Civil and Administrative Tribunal Act 1998* regarding entitlement to costs.

SENIOR MEMBER M. LOTHIAN