

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP11/2016

CATCHWORDS

Domestic building contracts. Claim for numerous alleged defective or non-compliant building works. Most claims rejected as unfounded or unsubstantiated.

APPLICANT	Sylvia Jeric
RESPONDENT	A.J. Key Pty Ltd (ACN 078 922 915)
WHERE HELD	Bairnsdale
BEFORE	Senior Member M Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	19 and 20 January 2017
DATE OF ORDER	14 February 2017
CITATION	Jeric v A.J. Key Pty Ltd (Building and Property) [2017] VCAT 211

ORDERS

1. The respondent, A.J. Key Pty Ltd, must pay the applicant, Sylvia Jeric, \$250.
2. Costs reserved with liberty to apply by 30 March 2017. **I direct the principal registrar to refer any application for costs to Senior Member Farrelly in chambers.** If no application for costs is received by 30 March 2017, there will be no order as to costs.
3. **I direct the Principal Registrar to send to the applicant, with these reasons, a copy of sections 109 to 115D of the *Victorian Civil and Administrative Tribunal Act 1998*.**

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:

Mrs Sylvia Jeric, in person

For Respondent

Mr Biviano of Counsel

REASONS

- 1 Mrs Jeric is in her senior years. On 21 February 2012 she entered a building contract with the respondent (“**the builder**”) for the construction of a new home in Bairnsdale (“**the contract**”). Since moving into her new home in November 2012, Mrs Jeric has raised numerous complaints with the builder. She brings this proceeding seeking compensation in respect of a large list of alleged building works which she says are defective or not compliant with the requirements of the contract.
- 2 The home Mrs Jeric selected in late 2011 was known as the “Hotham 260E”, one of a range of standard home constructions advertised by the “National Builders Group”. At that time, the National Builders Group operated as an agency connecting its member builders to consumers in respect of new home constructions from the National Builders Group range.
- 3 Prior to signing the building contract, Mrs Jeric attended several meetings with Mr Davies, the builder’s sales representative. At these meetings, Mrs Jeric and Mr Davies discussed and confirmed the changes Mrs Jeric wanted to the standard range of specifications and inclusions for the Hotham 260E. The selected changes, and the effect on the contract price, were confirmed in a ‘tender’ document signed by Mrs Jeric on 21 November 2011 (“**the tender**”). The tender confirmed that the contract price would be \$272,627, subject to engineer design and other relevant information.
- 4 Engineering documentation was subsequently obtained and the contract, signed on 21 February 2012, confirmed the contract price, \$272,627.
- 5 On 18 March 2012 Mrs Jeric completed and signed a “Colour Selection Form” which, amongst other things, confirmed the fittings and appliances selected by Mrs Jeric from the standard range (“**the colour selection form**”)
- 6 The building works commenced shortly after the issue of the building permit on 10 April 2012. At Mrs Jeric’s request, there were a number of relatively minor variations to the contract works during the course of construction which resulted in an increase of approximately \$7500 to the contract price.
- 7 An occupancy permit was issued on 2 November 2012. A short time later, Mrs Jeric conducted a final inspection with Mr Key, the builder’s director, and the home was handed over to Mrs Jeric. Mr Key says that at the final inspection, Mrs Jeric expressed her delight and gratitude.
- 8 In late January 2013, the builder received a letter from Mrs Jeric setting out a long and detailed list (in excess of 60 items) of works alleged to be defective or not compliant with the contract requirements (“**the January 2013 defects list**”). In response, the builder carried out a further inspection and, over a period of several months, attended to rectify a number of the

alleged defective or non-compliant works. The builder did not accept that all of the items on the list constituted building defects.

- 9 Sometime later, in late January 2014, Mrs Jeric lodged a complaint with Consumer Affairs Victoria (“CAV”), alleging a failure on the part of the builder to rectify various defective or non-compliant building works. CAV arranged an on-site conciliation meeting on 21 February 2014. That meeting was attended by:
 - Mrs Jeric,
 - Mr Davies on behalf of the builder,
 - Mr Pawluk, a CAV senior conciliator, and
 - Mr Karkut, a building inspector appointed by the Victorian Building Authority at the request of CAV.
- 10 Following that meeting, CAV sent to Mrs Jeric and the builder a report which confirmed matters discussed at the meeting, including the agreement of the builder to carry out rectification works in respect of some of the alleged defects (“**the CAV report**”).
- 11 The builder subsequently attended to some further rectification works, however it was unable to resolve all disputes with Mrs Jeric.
- 12 This proceeding commenced on 20 August 2015 when the tribunal received an application from Mrs Jeric seeking compensation from the builder in the sum of \$60,000 in respect of numerous alleged defective or non-compliant building works. Attached to the application was a copy of the CAV report, and a letter from Mrs Jeric to the Tribunal dated July 2015 setting out a list of alleged unsatisfactory or defective building works.

THE HEARING

- 13 The final hearing was conducted at Bairnsdale Courthouse on 19 and 20 January 2017. Mrs Jeric represented herself. I granted leave to the builder to be represented by a lawyer, and the builder was represented by Mr Biviano of Counsel.
- 14 Mrs Jeric gave evidence in support of her claim.
- 15 For the builder, Mr Davies and Mr Key gave evidence. The builder also called expert evidence from Mr Graeme Furphy, an experienced inspector and registered builder. Mr Furphy also produced a written report. That report had been filed at the tribunal and served on Mrs Jeric well prior to the final hearing.
- 16 A view of Mrs Jeric’s home was conducted on the first day of the hearing. At the view, Mrs Jeric pointed out the numerous items of building work making up her claim. A few items she pointed out were new items in the sense that they had not previously been clearly articulated by Mrs Jeric as items forming the subject matter of her claim. As the builder and Mr Furphy were present and able to inspect and comment on the new items,

and in the interest of bringing finality to the dispute, I treated such new items as included in Mrs Jeric's claims in the proceeding.

- 17 I found both Mr Davies and Mr Key to be credible witnesses who each gave clear, straightforward and honest answers, to the best of their recollections, to questions put to them by myself, Mr Biviano and Mrs Jeric.
- 18 I found Mr Furphy to be a credible and helpful expert witness who gave impartial expert evidence founded on years of practical experience.
- 19 Mrs Jeric's evidence was often confusing and she frequently resorted to irrelevant, sometimes derogatory, and generally unhelpful commentary in preference to simply answering questions put to her. I allow for the fact that Mrs Jeric is in her senior years and a stranger to the court room environment. Such allowance, however, does not enhance the probative value of her evidence.
- 20 For the reasons set out below, I find that almost all of Mrs Jeric's complaints in respect of the building works are unfounded or unsubstantiated.

WARRANTIES

- 21 The contract, a standard form HIA New Homes Contract, sets out the builders warranties applicable to the contract works as mandated by section 8 of the *Domestic Building Contracts Act 1995* ("**the warranties**"). The warranties prescribed in the Act include the following:
 - (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
 - (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
 - (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act⁴;
 - (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date or within the period specified by the contract.
- 22 Although she does not directly reference the warranties, Mrs Jeric's claim is, in effect, a claim for damages measured as the reasonable cost to rectify the builder's breaches of the warranties in respect of defective and/or non-compliant contract works. Mrs Jeric provides no explanation as to how she arrives at a damages sum of \$60,000. It is a guesstimate.

WITHDRAWN ITEMS

- 23 During the course of the hearing, Mrs Jeric confirmed her withdrawal of a number of the items of alleged defective or non-compliant work. Some of the items were withdrawn because they had previously been satisfactorily addressed by the builder. Other items were withdrawn because Mrs Jeric conceded that the items were not defective and/or the builder had not breached its contractual obligation in respect of such items. The withdrawn items are as follows:
- 24 **Bidet handle/tap main bathroom.** The builder has previously rectified this item.
- 25 **Bedroom 1 ceiling of movement.** Mrs Jeric confirmed that she no longer pursued this item. In any event, I inspected the ceiling at the view and agree with the builder that there are simply no signs of any movement in the ceiling.
- 26 **Missing basket wastes to vacuum system.** Mrs Jeric confirmed that this item had been satisfactorily addressed by the builder.
- 27 **Electric plug/PowerPoint not satisfactory.** Mrs Jeric confirmed her withdrawal of this item.
- 28 **Ensuite and bathroom mirrors.** Mrs Jeric initially claimed that the builder failed to provide mirrors with polished edges as specified under the contract. It was apparent from her evidence that Mrs Jeric mistakenly thought 'polished' edges meant 'bevelled' edges. When the difference was explained to her she accepted that the contract did not provide for mirrors with bevelled edges, and she withdrew this item.
- 29 **Store room door short / not properly sealed.** Mrs Jeric confirmed that this item had been satisfactorily rectified by the builder.
- 30 **Aluminium mesh missing from brickwork weepholes/vents.** Mrs Jeric confirmed that this item had been satisfactorily addressed, and to the extent that there were a few remaining weep holes to which mesh had not yet been installed, Mrs Jeric accepted that this item was, in any event, deleted from the contract works. The tender confirms Mrs Jeric's deletion of these works from the contract works. She intended the works to be carried out by her son.
- 31 **Faulty laundry door lock.** At the view, the lock appeared to be functional. In any event, Mrs Jeric confirmed that she was not pursuing this item.
- 32 **Kitchen cabinets do not shut properly.** Mrs Jeric confirmed that this item has been satisfactorily addressed by the builder.
- 33 **Unsatisfactory grouting to kitchen tiles.** Mrs Jeric confirmed that this item has been satisfactorily addressed by the builder. At the view, Mrs Jeric pointed out a small section of plaster wall in the kitchen where she would

like tiles installed, but she accepts that the builder is not contractually obliged to do so.

- 34 **Cut in rumpus room door fly screen.** Mrs Jeric confirmed that this item has been satisfactorily addressed by the builder.
- 35 **Study window faulty.** Mrs Jeric confirmed her withdrawal of this complaint. At the view I could discern no dysfunction in the window.
- 36 **Study key locks do not work.** Mrs Jeric confirmed her withdrawal of this item.
- 37 **Whole house window locks and key locks do not work.** Mrs Jeric confirmed her withdrawal of this item.

CONTESTED ITEMS

House smaller than original plan

- 38 Prior to entering the contract, Mrs Jeric obtained from the National Builders Group, as part of its advertising material, a simple plan of the Hotham 260E home. The plan indicated the overall footprint measurements for the home, with the front of the home identified as 15,320mm wide. The actual endorsed plans for the home, as approved by the building surveyor, indicate the width of the front of the home as 15,300 mm. On this basis, Mrs Jeric contends that the front of the home is 20mm less in width than it should be.
- 39 Mrs Jeric signed the endorsed plans. It is those plans, and not the advertising material plan, which must be followed by the builder. I find there is no breach of warranty because there is no evidence that the home as built does not comply with the endorsed plans.

Front of house drainpipes rattle. Front porch area beams/roof move in the wind.

- 40 These two items are grouped together because they form the same complaint/concern of Mrs Jeric. She says that, in windy conditions, she can hear some rattling noise coming from the roof area around the front porch.
- 41 Mr Key says that in all his inspections of the home, he has never heard the noise or noticed any signs of any movement.
- 42 Mr Furphy likewise says that he was unable to detect any loose pipes or signs of movement. He says that he did notice a slight overhang of sisalation paper at the gutter beside the entry porch, and he postulates that perhaps the overhanging paper flaps on high wind days and that this might be the noise Mrs Jeric claims to hear. It would be a simple and quick job to trim this sisalation paper. Having observed, in a photo taken by Mr Furphy, the very minor nature of the sisalation overhang, I do not accept that it alone constitutes a breach of warranties.
- 43 Like Mr Key and Mr Furphy, I observed at the view that there were no signs of movement in the downpipes or the front porch of the home. By the

end of the view, the wind had picked up to be what I would call a strong breeze. I could hear no noise coming from the front roof area of the home.

- 44 Perhaps there is some noise on very strong wind days as Mrs Jeric says. But on the evidence before me, I am unable to find any breach of the warranties on the part of the builder.

Cracks to garage slab floor

- 45 There are several cracks in the garage slab floor, but they are very minor. The builder says the cracks first appeared shortly after the slab was laid, and that they had not increased in size since. I accept the builder's evidence in this regard as it is not contested by Mrs Jeric, and I note also that 'cracks to the garage floor' are listed in the January 2013 defects list.
- 46 The builder says the cracks are normal shrinkage cracks that do not constitute defective building works or a breach of the warranties. Mr Furphy concurs with the builder and notes that the cracks are less than 1mm in width.
- 47 Having viewed the garage floor, I agree with the builder and Mr Furphy. The cracks are minor and present no safety, function or maintenance issue. I find that there is no breach of the warranties.

Fascia cornice dislodged/missing

- 48 Mrs Jeric's reference to 'cornice' in this regard is a reference to the timber beading installed along the edges of the eaves. There are a few areas where the beading has, in the past, sprung loose. I noticed at the view that the beading in these areas had been re-fixed in its proper position. I am satisfied that the issue was minor and has been satisfactorily rectified by the builder.

Movement cracking generally

- 49 This is one of the items that might be considered a new item which, as referred to above, is included as part of Mrs Jeric's claims in the proceeding.
- 50 Mrs Jeric says there are signs of cracking movement around the whole home. She points to movement gaps between beading, eaves, fascias, cornices, architraves, walls, windows and door frames. At the view I carefully observed the exterior and interior of the home, and in particular the areas pointed out by Mrs Jeric.
- 51 I observed nothing more than very minor, in most cases hairline width, movement gaps.
- 52 The builder referred me to the 'Guide to Standards and Tolerances 2007' (**'the ST Guide'**) published by the Victorian Building Commission (as it then was) in 2007. The ST Guide is a document frequently referred to by builders, consultants and owners when considering whether any particular building works in question exhibit sufficient deformity to constitute a

building defect. The ST Guide is precisely what it claims to be, namely *a guide*. As it says in its introduction, the ST Guide is ‘a tool that will provide guidance for areas of building standards that are not prescribed in legislation, building controls and/or policy.’

- 53 Nevertheless, the ST Guide is a useful document, much used by consumers and builders alike when there is a difference of opinion as to whether an item of building work constitutes defective building work. I agree with the builder that the movement gaps I observed fell ‘within tolerance’. That is, the degree of movement was within the acceptable range, and not the defective works range, as set out in the ST Guide.
- 54 Mr Furphy says the movement gaps indicate very minor movement of a degree to be considered normal and expected. He does not consider the movement gaps to be indicative of any defect in the building works.
- 55 In my view the home is obviously structurally sound and performing very well. The signs of movement are extremely minor and certainly well within the normal range to be expected of a house that is four years old. I find there is no breach of the warranties in regard to the alleged general movement cracks.

Hot water system not adequately secured to wall

- 56 Mrs Jeric says that the hot water service standing adjacent to the exterior brick wall of her home is insecure and needs to be fixed to the brick wall.
- 57 At the view I observed that the hot water system was sitting securely on a concrete pad, and I concur with the view of the builder and Mr Furphy that there is no need to further affix the system to the brick wall.

Hot water system not functional – water not hot enough. One solar pad insufficient.

- 58 The system is a gas boosted solar hot water system. There is one solar panel on the roof. The solar panel provides energy to heat the water, and when the solar produced energy is insufficient, the gas booster will activate.
- 59 Mrs Jeric’s complaint is that the hot water is often not hot enough. She says that one solar panel is insufficient and that she should have received two solar panels. To support her claim, Mrs Jeric produced a brochure for a Rinnai solar hot water system, similar to the system she has. The photo on the front of the brochure depicts two solar panels on a roof.
- 60 There is nothing in the tender or the other building contract documentation, or indeed the Rinnai brochure produced by Mrs Jeric, which specifies a particular number of roof solar panels. I accept the evidence of Mr Furphy that the number of panels generally required depends on a number of factors, not least of which being the location of the home and, in particular, the orientation of the roof to the sun’s orbit path.
- 61 Mr Furphy does not consider one solar panel to be insufficient.

- 62 Mrs Jeric produced no expert evidence.
- 63 At the view we tested the hot water. Initially it was barely lukewarm. However, Mr Key identified that the gas booster switch was not turned on. When he turned it on the water temperature quickly rose to an acceptable level.
- 64 On the evidence before me, I am not satisfied that the builder has failed to install a system that does not comply with the contract. Nor do I find that the system installed is inadequate. I find there is no breach of the warranties in respect of the hot water system.

Vanity basins and taps in both bathrooms

- 65 Mrs Jeric's complaint is that the vanity basins and mixer taps in both bathrooms function poorly because of the positioning of the tap relevant to the basin. In each case, the tap is placed adjacent to the side of the basin. Mrs Jeric says that the taps should be positioned directly behind the rear of the basin, or within the basin at its rear, rather than to one side. She says that because of the tap position, excessive water splashes out of the basin when using the tap.
- 66 I accept that Mrs Jeric is disappointed with the choice of basin and tap installed. She would have preferred a basin capable of housing the tap in the rear of the basin itself. Mrs Jeric identified basins in a catalogue that she would have preferred.
- 67 However, Mrs Jeric's disappointment does not prove a breach of the warranties on the part of the builder.
- 68 The tap/basin that Mrs Jeric prefers (identified in the catalogue she produced) is not the tap/basin identified in the colour selection form which she signed as confirmation of her choice of fittings. There is no evidence before me that the basin/taps installed are anything other than the basin/taps specified under the contract.
- 69 There is nothing in the contract documentation which specifies the actual position of the tap relative to the basin. At the view, the taps/basins did not look odd to me. I also ran one of the taps and, in my view, the functionality was acceptable.
- 70 On all the evidence, I find that there is no breach of the warranties in respect of this item.

Spa and bath glued and fixed in position

- 71 One of the items referred to in the CAV report is the alleged excessive flexibility when stepping into the spa bath in the ensuite to the master bedroom. The spa is not freestanding. That is, it is housed within a frame constructed by the builder.

- 72 Mr Key says that the builder addressed the flexing issue by removing the spa bath and reinstalling it ensuring that it was firmly supported on a mortar slurry.
- 73 Similar installation works were carried out in respect of the bath in the second bathroom.
- 74 Mrs Jeric's says that, when the builder reinstalled the spa, she observed that the builder fixed it in place with glue. She is now concerned that if there is any future problem with the plumbing to the spa or the bath, it will be extremely difficult to access the pipes because the spa and bath are glued in position.
- 75 Mr Key says that Mrs Jeric's concern is unfounded. He says the spa and bath were not permanently fixed in place with glue. As noted above, he says they were installed on top of a concrete slurry. He says that in the event the spa or the bath need to be removed to access pipes, it will be a simple matter of cutting the silicone seal line where the top of the spa/bath is sealed to the surrounding frame, and the spa/bath can then be easily lifted out from the framing.
- 76 I accept Mr Key's evidence. In my view it is likely that what Mrs Jeric believed to be glue, was in fact the concrete slurry forming the firm base for the spa.
- 77 Having viewed the spa and the bath, I also accept the evidence of Mr Furphy that the spa and the bath are not excessively or unacceptably flexing.
- 78 On the evidence before me, I find that there is no breach of the warranties by the builder.

Shower in bathroom

- 79 There are two issues with this shower.
- 80 One of the issues raised in the CAV report was the leaking of water to the tiled area outside the shower door. The CAV report noted that the frameless door had no bottom seal and that the door may have been slightly misaligned, thus creating a larger than normal gap through which water may leak when the shower is being used.
- 81 Mr Key says that, after the CAV conciliation meeting, the builder addressed the issue by realigning the door and fitting a bottom seal. Otherwise, he says that some water will inevitably escape the shower through normal use and that the use of a bath mat is the appropriate response.
- 82 I noted, as did Mr Furphy, that there is some minor water damage to a small area of the window skirting situated close to the shower.
- 83 Having viewed the shower, I am satisfied that the builder has adequately rectified the shower door, and the original issue with water has been satisfactorily addressed. However, because the rectification works were

carried out some considerable time after Mrs Jeric moved into the home, I am satisfied that the builder should also bear responsibility for rectification of the minor water damage to the adjacent window skirting. In my view, adequate rectification will require no more than sanding and repainting the affected area, and I allow \$100 as the reasonable cost Mrs Jeric will incur in having the rectification works carried out by someone other than the builder.

84 The second issue with the shower, also raised in the CAV report, is the allegation that the shower is smaller than agreed, and that Mrs Jeric has paid more than she ought to have paid in respect of this shower. It is not entirely clear whether this is a withdrawn item or an item that Mrs Jeric still wishes to pursue. As there is doubt, I treat it as an item she is still pursuing.

85 Having heard evidence from Mrs Jeric, Mr Davies and Mr Key, I am satisfied of the following:

86 The plans for the home provided for a 900mm x 900mm shower. Mrs Jeric requested, as a variation to the works, that the shower be enlarged to 900mm x 1000mm. The variation was agreed at an extra cost of \$97. However, during construction Mr Key decided that the larger shower could not be constructed for a number of reasons, one reason being that it would extend the shower opening unacceptably close to the adjacent window. Mr Key informed Mrs Jeric that the variation works could not be carried out, and that the charge for the variation works would be credited back to her.

87 Initially, Mrs Jeric was not prepared to accept the deletion of the variation works and the credit back of \$97. However, as noted in the CAV report: 'Following further discussion the property owner [Mrs Jeric] accepted the refund cheque [\$97] to resolve this issue'

88 Mrs Jeric agrees that she accepted the payment of \$97.

89 On the evidence before me, I am satisfied that this issue was resolved when Mrs Jeric accepted the credit back payment of \$97, and it is not open to Mrs Jeric to now pursue a claim for breach of the warranties in respect of the shower size.

Drummy exterior tiles

90 This is a new item raised at the view which, as noted above, is included as part of Mrs Jeric's claims in the proceeding.

91 The builder has installed exterior paver tiles on the landing outside the living room and on the landing outside the meals room. The contract did not provide for such tiling works. Mrs Jeric was unhappy with the appearance of the slab in these areas which, like the garage floor, had minor shrinkage cracks. Mrs Jeric and the builder reached agreement that the builder would lay tiles to these areas at no extra cost, with Mrs Jeric bearing the supply cost of the tiles.

- 92 Mrs Jeric's complaint now is that some of the tiles are 'drummy'. At the view she tapped the tiles with her walking cane to demonstrate the drummy sound.
- 93 I accept that some of the tiles on both landings sounded very slightly 'drummy' when tapped with the walking cane. However, I also observed that there were no signs of movement in any of the tiles on either landing. The tiles looked good, were firm to walk on and there was no dislodged grout.
- 94 Given the good condition of the tiles four years after completion of the works, I find that there is no breach of the warranties by the builder in respect of the laying of the tiles.

Feature border tiles in the bathroom

- 95 The shower in the bathroom features border tiles with a pattern. The border tiles around the bath are plain white, like the rest of the tiles around the bath. The contract did not provide for the patterned feature border tiles around the bath.
- 96 During construction, Mrs Jeric requested that feature border tiles be installed around the bath, similar to the feature border tiles in the shower. Mr Key says that he [for the builder] agreed to install the requested border tiles at no extra cost, however the tiles could not be sourced. That is, the builder was unable to locate a supplier who still carried the feature border tiles.
- 97 Mr Key says he informed Mrs Jeric that the tiles could not be sourced, and that the builder would proceed to install the (originally specified) plain border tiles.
- 98 I accept the evidence of Mr Key. It is not contested by Mrs Jeric.
- 99 In the circumstance where the builder has been unable, through no fault of its own, to carry out agreed variation works, and that fact is acknowledged and accepted by Mrs Jeric, there is, in my view, no breach of the warranties. Further, as the initial variation to the tiles and the subsequent reversion to the plain border tiles had no effect on the contract price, I am not satisfied that Mrs Jeric has suffered any 'loss'. For these reasons, this claim fails.

Carpet joins in the rumpus room and the family room.

- 100 The carpet was selected by Mrs Jeric. In the rumpus room and the lounge room, it is a thick wool pile carpet. In both rooms, there is a join in the carpet approximately 1 metre in from the north facing walls which include floor-to-ceiling windows.
- 101 Mrs Jeric's complaint is that the carpet, particularly in the rumpus room, looks different either side of the join. The carpet on the window side of the join looks different in hue to the carpet on the other side of the join.

- 102 The CAV report notes the view of the inspector, Mr Karkut, that the difference in hue is so obvious that it amounts to a defect. Mr Karkut did not prepare the CAV report, and the report is not, by its terms, purporting to be an independent expert's report. It is a report of events at a conciliation conference. If Mr Karkut prepared an inspection report, it has not been produced. Mr Karkut was not called to give evidence at the hearing.
- 103 Mr Furphy says the visual effect - the different hue either side of the carpet join - is caused by the prominence of the carpet join coupled with the play of light entering the rooms primarily through the floor-to-ceiling windows. He says also that the type of the carpet, a thick wool pile, means that the carpet joins will necessarily have some prominence.
- 104 I carefully viewed the carpet in both rooms from various positions, close and far. From some positions, the difference in hue either side of the join appears very noticeable. From other positions, however, there is no apparent difference in hue either side of the joins, although the carpet joins themselves are always noticeable.
- 105 Because the difference in hue either side of the carpet joins is not apparent from some viewing positions, I am satisfied that the carpet itself is not faulty, and I accept Mr Furphy's opinion that the visual effect is a combination of the light entering the rooms relative to the positioning of the carpet joins.
- 106 As to the carpet joins themselves, I am not satisfied that the manner in which the joins have been carried out constitutes defective work or a breach of the warranties. On my viewing of the joins, and Mr Furphy's evidence as to the inevitability of a join of some prominence with this type of carpet, I am satisfied that there is no fault in the methodology of the joins.
- 107 The final consideration is the positioning of the carpet joins as selected by the carpet layer. I accept the evidence of Mr Key and Mr Furphy that, because of the size of the rooms, a join in the carpet somewhere in each room was necessary. Can it be said that, having regard to the light entering the room through the north facing windows, the carpet layer made a poor choice in positioning the carpet joins where he did?
- 108 I accept Mr Furphy's evidence that, by reason of the type of carpet, the carpet joins would have been noticeable wherever they were positioned in the room. And as one can only speculate as to the visual effect of light on the carpet joins had they been placed elsewhere, I am not satisfied that the positioning of the carpet joins where they currently are amounts to a building defect or a breach of the warranties.
- 109 In conclusion, on the evidence before me I find that there is no breach of the warranties in respect of the carpet in the rumpus room and the family room.

Heating vent close to projector

- 110 A heating vent is installed in the rumpus room ceiling. A cinematic projector is also installed to the ceiling, quite close to the heating vent. The vent was installed before the projector was installed.
- 111 The positioning of a projector is somewhat exacting, and is determined by the position of the picture screen onto which the picture will be projected. In this case, the screen hangs in front of the southern wall in the room, and the positioning of the projector was dictated by the position of that screen.
- 112 Mrs Jeric is concerned that the heat from the vent may adversely affect the projector, and for this reason the vent has been closed off. She says that the builder ought to have given more consideration to the positioning of the heating vent, having regard to the fact that a projector was to be installed in the ceiling. She says that the vent should be moved to a new position that does not threaten the projector.
- 113 Mrs Jeric says she telephoned the manufacturer of the projector, Sony, who confirmed to her over the phone that the close positioning of a heating vent to the projector could cause damage to the projector.
- 114 Mr Davies says that he also contacted Sony by telephone and was told that heat should not pose a problem to the projector because the projector had an inbuilt measure that would shut it down in the event it was over heating. Mr Davies also produced a Sony brochure which he says indicates the heat output of a projector when operating, and he says that such heat output is less than the heat that would emanate from the vent during normal heating operation.
- 115 The evidence of both Mrs Jeric and Mr Davies has little probative value. No direct evidence from the manufacturer of the projector was produced at the hearing. And I do not accept that Mr Davies is qualified to give evidence as to the temperature resistance threshold of a projector relative to the heat emanating from a closely located heating vent.
- 116 Mrs Jeric bears the burden of proof. She alleges that the projector will or might be damaged by heat from the heating vent if the vent is opened while the heating is on. On the evidence before me, I am not satisfied that that is the case. While Mrs Jeric's concern is understandable, there is insufficient evidence for me to find, on the balance of probabilities, her allegation proven. Accordingly this claim fails.

Noisy Heating. Possible gas leak

- 117 Mrs Jeric says the heating system, vented heating throughout the house, is unacceptably noisy.
- 118 At the view the heating was turned on so that I could hear it functioning. Whilst there was a noticeable noise, I agree with Mr Key and Mr Furphy that the level of noise is not outside an ordinarily acceptable level.

- 119 Mrs Jeric is also concerned that there may be a gas leak connected to the heating system. She says she has on occasion smelled gas.
- 120 Mr Key says he has never smelled gas at the home on any of his inspections. Mr Furphy says that on his inspection he did not smell any gas and he was unable to detect any gas leaks.
- 121 At the view, I did not smell gas.
- 122 On the evidence before me, Mrs Jeric's allegations in respect of the heating are not substantiated. This claim fails.

Laundry and kitchen sinks scratched

- 123 At the view, I observed that the stainless steel sink in the laundry has a number of minor scratches, and the stainless steel sink in the kitchen has several minor scratches and one prominent sizeable scratch.
- 124 Mrs Jeric says that the builder installed the sinks with scratches in them, and as such the builder should be responsible for replacing them.
- 125 Mr Key says that scratches in sinks were certainly not mentioned or otherwise noted by Mrs Jeric, or anyone else, at the time of final inspection and handover to Mrs Jeric in November 2012. Mr Key also says that the scratch in the kitchen sink is so prominent that it would surely have been noted at the final inspection if it existed at that time. Because there was no mention of sink scratches at the time of final inspection and handover, Mr Key believes that the scratches occurred after Mrs Jeric took possession of the home, and as such, the builder is not responsible.
- 126 The January 2013 defects list has been updated by Mrs Jeric a number of times after she first created it. The updates are in the form of her handwritten notations added to the typed list. There is nothing suspicious in this. Mrs Jeric has simply used the January 2013 defects list as the reference point for her list of claimed items, and she has, over time, added more items as she became aware of them. It cannot be ascertained from the list itself when the various handwritten notations were added.
- 127 Under the heading 'Kitchen' in the list, there are several typed items and several handwritten items. The reference to a scratch in the sink is a handwritten item.
- 128 Mrs Jeric's evidence as to when she may have added the scratched sink item to the list is unclear. She does not remember.
- 129 I note, however, that the kitchen sink scratch is referenced in the CAV report which states:
- 'It was noted that this issue was not listed on the defects list dated 25 January 2013 as provided to the builder'
- 130 Having regard to the notation in the CAV report, I consider it more likely than not, that as at 21 February 2014 (the date of the CAV conciliation), the January 2013 defects list did not include the scratched kitchen sink.

- 131 Having regard to the number of detailed items Mrs Jeric includes in the January 2013 defects list, it is difficult to accept that the failure to include the kitchen sink scratch was an oversight on her part. I prefer the evidence of Mr Key, namely that there was no reference to scratches in the kitchen sink at the time of final inspection and handover because the scratches did not exist at that time.
- 132 I find on the evidence that Mrs Jeric has been unable to prove this claim, and the builder is not responsible for the scratches in the kitchen sink.
- 133 As to the minor laundry sink scratches, I agree with Mr Furphy that they are consistent with the ordinary use of a laundry sink over a number of years.
- 134 It is not clear whether scratches to the laundry sink are actually referenced in the January 2013 defects list. Under the heading 'Laundry' in that list, reference is made to a scratched '*vanity top*'. It is unclear whether this is a reference to the sink.
- 135 I accept Mr Key's evidence that there was no mention of scratches to the laundry sink at the time of final inspection and handover of the home to Mrs Jeric. I also accept Mr Furphy's evidence that the laundry sink scratches are consistent with the ordinary use of a laundry sink over a number of years.
- 136 On all the evidence, I am unable to find that the scratches to the laundry sink existed at the time Mrs Jeric took possession of her new home. As such, I find that the builder is not responsible for the scratched laundry sink.

Kitchen bench

- 137 Mrs Jeric says that the kitchen bench is too narrow and that this causes problems with the functionality of the kitchen mixer tap. Having viewed the sink and the tap, it appears that Mrs Jeric's complaint is that the configuration of the bench means that the mixer tap is located quite close to the window sill behind the tap, with the result that water frequently splashes onto the sill causing deterioration in the paint. At the view I noted that the paint to a small section of the window sill, directly behind the tap, had deteriorated.
- 138 At the view I tested the tap by turning it on and swivelling it. I could detect no dysfunction. In my view this item is a household maintenance item, not a building defect. A painted window sill in close proximity to a kitchen sink will inevitably face wear and tear greater than other window sills in the home. The damage to the sill was minimal in that some paint was missing, but the sill otherwise appeared sound. There is no evidence before me that the positioning of the sink and tap, relevant to the windowsill, constitutes a breach of any building regulations.
- 139 On all the evidence, I find that there is no breach of the warranties in respect of this item.

Dishwasher not working properly

- 140 Since moving into the home, Mrs Jeric has apparently had a number of problems with the dishwasher. The builder has previously replaced the dishwasher.
- 141 Mrs Jeric's current concern appears to be that when the dishwasher is operating, it expels some hot steam through the door seal onto the cabinetry wall within which it is housed. She is concerned that this will damage the cabinetry.
- 142 At the view, Mrs Jeric was unable to demonstrate the problem, and I could not detect any water damage to the cabinetry. As such, I find that Mrs Jeric has failed to prove, on the balance of probabilities, the alleged building defect.

Other appliances faulty or not working

- 143 Mrs Jeric's complaint is that some appliances are not functioning properly. The dishwasher has been dealt with above.
- 144 Mrs Jeric is concerned that the oven clock does not function properly, however at the view Mr Davies was able to demonstrate that the clock functions properly. The problem is not the clock itself, but rather Mrs Jeric's poor understanding as to how to operate the clock.
- 145 Mrs Jeric says her gas stove top is unsatisfactory because it has no automatic 'flame failure' cut-off function. That is, if the flame of an operating gas jet is extinguished while the gas is still on, the gas will not automatically cut off. Mrs Jeric says that her cooktop ought to have included the automatic flame failure feature as it is an important safety feature.
- 146 The 'Blanco' brand cooktop, model number CG904WWXC is identified in the colour selection form. It is not suggested by Mrs Jeric that the cooktop she has is anything other than that brand and model.
- 147 There is no evidence that the cooktop installed, as specified in the contract documentation, is faulty. There is no evidence before me that the cooktop installed does not meet plumbing compliance regulations.
- 148 While I understand that Mrs Jeric would rather a cooktop with the flame failure safety measure, on the evidence before me I am satisfied that there is no breach of the warranties by the builder in relation to the cooktop.

Twisted doors. Some doors installed too high

- 149 At the view I examined the interior doors at the home. I agree with Mr Furphy that none of the doors were twisted, and all of the doors functioned as they should. Mrs Jeric was unable to identify any 'twisted' doors.

- 150 Mr Key says that at least one door, the door from the home into the garage, was replaced as part of the works carried out in the month or two following the builder's receipt of the January 2013 defects list.
- 151 Having viewed the doors, I am satisfied that if there was any problem with 'twisted' doors, the problem has been satisfactorily addressed by the builder.
- 152 Mrs Jeric says also that a number of the doors, particularly at the rear bedrooms, bathroom and laundry, are 'too high'. What she means is that she considers the bottom clearance gap between some doors and the floor to be too wide. The flooring under the doors in question is tiled in some areas and carpeted in others.
- 153 The ST Guide provides that a clearance between the bottom of a door and the floor finish should generally not exceed 20mm. The Guide also notes that clearances under doors will generally be determined by the nominated floor coverings.
- 154 Mr Key says that the doors and door jams are standard sizes as sourced from the builder's supplier.
- 155 Mr Furphy says it is common practice to leave a gap of 20 to 25 mm clearance above slab level, and the final clearance gap above the finished floor will then be determined by the choice of floor covering. In Mr Furphy's view, the clearance gaps under the doors in Mrs Jeric's home are acceptable and in accordance with standard practice.
- 156 Having viewed the doors, I accept the evidence of Mr Furphy. While I noticed that the size of the bottom clearance gap was greater for some doors than others, I am satisfied that the clearance gaps are within an acceptable range, and there is no breach of the warranties by the builder.

Insulation batts not properly laid – messy.

- 157 Mr Furphy took several photos of the insulation batts in the roof space. He agrees that not all of the batts are neatly in place. He suggests that it is likely that some batts were disturbed by tradesmen checking or fitting off services after the batts were installed.
- 158 Mr Key says that he inspected the batts after they had been installed, just prior to the final inspection, and was satisfied that they were correctly installed. He also concedes that, after handover of the home, tradesmen engaged by the builder have accessed the roof space to investigate the heating and other complaints raised by Mrs Jeric.
- 159 Mrs Jeric says that she did have tradesmen out to her home after handover to check the functioning of her heating/air conditioning. Although it is not clear from her evidence, I think it likely that such tradesmen were in fact the tradesmen engaged by the builder following complaints from Mrs Jeric.

160 On the evidence before me, I am satisfied that the disturbance to the insulation batts has likely been caused by tradesmen engaged by the builder. As such, I find that the builder should bear the cost of rectifying the batts. I accept Mr Furphy's evidence that rectification is a simple task of rearranging the disturbed batts. An allowance of up to one hour's labour is sufficient. Allowing also for a callout fee for the tradesman engaged to carry out the works, I will allow \$150 as the reasonable cost for the rectification works.

Difference in colour between heating vent covers and air-conditioning vent covers

161 The ceiling vent covers for the heating system and the air-conditioning system are different. One is white and the other is cream.

162 The builder says there is nothing in any of the contract documents specifying a colour for the vent covers. I could not identify any information in the contract documents identifying a colour for the vent covers. Mrs Jeric was unable to identify information in any documents as to the vent cover colours.

163 Mr Key says that the heating and air conditioning systems come with their own standard colour vents, and the builder has simply installed the standard systems as specified in the contract. This evidence is not contested by Mrs Jeric.

164 On the evidence before me, I find that there is no breach of the warranties by the builder. The builder has installed the heating and air conditioning systems in accordance with the contract.

Garage doors

165 As noted above, the interior door into the garage was replaced by the builder as part of the rectification works carried out after handover. The builder acknowledged that the door did not properly seal, and it was replaced. Mrs Jeric now has no complaint with this door.

166 At the view, Mrs Jeric indicated her concerns that the main exterior remote-controlled garage door, namely that it is noisy when opening and closing, and it does not provide adequate sealing of gaps when shut.

167 I agree with Mr Furphy that there are no prominent or unacceptable gaps between the door and the adjacent walls and the garage floor when the door is shut. In my view, the door is a very good fit.

168 As to the operation of the door, I observed at the view that the door, in opening/closing operation, operated very smoothly and with little noise.

169 I find that Mrs Jeric's complaints as to the external garage door are unfounded, and there is no breach of the warranties by the builder.

Garage/storeroom light switch

- 170 When one enters the garage through the internal door, one has to step down into the garage and take several steps through the designated 'storage' area to find the light switch on the garage wall. The light switch for the store area and the other light switch for the garage in general have the same location. I agree with Mrs Jeric that this is not the ideal position for the light switch, and it would be preferable to have a switch just inside the door that opens to the store area.
- 171 However, I am satisfied that there is no breach of the warranties by the builder because the light switch is located precisely where indicated on the approved construction plans. Mrs Jeric signed those plans. Of course, she probably did not notice the location of the light switch when she signed the plans. But that does not change the fact that the builder has complied with the contract.

Excess mortar on the brickwork

- 172 Mrs Jeric says the mortar to the brickwork throughout the home is of poor quality, in that it spills over onto bricks, is uneven and messy.
- 173 Mr Furphy says he cannot fault the brickwork. He says there is no excess mortar and the standard of cleaning is a very good.
- 174 Having viewed all of the brickwork to the home, I agree with Mr Furphy. I find there is no breach of the warranties in respect of this item.

Laundry external door swells in rain

- 175 At the view I inspected the door with Mr Furphy. The door functions properly and there is no indication of swelling. There are no signs of water damage to the door or the surrounds.
- 176 Having viewed the door, I find that there is no breach of the warranties by the builder.

Laundry sliding doors rub

- 177 At the view I inspected the sliding doors to the laundry cupboard with Mr Furphy. The doors functioned properly and there were no signs of catching or rubbing. The doors were not bowed.
- 178 The CAV report noted a bowed sliding door in the laundry that was restricting its movement. The problem was subsequently rectified by the builder.
- 179 Whatever the problem with the sliding doors in the past, I am satisfied it was satisfactorily rectified by the builder.

Main bathroom doors rub

- 180 This is a reference to the vanity doors in the bathroom. I inspected them with Mr Furphy and found the doors functioned properly without any

rubbing. As with the bathroom sliding doors, if there was a problem with these doors in the past, the problem has been adequately rectified by the builder.

Master bedroom wardrobe doors rub

181 I inspected the doors with Mr Furphy and found they functioned properly without any rubbing. As with the bathroom sliding doors, if there was a problem with these doors in the past, the problem has been adequately rectified by the builder.

No drawers in bathrooms vanities

182 The bathrooms vanity cupboards have no drawers. They are functional, but Mrs Jeric would prefer that they included drawers.

183 The builder says there is nothing in any of the contract documents specifying drawers for the vanities. I could not identify any information in the contract documents identifying drawers for the vanities. Mrs Jeric was unable to identify information in any of the contract documents specifying drawers to the vanities.

184 On the evidence before me, I find that the vanities are functional and there is no breach of the warranties in respect of this item.

Scratch on master bedroom window

185 At the view I inspected the window and was unable to identify the alleged scratch. Mrs Jeric did not identify the alleged scratch. This claim fails for want of evidence.

CONCLUSION

186 Of all the items of alleged defective or non-compliant building work claimed by Mrs Jeric, including the extra items raised for the first time at the view conducted during the course of the hearing, I find that only two are substantiated. As discussed above, I allow \$100 as the reasonable cost Mrs Jeric will incur for rectification of the minor water damage to the window skirting in the bathroom, and I allow \$150 as the reasonable cost she will incur for rectification of the disturbed insulation batts in the roof.

187 Accordingly, I will order the builder to pay Mrs Jeric \$250.

188 I will grant liberty to each of the parties to make application in respect of costs of the proceeding. I draw the parties' attention to sections 109 to 115D of the *Victorian Civil and Administrative Tribunal Act 1998*. I will direct the Principal Registrar to send a copy of those sections of the Act to Mrs Jeric.

189 If no application for costs is received by 30 March 2017, there will be no order for costs. If an application for costs is made prior to 30 March 2017, directions will be given as to how such application will be heard.

SENIOR MEMBER M. FARRELLY