VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP486/2014

CATCHWORDS

Domestic Building: breach of warranty implied into contract by s 8 of the *Domestic Building Contract Act 1995*; assessment of damages.

APPLICANT	Milani Pty Ltd t/as Milani Developments (ACN 141 602 477)
RESPONDENT	Australia Nice Flooring Warehouse Pty Ltd (ACN 145 886 443)
WHERE HELD	Melbourne
BEFORE	Member C F Edquist
HEARING TYPE	Hearing
DATE OF HEARING	29 May 2015 and 22 July 2015
DATE OF APPLICANT'S SUBMISSIONS	9 September 2015
DATE OF RESPONDENT'S SUBMISSIONS	26 August 2015
DATE OF ORDER	6 November 2015
DATE OF REASONS	6 November 2015
CITATION	Milani Pty Ltd v Australia Nice Flooring Warehouse Pty Ltd (Building and Property) [2015] VCAT 1757

ORDERS

1 The Respondent must pay to the Applicant the sum of $40,495.92**.**

2 The Respondent must reimburse to the Applicant the filing fee paid by the Applicant of $460.80 and the Hearing Fee paid by the Applicant in respect of the second day of the hearing of $399.80.

3 Costs are reserved. The Applicant has liberty to apply for costs, but on any application the Applicant must satisfy the Tribunal that it has leave to proceed, if the Respondent is in liquidation, having regard to s.471B of the *Corporations Act 2001 (Cth)*. Any application for costs must be made within 90 days.

MEMBER C F EDQUIST

APPEARANCES:

For the Applicant	Mr D Oldham, solicitor
For the Respondent	Mr J P Chen on the first day, and Mr L Kostadinoski on the second day

REASONS

Introduction

1 In 2014, the Applicant, Milani Pty Ltd t/as Milani Developments (ACN 141 602 477) ('the developer') developed a pair of townhouses in Doncaster Road, Doncaster East, Victoria.

2 The developer purchased timber for the flooring in the two townhouses from the Respondent, Australia Nice Flooring Warehouse Pty Ltd (ACN 145 886 443) ('the supplier').

3 After the flooring was laid, problems developed with it. In respect of one townhouse (referred to as No 332 because of its street number). The developer undertook remedial work before putting the townhouse on the market. In respect of the other townhouse (No 330), the developer went ahead with a scheduled auction.

4 The developer seeks damages from the supplier in respect of the cost of rectifying the defects in the floor laid in the first townhouse, and seeks damages in respect of diminished price it alleges it received in respect of the second townhouse at the auction. In doing so, it asserts that in each case the supplier has breached warranties said to be implied into the contract by s 8 of the *Domestic Building Contracts Act 1995*. The developer's total claim against the supplier is for damages of $152,345.92, plus interest and costs.

5 In its Points of Defence the supplier raises these matters:

(a) the timber supplied by it contained no defects;

(b) the developer was responsible for the installation of the timber flooring, which is not part of the supplier's contract with the developer;

(c) the developer refused to purchase and use foam/plastic mat underlay which is required to protect the timber flooring from moisture damage;

(d) the developer chose to purchase clearance stock which is not covered by the supplier's standard warranty;

(e) the choice of installer had nothing to do with the supplier as the installer was chosen by the developer;

(f) the installer's work is not warranted by the supplier.

6 The primary issues to be resolved in the case are:

(a) whether the contract made between the developer and the supplier was for supply only, or for supply and installation;

(b) whether the contract has implied into it any terms as a result of the *Domestic Building Contracts Act 1995*, or any other legislation;

(c) whether the supplier's standard warranty applies;

(d) the cause of the problems which developed in the flooring;

(e) the losses (if any) flowing from any breach of contract on the part of the supplier.

The hearing

7 The hearing began before me on 29 May 2015. On this occasion, the developer was represented by Mr D Oldham, its solicitor. The supplier was represented Mr J P Chen, who said he was not a professional advocate. On the first day, the developer's director, Mr Nick Milani gave evidence and the developer closed its case regarding the formation of the contract. Evidence was also given about the defects in the flooring. The supplier opened its case and called its director, Mr Xiao Qiu. The supplier then called a Mr Yunhong Han, who gave evidence about a conversation he said he overheard between Mr Milani and Mr Qiu.

8 The hearing did not conclude on 29 May 2015, and resumed on 22 July 2015. On this occasion the developer was again represented by Mr Oldham, but the supplier had changed representation. This time Mr L Kostadinoski appeared for the supplier. By the end of the second day the evidence had been concluded, but there was no time for the parties to make final submissions.

9 In these circumstances, I ordered that, by 12 August 2015, the developer was to send to the Tribunal and to the supplier any written closing submissions it wished to make. The supplier was to file and serve its closing submissions by 2 September 2015. The developer was allowed to make written submissions in response by 16 September 2015, and the supplier was given liberty to apply if it wished to have leave to file and serve further submissions in response to the developer's response submissions. Costs were reserved.

Submissions received

10 The developer's closing submissions were filed on 7 August 2015. They were very brief, and covered less than two pages, although some documents were attached.

11 The supplier filed a one page submission on 26 August 2015 with the Tribunal. It appears that a copy of this document was not provided to the developer because, on 2 September 2015, the developer wrote to the Tribunal indicating that it had not received any submission from the supplier by the due date. After the developer wrote to the Tribunal on 2 September 2015, it received a copy of the supplier's submission. On 9 September 2015, the developer made a response submission contending that:

> the evidence given by Mr Lupco Kostandinoski (sic) ought to be excluded for the following reasons:

a) he was an advocate on the day of hearing;

b) he did not appear as an expert and he did not see the property;

c) he did not give any evidence.

The contract

12 The evidence of the respective parties regarding the formation of the contract, its contents, the appointment of an installer, the installation process, and the management of defects, are all potentially relevant to the key issues of the nature of the contract and its terms. Accordingly, those matters will be addressed in turn.

Formation of the contract

13 Mr Milani's evidence about the formation of the contract between his company and the supplier was this:

(a) he knew about the supplier through a previous interaction with a man named Elvis;

(b) he made contact with the supplier through its website and spoke to Mr Qiu;

(c) he made an arrangement with Mr Qiu to inspect a job which the supplier was performing in Rockley Road, South Yarra. In this connection he tendered a bundle of text messages which evidenced, amongst other things, the setting up of a meeting in Rockley Road on 20 February 2014;[1]

(d) he was happy with the quality job he inspected in Rockley Road, and he says that he told Mr Qiu that:

> If you give this quality I am happy.

(e) Mr Milani acknowledged that the floor he inspected in Rockley Road was jarrah, but said it was still good;

(f) he said that he asked Mr Qiu how long he needed to deliver, and was told two to three weeks.

14 Mr Qiu's evidence was that he was contacted by Mr Milani after Christmas 2013. He says they made a time to meet. He said Mr Milani explained that he had been recommended by Elvis. He said the properties were under construction and that he wanted the 'cheapest floor', at the 'best price'.

15 Mr Qiu said that he recommended spotted gum, and quoted a price on $110 per m². Mr Qiu said that Mr Milani indicated he wanted something cheaper, and he did not want to spend that much as he was selling. Mr Qiu then suggested laminate. This was rejected by Mr Milani as he thought laminate might not suit his project.

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[1] Exhibit A1.

16 When Mr Qiu confirmed the price was $110 per m², the price was rejected, and no deal was concluded on that day.

17 Mr Qiu further said that, on 6 January 2014, Mr Milani came to his store and asked for a lower price. Mr Qiu offered clearance stock, and pointed out there was no guarantee with it. Mr Milani offered to pay $95 per m², and Mr Qiu said he did not agree. He said this price was for supply only. Mr Qiu said that he advised that his cheapest price for the floors was $110 per m² and that he couldn't accept $95 per m². The two negotiated and ultimately agreed on $97 per m². Mr Milani says this was for spotted gum which was not clearance stock.

18 Mr Qiu said that it was at the conclusion of the negotiation about price that he was asked by Mr Milani to arrange an inspection. He initially refused, but agreed to set an inspection up after Mr Milani insisted on it. He said he had to find another company that was prepared to allow Mr Milani to go to their site. He said the floor inspected was 'quite different'. This is consistent with Mr Milani's description of the inspection of Rockley Road, where the floor was of jarrah, not spotted gum.

Engagement of an installer

19 Mr Milani's evidence was that the contract included installation.

20 Against this, Mr Qiu said that after the price of $97 per m² had been negotiated, Mr Milani asked if he could recommend an installer. Mr Qiu said that he told Mr Milani that he had business cards on his desk and invited Mr Milani to pick one.

21 He says that after Easter, Mr Milani picked a business card at random, he asked:

> Is this a good person.

22 Mr Qiu said that he answered:

> You need to ask him.

23 In support of his contention regarding the manner in which the installer was appointed, Mr Qiu called evidence from one of his company's customers, Mr Yunhong Han. Mr Han said that he was in Mr Qiu's store on 6 January 2014. From the ground floor he could see Mr Milani, who he referred to as 'Mr Nick', talking to Mr Qiu. He said they were two or three metres away and he could hear what they were saying. He said there was a discussion about the need for a plastic underlay for the flooring. At the end of the discussion, Mr Milani grabbed a card from the table. Mr Han said he later did the same thing himself, and when he called the installer on that card he was told the installation cost would be $28-$30 per m².

24 Under cross-examination, Mr Han insisted that he had been in the supplier's store on 6 January 2014, even though he made payment for the bamboo floor he had purchased only on 29 March 2014.

25 More significantly, in my opinion, Mr Han conceded that his written statement dated 15 May 2015, which had been submitted to the Tribunal, had been prepared by the supplier's representative at the hearing, Mr Chen.

26 Reference to that written statement is instructive. It makes these points:

(a) Mr Han says he observed a gentleman negotiating with Mr Qiu finalising an order for a timber floor.

(b) He heard and still clearly remembers the conversation between Mr Qiu and the gentleman, who he was told is Nick from Milani Pty Ltd.

(c) He witnessed Mr Milani asking Mr Qiu for cheap clearance stock.

(d) He heard Mr Qiu tell Mr Milani there was no warranty for clearance stock and that the selling price did not include the installation fee.

(e) He also heard Mr Qiu tell Mr Milani that an underlay of foam/ plastic matting is necessary for the protection of the timber floor he was building, as it was suspended, and that he heard Mr Milani say 'no', he did not want it.

(f) He said he heard Mr Milani say he wanted it cheap, because he was selling the house once it was built, unless it was for free, and Mr Qiu refused to make it free.

(g) Finally, when Mr Milani asked Mr Qiu for a recommendation about an installer, Mr Qiu handed him a business card from his desk and told Mr Milani he might talk to the person and make the decision himself.

The order form

27 Mr Milani said that he then signed an order form for the supply of 350 m² of spotted gum at a price of $97 per m² giving a total price of $33,950. This order form was tendered.[2] The product identified is 'spotted gum'. The 'Order Date' is given as '3/2/2014', but Mr Milani said that this was 'American dating' and that the date intended was 2 March 2014. Installation is clearly stated to be 'INC', which he said meant it was included. On the order form, there was a heading 'Deposit'. Against this heading, someone had noted in handwriting '$3395 – paid'.

28 Mr Milani compared the price to the sum he had paid to Elvis for supply and installation of 120 m² of spotted gum, which he said was $88 per m².

29 When queried about what he would have expected to pay for supply of spotted gum only, he answered 'up to $65', so that the installation component was priced at $32 per m².

30 For the purposes of comparison Mr Milani tendered a quotation he had received from Ascentliving dated 16 February 2015 for the supply of 'Solid Spotted Gum Prefinished Timber Flooring (1800 x 120 18 mm) at $68 per unit, with installation itemised separately at $27 per unit'.

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[2] Exhibit A2.

31 Mr Qiu agrees that the order form is a relevant document. Mr Qiu contends that the order form shows installation was not included because it had 'no price'. He also says that the order form shows that the stock ordered was clearance stock. He also says that the order form confirms that foam/plastic mat was not ordered even though its price was only $2 per m².

The tax invoice

32 Mr Milani tendered a tax invoice which bore an 'Order Date' of '6/1/2014' and an Installation date of '7/10/2014'.[3] Mr Milani confirmed that because these were Americanised dates the installation date was actually 10 July 2014, which was when he said the installation started.

33 On the tax invoice the column headed 'Type' stated 'clearance Asia Suptt gum'.

34 The column headed 'Qty' was endorsed with the handwritten word 'approx'. Furthermore, Mr Milani said that he wrote on the tax invoice:

> "Final payment will be based on finish area" (sic)

35 On the tendered tax invoice, the typed quantity, namely, '240 m²' had been replaced with a handwritten figure '227 m²' and the typed price had been amended from by hand to $22,019. Below, someone had written in blue pen:

> Total owing $22,019. 00
>
> Three instalments have been paid as follows: $3395.00, $7000. 00 and $5000. 00.
>
> Remaining payment to be made on 25/07/20(obscured)
>
> $6624.

These amendments were initialled by two parties.

36 Mr Qiu gave evidence that the order first signed was for 350 m², but that it was later changed to:

> 200 something. Initially he gave me 240 and then he changed the figure.

37 Mr Qiu later said that Mr Milani only paid for 227 m². Mr Qiu's recollection is consistent with Mr Milani's narrative, and with the contents of the order form and the amended tax invoice regarding the quantity delivered and paid for.

38 The tension between the type of product supplied according to the invoice, and the type of product ordered as set out in the order form, remains unresolved.

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[3] Exhibit A4.

The supplier's email of '04-03-2014'[4]

39 The developer tendered an email sent by Mr Milani to his lawyer, Michelle Ho, which attached an order form sent by Mr Qiu to Mr Milani on '04-03-2014'.

40 Mr Milani's covering email pointed out to Ms Ho that the order form was inconsistent with the invoice as the order form refers to:

> spotted gum and not clearance which he changed in his last invoice (the unit rates remain the same).

41 This email was put to Mr Qiu in cross-examination, and he confirmed that he had sent it. He said that his intention was to let the client know that he had;

> kept 350 m² of floor and acknowledged the deposit.

Installation

42 Prior to the commencement of installation, Mr Milani was asked to make a further payment of $7,000, which he did by cheque.

43 A controversy arose when Mr Qiu first gave evidence, because he said the installation started in October and Mr Milani said it started in July. However, this tension between Mr Qiu's view and that of Mr Milani was resolved after Mr Qiu had an opportunity to check his bank statements which established that payments had been made as follows:

- $3,395 on 28 February 2014
- $7,000 on 11 July 2014
- $5,000 on 16 July 2014
- $6,624 on 24 July 2014

After reviewing the bank statements Mr Qiu agreed that the installation occurred from 10 July 2014.

44 The installer who started on 10 July 2015 was 'John'. Mr Milani said that he did not know John. He spoke almost no English. At one point, when Mr Milani was concerned that John had not shown up, he rang Mr Qiu and asked him to chase John. Mr Qiu agreed he did this, in order to help his client.

45 On 16 July 2014, 'Leo' (Mr Qiu) asked for another $5,000, which was paid, and on that day John came back. John came again on 18 July 2014 and finished the job on 24 July 2014.

46 The balance of $6,644 was duly paid.

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[4] Exhibit A6.

Emergence of problems

47 Mr Milani's evidence is that problems with the flooring arose soon after installation. In particular, the flooring began to cup.

48 Mr Milani refers to a text he sent to 'Leo' (Mr Qiu) on 7 August 2014 which asked Leo to give him a call.[5]

49 Mr Milani then, on 12 August 2014, sent a text addressed to Leo as follows:

> We need to sort out the issues with the flooring ASAP. I'm putting them on the market next week.
>
> If you're not back ask John to come back and I can show him

50 Mr Milani followed up with a series of texts sent on 19 August 2014 which respectively read as follows:

[8:17 am]

> Leo
>
> John is here we are waiting. What time will you be here?

[8:31 am]

> This is one of the kitchens
>
> The other one is the same and there are some other areas that we have similar problem

[8:33 am]

> You haven't even been here to see the finishes (sic) job. If you're not taking immediate action to rectify the problem I will follow this through legally

[3:50 pm]

> Lee
>
> You need to respond urgently as I have the units on the market next week

Mr Milani then sent subsequent texts as follows:

[20 August 2014 at 6.06 pm]

> Leo
>
> You were going to call me to resolve the issues.

[22 August 2014, at 9.07 am]

> Leo
>
> Still waiting for your call to fix a time and have the flooring fixed.
>
> We don't have too much time as the open house is next week

[22 August 2014 at 1.09 pm]

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5 This text and the following texts referred to are contained in Exhibit A1.

> Leo, let's fix the time for tomorrow and you can go through my measurement as we'll (sic)

[23 August 2014 5.06 pm]

> Leo
>
> This is completely unprofessional to keep promising and not delivering. When are you coming here to fix the problems?

51 Mr Milani said that after 23 August 2014 he contacted the Australian Timber Flooring Association ('ATFA'). After that organisation spoke to Mr Qiu, he agreed to come to the site. John, the installer, came as well on this occasion. Mr Milani said that Mr Qiu and John seemed to blame each other. Then Mr Qiu told Mr Milani that it was his problem that the floors were as they were.

First findings regarding the contract

52 After reviewing the evidence, I find that the contract between the developer and the supplier was partly in writing, partly oral and partly to be implied. In so far as it was in writing it was constituted by the order form dated on its face '3/2/2014', but I accept Mr Milani's explanation that the date has been 'Americanised' and actually confirmed the date of the order as being 2 March 2014. In so far as it was oral, it was constituted by an agreement reached between Mr Milani and Mr Qiu to the effect that the quantities to be supplied would not necessarily be 350 m² as shown on the order form, but would be the amount actually required by Mr Milani for his project, and that the final price would be determined accordingly using the unit price of $97 per m² contained in the order form. In so far as it was to be implied, the contract contained those terms which, under the law of Victoria, are implied into a contract of this type.

53 I find that the contract contained the following express terms:

(a) the contract was for the **supply and installation** of spotted gum. The unit rate, as noted, was $97 per m²;

(b) the contract price included the provision of metal edges;

(c) the contract price did not include changing doors, stair installation, lifting carpet, lifting old flooring, lifting plywood, the installation of foam/plastic mat, delivery, or plywood.

54 I also find that the conditions set out at the foot of the order form were incorporated into the contract. Those conditions include the following:

> 5. AUSTRALIA NICE FLOORING WAREHOUSE does not take any responsibility to any physical damage made after the job been handed over. (sic)
>
> 6. AUSTRALIA NICE FLOORING WAREHOUSE guarantee the quality of the floorboards only. the installation team will take responsibility the installation quality. (sic)

Warranty

The AUSTRALIA NICE FLOORING WAREHOUSE warranty only applies to timber installation carried out by a professional AUSTRALIA NICE FLOORING WAREHOUSE timber installer. In addition to this all clearance/sale timber is not covered by the AUSTRALIA NICE FLOORING WAREHOUSE standard warranty.

Please choose carefully when choosing a clearance/sale timber as we don't provide refunds or credit on those items.

55 My finding that the contract included installation is reinforced by the following factors:

(a) the order form expressly includes installation;

(b) the evidence of Mr Milani to the effect that the installer, John, had very limited English, and the concessions by Mr Qiu that all the communications with John were through him, is consistent with the supplier being responsible for the appointment of the installer;

(c) the text sent by Mr Milani to Mr Qiu on 18 July 2014 at 12:20 pm enquiring when John would be coming back, and Mr Qiu's response sent immediately to the effect that he would be back tomorrow, are also consistent with the installer being managed by Mr Qiu;

(d) under cross-examination Mr Qiu initially denied that he paid John, but then conceded that he did pay him once.

56 I am of the view that Mr Han's written statement as to what he witnessed on 6 January 2014 is not only supportive of the supplier's case, but it is remarkably so. In circumstances where Mr Han has conceded that his statement was prepared by a representative of the supplier, I do not find his evidence of probative value, even though he was prepared to repeat some of the propositions contained in his written statement in his sworn evidence. I am not satisfied that he had a personal recollection of all of the matters he attested to in his written statement. Therefore, I attach little weight to his evidence.

57 I make the observation that what happened after defects in the flooring were identified is also consistent with the view that the supplier was responsible for the installation of the flooring, as well as the provision of the materials. The relevant evidence is:

(a) the text messages sent by Mr Milani to Mr Qiu from 12 August 2014 make it clear that the developer was holding the supplier responsible for the issues with the flooring;

(b) Mr Qiu was prepared to come to the site to inspect the flooring, albeit after some delay.

58 It remains to discuss the issue of whether the developer purchased clearance stock. As noted, Mr Qiu in his evidence contended that the order form suggested that clearance stock had been purchased. However, he did not explain why this was the case, and a reading of the order form does not support this view. It may be that he had confused the order form with the tax invoice.

59 The tax invoice clearly refers to clearance stock. However, it is not a contract document and I find that the spotted gum purchased was not clearance stock.

60 I accept the developer's contention expressed in the points of claim that the contract is subject to the *Domestic Building Contracts Act 1995*. This is because the contract is both for the supply of timber flooring and its installation, and the installation is clearly connected with the 'erection or construction of a home' for the purposes of s 5 (1) (a) of that Act.

61 It was not argued by the supplier that the contract is excluded from the purview of the *Domestic Building Contracts Act* by Regulation 6(d) of the *Domestic Building Contract Regulations 2007,* which provides that a contract for 'installing floor coverings' is not covered by the Act. I consider that Regulation 6(d) is concerned with a contract for the installation of something covering a floor, such as a carpet. The supplier's contract was in effect a contract for supply and carpentry, and I find that it does come under the *Domestic Building Contracts Act*.

62 The upshot is that I find that the warranties contained in s 8 of the *Domestic Building Contracts Act* are implied into the contract. The supplier accordingly provided the following warranties to the developer:

> **8 Implied warranties concerning all domestic building work**
>
> The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—
>
> (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 Act;
>
> (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;

(e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

63 If I am wrong about this, and the *Domestic Building Contracts Act* is excluded by the operation of Regulation 6(d), then the supplier's contract is a contract for the supply of goods and provision of services to a consumer, and under s 60 of the *Australian Consumer Law*, which applies as a law of Victoria under the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*, there is an implied guarantee that the services will be rendered with due care and skill.

64 The upshot is that either under the *Domestic Building Contract Act* or under the *Australian Consumer Law (Vic)* the supplier will be liable to the developer.

What defects were found in the flooring?

65 Mr Milani gave evidence that after he spoke to ATFA, they arranged to send someone to look at the flooring. This individual was Mr Brett Scarpella, an accredited ATFA inspector. He looked at the flooring on 9 September 2014 and prepared a report. This report was tendered.[6]

66 It is useful to quote some sections of Mr Scarpella's report. For instance section 1 says:

> The flooring installed in this new property development (2 townhouses) was initially observed to be demonstrating the effects of moisture ingress with widespread peaking and isolated buckling of boards with the appearance and installation stability at the time being of significant concern. Both townhouses are affected with only one upstairs area being of acceptable appearance at the time of inspection.

67 Regarding the fixing method, Mr Scarpelli observed [in Section 2, fourth paragraph]:

> The floor is observed to be undulating/peaking, and where destructive investigation was undertaken at the site of buckled boards, the boards were installed groove to groove and minimal adhesive and fixings were observed. The installed beaded glue was applied randomly in this area and was supported by few secret staples into the unprepared

6 Exhibit A5.

(cleaned/sanded) structural flooring. It is not clear if this is consistent across the entire floor area.

68 Mr Scarpelli appended a photograph [at page 11] which he said demonstrated the installation of two boards groove to groove with minimal adhesive applied, and no supporting tongue interface, over an unprepared sheet flooring, and sparse fixings (staples).

69 As to 'Aspects considered to have affected the floor', Mr Scarpelli advised [in Section 3]:

> The timber flooring installed has likely endured the effects of moisture ingress via the timbers natural acclimatisation process "after installation". It is considered likely the flooring was supplied at a relatively low moisture content and whilst adjusting to the prevailing internal environment and the lateral pressure created has tested the fixing methods employed-which are observed to have failed at the weakest point.
>
> In the areas that have not failed the flooring exhibits a significant level of undulation.

70 As part of his investigation, Mr Scarpelli tested the moisture content of the flooring using a resistance meter. The results are set out in the table at page 12 of his report. The estimated moisture content of the flooring was as follows:

- kitchen flooring 11.5%
- dining room flooring 10.5%
- lounge flooring 11.5%
- upstairs flooring 11.5%
- stairs 11.5%

71 Regarding the reasons for the failure of the flooring, Mr Scarpelli said [at Section 7]:

> The flooring at this site is demonstrating an undulating effect likely caused due to flooring supplied and installed at the lower end of the acceptable moisture range as provided per Australian Standard AS2796, which is taking up atmospheric moisture post installation which has resulted in marginal expansion in the individual boards. The resulting lateral pressure generated by this expansion has likely caused the peaking effect observed however the fixing method observed may have exaggerated the concern.
>
> Currently the primary concern with the flooring observed is considered to be the structural integrity and therefore potential life expectancy of the floor. Whilst the flooring is exhibiting undulation/peaking throughout and an isolated instance of buckling, **there is evidence to suggest that the flooring is not adequately adhered to the subfloor, and that in the absence of specific manufacturer instruction, installation methodology used is not**

> **considered industry best practice as per ATFA or industry guidelines and may not adequately adhere the flooring to the subfloor over the longer term.** [Emphasis added]

72 As to the placement of a moisture barrier, Mr Scarpelli's observation is [as set out in Section 2]:

> None however is reportedly insulated with Aircell "Permacell" underfloor insulation which would assist subfloor moisture management.

Discussion regarding liability

73 At the hearing on 29 May 2015, the supplier did not tender any expert evidence. It made the decision not to procure an expert's report notwithstanding that Mr Scarpelli's report had been filed and served with the application, and the Tribunal had, on 5 February 2015, ordered that any expert report upon which the supplier intended to rely must be filed at the Tribunal and served on the developer by 16 April 2015.

74 In its Points of Defence [at paragraph 5] the supplier concedes:

> In breach of Section 8 (a), (b) and (d) of the Domestic Building Contracts Act 1995, the work contained defects as identified in the report of Australian Timber Flooring Association ("A T FA") dated 9 September 2014.

75 The defence raised by the supplier is to be found in the particulars set out under paragraph 5 where it is stated:

> The supply of timber flooring undertaken by the Respondent contained NO defects. The Applicant was responsible to the work contained defects as identified in the report of Australian Timer Flooring Association ("ATFA") dated 9 September 2014 as follow:
>
> a) The Applicant refused to purchase and use foam/plastic mat underlay which is required to protect the flooring from moisture damage.
>
> b) The installation was conducted by third party, which was not part of the Respondents identity and was NOT related to the Respondent. The Applicant chose the installer at his own will.
>
> c) The Applicant chose to purchase the clearance stock which is NOT covered by the Respondent's standard warranty. The Applicant chose the installer on his own which does NOT apply to the Respondent's quality. (Sic)

76 The supplier accordingly has effectively conceded liability unless findings in its favour are made regarding the developer's refusal to purchase foam/plastic mat underlay, the engagement of the installer or the purchase of clearance stock. As I have already made a finding that the developer did not purchase clearance stock from the supplier, the remaining issues relate to the foam/plastic mat and the installer.

Findings as to liability

77 I have already found that the contract made between the developer and the supplier did not include the supply of foam/plastic mat.

78 Mr Qiu gave evidence that he told Mr Milani during the negotiations that a moisture barrier would be required underneath the floor. The supplier no doubt urges the Tribunal to infer that the absence of the recommended moisture barrier was a critical matter.

79 However, Mr Milani said in his evidence that there was a layer of insulating material underneath the flooring. This is presumably the moisture barrier that Mr Scarpelli said he understood to have been installed.[7]

80 Mr Milani also said that there was a 400 mm gap between the flooring and the ground and that the flooring was not on a slab.

81 A difficulty for the supplier regarding the moisture issue is that it offered no expert evidence regarding the relevance of the absence of the recommended moisture barrier, or whether a moisture barrier of the type which Mr Milani had said had been installed, would have been satisfactory. In the same vein, there was no expert evidence, or even a submission made, as to the relevance Mr Milani's uncontested evidence that the flooring was 400mm higher than the ground level.

82 In his evidence, Mr Milani noted that Mr Scarpelli had taken moisture tests and that they were consistent throughout the building, which indicated that the moisture content of the timber upstairs was the same as downstairs. In doing this he was suggesting that the absence of the recommended moisture barrier was not a factor in the failure of the flooring. I could, however, find no comment in Mr Scarpelli's report about this.

83 Notwithstanding this last point, I am not satisfied that the fact that the developer did not purchase the recommended moisture barrier, at the time it purchased the flooring from the supplier, was causal of the failure of the flooring, and I make a finding accordingly.

84 Furthermore, the fact that I have found that the supplier was also the installer of the flooring also presents a problem for the supplier regarding the moisture issue. This is because, as installer, the supplier provided warranties under the *Domestic Building Contracts Act* including a warranty that the work will be carried out with reasonable care and skill and that each home will be suitable for occupation at the time the work is completed.

85 As noted, the supplier conceded in its defence that the work was not carried out with reasonable care and skill, and, in essence, its defence was that a third party had installed the flooring. As I have found that the supplier installed the floor, it follows that the supplier must be held liable for breach of the warranty that the flooring would be laid with reasonable care and skill.

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[7] Mr Scarpelli's report Section 2.

86 I also find that the warranty that each home will be suitable for occupation at the time the work is completed was breached in the case of each townhouse.

The final submissions of the supplier

87 The supplier filed its final submissions on 26 August 2015. They were in the form of a document prepared by Mr Lupco Kostadinoski.

88 In this submission, Mr Kostadinoski appears to give evidence regarding the practice of the supplier in connection with installation. This evidence, such as it is, is of little probative value because Mr Kostadinoski appeared as the representative of the developer on the second day of the hearing, and did not give evidence. He was not sworn in. Mr Kostadinoski also made some comments about the quality of the installation. This evidence is also of low value because he did not give evidence at the hearing. Furthermore, Mr Kostadinoski has not qualified himself as an expert witness, nor prepared an expert witness report in the format required by PNVCAT 2 Expert Evidence, and if he had given evidence at the hearing, these significant oversights would have affected the weight attached to it.

89 Mr Kostadinoski does make some observations on behalf of the supplier regarding some of the invoices and the quotation of Ascentliving upon which the developer relies in establishing its claim for damages. It is legitimate for the supplier to make observations regarding these exhibits, and they will be taken into account when the exhibits are discussed below.

The developer's claim for damages

90 As liability of the supplier has been established, it is necessary to consider what losses flowed from its breach of contract.

91 The proceeding involves a situation where the supplier has supplied timber floorboards and installed them in a defective manner so that the flooring in one unit (at No 332) had failed to the extent that the developer made a decision that some of the flooring had to be replaced before the townhouse could be let. The developer still owns this townhouse and says that it will attend to the remediation of the balance of the flooring and carry out consequential repairs to the townhouse, once the tenant who is in occupation leaves at the expiration of their tenancy. The failure of the flooring in the second townhouse (at No 330) was less marked, and in order to avoid the considerable expense of having the flooring rectified before selling the townhouse, the developer made a decision to allow the scheduled auction of that townhouse to continue.

92 In its closing submissions filed on 7 August 2015, the developer contends that it had sustained damages in the sum of $152,345.92, made up as follows:

(a)	remedial costs (Peter King invoice #10336)	$ 1,930.60
(b)	remedial works (Ascentliving invoice #63344)	346.32
(c)	remedial works (Mario)	250.00
(d)	removal and replacement of the flooring in the townhouse at No 332 (Ascentliving quote)	18,035.00
(e)	cost escalation for the floorboard material in the above quote ($2 per m²)	234.00
(f)	kitchen plinth replacement (Scandic Carpentry quote)	550.00
(g)	painting of affected walls (Dominik Olak quote)	12,000.00
(h)	loss of rental for townhouse at No 332 in 2014 (six weeks for remedial works)	6,000.00
(i)	loss of rental for the townhouse at No 332 in 2015 (estimated to take three weeks to complete)	3,000.00
(j)	loss of value (on sale of the townhouse at No 330)	110,000.00
	TOTAL	**$152,345.92**

Principles governing the developer's recovery of damages

93 The general rule for the recovery of damages for breach of contract is that the innocent party is entitled to be put in the same position as it would have been had the contract been properly performed.

94 The leading Australian authority on the recovery of damages for breach of a building contract is the High Court decision in *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613 (20 August 1954). In that case a builder named Bellgrove had entered into a contract with Ms Eldridge in connection with the construction of a house. The builder initiated proceedings to recover the balance of the contract sum together with other money he claimed for extras and adjustments under the contract. The owner denied the claim and brought a cross action in respect of substantial departures from the specifications for the concrete in the foundations and the mortar used in the erection of its brick walls which, it was alleged, had resulted in substantial instability of the building. The builder's claim failed, and the appeal was solely concerned with the judgment which the trial judge awarded to the owner, which was for a sum assessed on the basis that it would be necessary to demolish and re-erect the building in accordance with the plans and specifications.

95 In upholding the decision of the trial judge, the High Court said [in section 5 of the judgment]:

> In the present case, the respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a

> building on her land which is substantially in accordance with the contract.

96 The High Court went on to say [in section 6 of the judgment] that this rule was subject to a qualification, which was that the work undertaken to produce conformity with the contract must be necessary, and must also be a reasonable course to adopt.

97 Applying these principles in the present case, the developer is entitled to recover damages, in respect of the townhouse where repairs were carried out (No 332), assessed on the basis of the cost of having the necessary work performed, in order to get what it had bargained for, provided that work is also reasonable.

98 The evidence given by Mr Milani regarding the losses claimed in respect of this townhouse concerned a number of invoices and quotations which were tendered.

99 Mr Milani said that remedial works had to be performed in both townhouses after the flooring had been laid. The supplier would not assist, and Mr Milani said he engaged Ascentliving to supply some flooring. The relevant invoice tendered was in the sum of $346.30 and was dated 29 September 2014.[8] An invoice from Floorcraft dated 8 October 2014 was also tendered, principally in respect of labour, in the sum of $1,930.60.[9] Mr Milani said that the principal of Floorcraft is Peter King. Mr Milani explained that when the floor was removed, it was discovered there was no basic bondage between the floor and the substructure and Mr King had to carry out this work. Mr Milani said that this is demonstrated by the photos taken by Mr King, which were tendered.[10]

100 I accept Mr Milani's evidence that it was necessary to replace some floorboards in both townhouses and I find that the provision of new floorboards by Ascentliving and their installation, and the remedial work carried out by Mr King at the same time, were reasonable. I allow the claims for damages respectively for $1,930.60 in respect of the Floorcraft invoice and for $346.32 in respect of the Ascentliving invoice.

101 Mr Milani did not tender any invoice from 'Mario' in relation to the $250 that was claimed in respect of remedial work carried out by him. I do not allow recovery of this $250.

102 The developer's major claim in relation to townhouse No 332 that it continues to own, is for the cost of rectification of the flooring in the future. Mr Milani said that the photographs taken by Mr King, which he had tendered, demonstrated that the lack of adhesion resulting from a sparse use of glue and non-attachment of the subfloor to the floorboards, means that rectification of the flooring by sanding would be an inappropriate solution,

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8 Exhibit A7.
9 Exhibit A8.
10 Exhibits A9-A10.

particularly having regard to the significance of the cupping in the floorboards. As evidence of the cupping, Mr Milani referred to a third photo from Mr King, which was tendered.[11]

103 Mr Milani also tendered an email from Mr King dated 22 October 2014 which set out some observations he made about the flooring after he carried out the replacement of two rows of boards on 8 October 2014.[12] This email confirmed it was Mr King's:

> professional opinion after careful observation of the problem that the only way to rectify the visual defect in these floors is to completely remove and replace all the affected flooring.

104 Mr King was not called as a witness, and he did not provide a report in the format required of an expert mandated in PNVCAT 2 Expert Evidence. I would not have been prepared to rely on his email alone to justify a finding that the flooring in townhouse No 332 requires total replacement.

105 However, during his cross-examination of Mr Milani, Mr Kostadinoski conceded that the replacement of the floor was 'fair enough'. On the basis of Mr Milani's evidence, and this concession on behalf of the supplier, I find that it is necessary and reasonable for the flooring in the townhouse at No. 332 to be replaced. It accordingly becomes necessary to consider what work would be involved in this, and what the reasonable cost of that work will be.

106 In connection with these issues, Mr Milani referred to the quotation he had obtained from Ascentliving dated 16 February 2015 in the sum of $18,035 inclusive of GST which he had previously tendered.[13] Mr Milani explained that the invoice covered:

(a) the provision of new spotted gum flooring at $68 per m² - $7,956.00;

(b) its installation at the rate of $27 m² - $3,159.00;

(c) stripping the existing flooring and skirting and removal of all rubbish $2,340.00;

(d) preparation of the flooring prior to installation of new flooring - $585.00;

(e) supply and installation of skirting and kitchen kick-boards - $2,500.00;

(f) painting, touch up, remove and clean floor, fix up plaster and other areas - $1,495.00.

107 Mr Milani also referred to an estimate of the cost of replacing the flooring in townhouse No 332, as well as the flooring downstairs in townhouse No

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11 Exhibit A11.
12 Exhibit A12.
13 Exhibit A3.

330, prepared by Mr King dated 22 October 2014.[14] The figures quoted by Mr King were as follows:

(a)	removal of skirting board and trims;	$ 1,056.00
(b)	removal of all flooring (excluding upstairs of one townhouse not obviously affected);	3,168.00
(c)	sanding of subfloor;	683.10
(d)	laying new flooring (at cost-supplied material not included);	7,969.50
(e)	replacing skirting and trims (materials at cost price – not included);	2,640.00
(f)	painting skirting.	2,112.00
	TOTAL	**$17,628.60**

108 It is to be noted that Mr King's figure did not include the supply of materials. Mr Milani said he had opted for the Ascentliving quotation as they had indicated they would honour their quotation dated 16 February 2015, subject to an increase of $2 per m² for installation.

109 During his cross-examination of Mr Milani, Mr Kostadinoski noted the figures quoted by Ascentliving for supply of the timber flooring and installation, and accepted the figures for stripping, preparation, supply and installation of skirting and kickboards, and painting.

110 A comparison of the Ascentliving quotation with the estimate of the cost of the works prepared by Mr King in October 2014 suggest that the Ascentliving quotation is reasonable. In particular, Mr King's estimate validates, in my view, the figures quoted by Ascentliving for stripping the existing flooring and skirting, preparation, installation of skirting and kickboards, and painting. Because of this, and because of the acceptance by Mr Kostadinoski on behalf of the supplier of a number of the elements in that quotation, I find that the quotation provided by Ascentliving accurately reflects the cost of carrying out the necessary and reasonable works required to rectify the flooring in townhouse No 332, and allow recovery of the sums of $18,035.00 in respect of it.

111 The next item claimed by the developer is an adjustment for inflation of $2.00 per m² in connection with the price of the floorboards contained in the quotation from Ascentliving issued in February 2015. Mr Milani's evidence was that the contractor was prepared to abide by that quotation provided this adjustment was allowed. The amount involved is $234.00. I am prepared to allow this claim.

112 The next item claimed by the developer was $550.00 in respect of the replacement of a plinth. When he was asked why this was not covered by the quotation of Ascentliving, Mr Milani explained that the plinth required was an aluminium plinth that looked like stainless steel. He said that

[14] Exhibit A12.

Ascentliving had quoted for the removal of the kitchen skirting boards but not their replacement. He tendered a quotation from LINX Carpentry Solutions dated 14 November 2014 in connection with this item in the sum of $550.00 inclusive of GST.[15]

113 Although Mr Kostadinoski, in the supplier's final submissions, made a general complaint about the lack of photographic evidence regarding the required works, I am prepared to accept Mr Milani's evidence that the replacement of the plinth is necessary and reasonable, and I am prepared to allow this claim for $550.00.

114 The final item of rectification work claimed by the developer is $12,000.00 for the repainting of townhouse No 332 after the replacement of the flooring. Mr Milani tendered a quotation from Dominik Olak (undated) in the sum of $12,000.00 inclusive of GST.[16]

115 Mr Kostadinoski, in his cross-examination of Mr Milani, asked him why it was necessary to repaint the whole townhouse. Mr Milani's answer was that after the removal and replacement of the skirting, a touch-up of the painting would not be acceptable because the townhouse was a premium executive home achieving a rental of $1,000.00 per week, and a complete repainting was required.

116 On balance, I am not satisfied that a complete repainting of townhouse No 332 is necessary to restore the developer into the position it would have been in had the floorboards been adequately laid in the first place. I do not consider repainting the entire townhouse at a cost of $12,000.00 is reasonable in the context of floorboard rectification work valued at just over $18,000.00. I consider that a careful touch-up of the paintwork would be adequate and reasonable. I accordingly disallow this item, noting that some touch-up painting has been allowed for by Ascentliving.

117 The next claim in relation to townhouse No 332 relates to loss of rent of $1,000 dollars a week for six weeks while the initial remedial works were being carried out. In my view, two issues need to be considered in connection with this claim. The first is whether the developer can, as a matter of law, be held liable for this loss. The second is whether the claim is made out factually.

118 The legal issue arises from the fact that the loss which the developer seeks to recover is purely financial in nature, and is consequential upon the defective laying of the flooring.

119 The basic rules as to the recovery of damages in a case of breach of contract were laid down more than 150 years ago in the seminal case of *Hadley v Baxendale* [1854] EWHC J70. The relevant passage in the famous judgment of Baron Alderson reads as follows:

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15 Exhibit A14.
16 Exhibit A13.

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

120 The developer's claim for loss of rent gives rise to a problem of characterisation of damage. In my view, the loss naturally flowing from the failure to properly lay the floor is the cost of removing and relaying the floor. The claims made by the developer considered above fall into this category. I consider the claim for loss of rent sits outside that category, and accordingly the claim will only be allowable if loss of rent is damage which reasonably might be said to have been in the contemplation of both parties as likely to arise in the event of such a breach of contract.

121 As explained by Baron Alderson in *Hadley v Baxendale*, the state of knowledge of the parties at the time the contract is formed is relevant to the nature of the loss or damage which will be in their contemplation as likely to arise in the event of breach. He said:

> Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

122 In the present case, Mr Qiu acknowledged that he was told by Mr Milani that he was developing the townhouses for sale. It follows from this that the supplier might reasonably be supposed to have known that should the laying of the floor be defective, then the sale might be postponed while rectification works are carried out. Alternatively the sale might go ahead but a less than optimal price might be achieved.

123 The supplier made no submission regarding the recoverability of damages for loss of rent. On balance, I am prepared to assume that this was because the supplier did not think remoteness of loss was an issue. I accordingly find that the claim is allowable as a matter of law.

124 Turning to the question of whether the claim is made out factually, I note that as six weeks loss of rent is being claimed, the developer is asserting that the townhouse would, but for the damage to the flooring, have been ready for rental on 26 August 2014.

125 No timeframe for the short-term remedial works was specified by Mr Milani in his evidence relating to this particular claim, but the email from Mr Peter King dated 22 October 2014 indicates that his work was completed on 8 October 2014. Mr Milani said in his evidence that there

was a 12 month lease in place from 7 October 2014, and this is confirmed by the copy of the lease tendered by the developer's agent.[17] However, a close reading of the lease indicates that it was dated 26 September 2014. This means that the tenant had been secured, and was merely waiting for the short term rectification work to be completed before moving in.

126 The series of texts passing from Mr Milani to Mr Qiu after 12 August 2014, when issues with the floors were first notified, have been referred to.[18] By 26 August 2014 it may have become clear to Mr Milani that the supplier was not going to fix the defective floors. However, this does not necessarily mean that a claim for loss of rent can be backdated to that date. There are two issues here. The first is that the developer must establish that, but for the damage to its flooring, the townhouse would have been rented from 26 August 2014, notwithstanding that the townhouse was in the process of being completed. Apart from Mr Milani's express assertion that the problem of the flooring delayed the tenancy by six weeks, there was no evidence as to the state of the works generally at the time the problem with the flooring was discovered.

127 The second issue is that, in the normal course of events, a property will not be rented immediately it is put on the rental market. The leasing authority tendered by Mr Dallas Taylor, who was called on behalf of the developer, shows that his company Jellis Craig was engaged on 1 September 2014.[19] This strongly implies that the property was either ready for leasing on that date, or was very close to that condition.

128 As noted, the lease was dated 26 September 2014. This suggests the developer's claim for loss of rental is a claim for the period 26 September-7 October 2014, i.e. just under two weeks. I am prepared to allow a claim for loss of rent for two weeks, in the sum of $2000.

129 I turn now to the separate claim for loss of rent for three weeks while the future rectification works are being carried out. Mr Milani's evidence is that Ascentliving had indicated on its quotation of 16 February 2015 that it would take 12-14 days to carry out its work. Furthermore, the painter, Dominik Olak, was Mr Milani said, able to do his work in 10 days. Although the total of these two timeframes is 22-24 days, Mr Milani said the works will be carried out on a seven days a week basis, and hence the claim is limited to 3 weeks.

130 Although I do not consider that repainting the entire townhouse is necessary, I accept that Ascentliving might reasonably take 12-14 days to perform its work. When this timeframe is coupled with the time it will take to re-rent the townhouse after the work has been carried out, I am prepared to allow the three weeks loss of rent claimed in respect of the future rectification of the townhouse, namely $3000.

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17 Exhibit A15.
18 Exhibit A1.
19 Exhibit A15.

131 I turn now to the claim made by the developer in respect of townhouse No 330 which was sold at auction for $1,440,000.00. The developer's claim is that as a reserve had been fixed on the advice of a real estate agent at $1,250,000.00, the difference of $110,000 should be recoverable from the supplier.

132 It follows from the discussion above regarding the recovery of loss of rent for townhouse No 332 that in circumstances where Mr Qiu knew the townhouses were to be sold, this type of consequential loss is not too remote. It can be assumed that Mr Qiu might reasonably have contemplated that if the installation of the flooring in townhouse No 330 was laid defectively then a financial loss might arise for the developer. Either the floor would have to be repaired, and this would result in delay, or the townhouse would be sold with a defective floor, and this would result in a lower sale price.

133 Ordinarily, it might be expected that the cost of rectification of a defect in a property, such as a warped floor, might be cheaper than the loss in value of the property if it is sold with the defect un-remedied. Accordingly, mitigation of loss is an issue, as the developer may have had a legal responsibility to maximise its sale price by undertaking the necessary repair work prior to the auction if it had the means to do so.

134 When questioned about why he did not rectify the flooring before putting the property to auction, Mr Milani tendered the accounts for his family trust for the financial years 2014[20] and 2013.[21] He referred to the 2013 accounts and pointed out that in the 2012 financial year the Milani family trust had a profit, after allowing for expenses, of $141,910, but in 2013 the trust made a loss of $28,511. He referred to the 2014 accounts and noted that in the year ending 30 June 2014 the trust lost $215,510. In the light of the fact in the tendered 2014 tax return[22] for the Milani family trust the developer is identified as the trustee, the assertion of inpecuniosity can be accepted as a valid explanation for why the developer did not mitigate its loss by rectifying the flooring before the auction. See *Dodd Properties v Canterbury City Council* [1980] 1 WLR 433.

135 The real issue with the claim is factual. In support of this claim the developer called Mr Dallas Taylor of Jellis Craig, Doncaster. Mr Taylor identified himself as a licensed real estate agent. He put into evidence on behalf of the developer a letter on Jellis Craig letterhead dated 16 February 2015 confirming that the company had marketed the new two-storey dwelling at No 330 for the developer and sold it auction on 20 September 2014 for a single bidder for a price which was $110,000 less than the reserve price. The letter said:

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20 Exhibits A16.
21 Exhibits A17.
22 Also Exhibit A16.

> The architectural aspects and the quality of appliances, products and design made the property attractive to the higher end of buyers in this area. However, there were issues with the timber flooring, a key feature of this property, which dissuaded a number of potential buyers.[23]

Mr Taylor in his oral evidence effectively confirmed the statements he had made in the letter.

136 While I am prepared to accept that the sale of the property with a defective floor must have affected the price achieved at auction, I am concerned at the methodology used by the developer to calculate its loss. The developer takes the view that it is entitled to recover the difference between the reserve and the price achieved at auction. Central to this approach, of course, are the assumptions that the reserve price was appropriate, and that the only reason the reserve was not actioned was the state of the flooring.

137 Having regard to the importance of the issue, it is surprising that the developer did not call expert evidence regarding what the value of townhouse No 330, without defective flooring, would have been.

138 Mr Taylor was called as a witness of fact, not as an expert. He did not explain the process by which he arrived at the reserve price of $1,250,000.00.

139 A further issue is that when he was asked about whether factors other than the floor which might have affected the price, he conceded:

> There are always other factors.

This concession underlines the weakness of the causal link between the defective floor and the price received, upon which the developer relies.

140 In these circumstances, I am not prepared to accept the developer's methodology for assessing its loss with regard to the townhouse sold. I think the most accurate way in which to assess the loss of value in townhouse No. 330 due to its defective flooring is to assess the cost of fixing that flooring.

141 I am mindful that Mr Milani's evidence was that the upstairs flooring in townhouse No 330 was not as bad as downstairs.

142 Mr Scarpelli, in this regard, [in Section 1] noted that although both townhouses were affected by the flooring problems, one upstairs area was of acceptable appearance.[24]

143 Mr King, in his email of 22 October 2014, expressly excluded the cost of rectifying 'upstairs of one unit not obviously affected'. On the basis of this evidence, it would seem any would-be buyer of townhouse No 330 would have made an allowance for the need to rectify the downstairs flooring only.

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[23] Exhibit A18.
[24] Exhibit A3.

144 Neither party gave evidence about the cost of rectifying the downstairs flooring in townhouse No. 330. Nevertheless, as Mason CJ and Dawson J said in *Commonwealth v Amann Aviation Pty Ltd*:[25]

> The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can (*Fink v Fink* (1946) 74 CLR 127 at p.143; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at pp.411-412; *Chaplin v Hicks* [1911] 2 KB 786 at p.792. Indeed in *Jones v Schiffmann* ((1971) 124 CLR 303 at p.308) Menzies J went so far as to say that the 'assessment of damages … does sometimes, of necessity involve what is guess work rather than estimation.' Where precise evidence is not available the court must do the best it can (*Biggin & Co. Ltd v Permanite Ltd* ([1951] 1 KB 422 at p.438 per Devlin J)

145 Doing the best I can on the evidence available, I assess the loss of value of townhouse No 330 as a result of the defective downstairs flooring as $14,400, as this is very close to 80% of the price quoted by Ascentliving to rectify the whole of the flooring in townhouse No 332. I adopt 80% of that price because the downstairs flooring is considerably larger than the upstairs flooring.

Summary

146 For the reasons set out above, I find the supplier is liable to the developer for damages for breach of contract. I order that the supplier must pay to the developer damages as follows:

(a)	remedial costs paid to Floorcraft (Peter King);	$ 1,930.60
(b)	remedial works (Ascentliving invoice #63344);	346.32
(c)	removal and replacement of the flooring in townhouse No 332 (Ascentliving quote);	18,035.00
(d)	cost escalation for the floorboard material in the above quote ($2 per m^2);	234.00
(e)	kitchen plinth replacement (Scandic Carpentry quote);	550.00
(f)	loss of rental for townhouse No 332 in 2104;	2,000.00
(g)	loss of rental for townhouse No 332 in 2015;	3,000.00
(h)	loss of value on sale of townhouse No 330;	14,400.00
	TOTAL	**$40,495.92**

Fees

147 As the developer has been successful, I will make the usual order pursuant to s 115 B of the *Victorian Civil and Administrative Tribunal Act 1998* regarding reimbursement of the filing fee paid by the developer of $460.80, and the hearing fee paid in respect of the second day of the hearing of $399.80.

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[25] (1991) 174 CLR 64 at 83

Costs

148 The Tribunal reminds the parties that on 6 May 2015 the Tribunal ordered the supplier to pay to the developer the developer's costs associated with that day's compliance hearing, fixed at $350.

149 Costs are reserved. The Applicant has liberty to apply for costs, but on any application the Applicant must satisfy the Tribunal that it has leave to proceed, if the Respondent is in liquidation, having regard to s.471B of the *Corporations Act 2001 (Cth)*. Any application for costs must be made within 90 days.

MEMBER C F EDQUIST