

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP411/2015

CATCHWORDS

Domestic Building Contracts Act 1995 – subsequent Owner – defects alleged – previous proceedings resolved by agreement – whether previous claim for the same breach - whether accord and satisfaction– assessment of damages

APPLICANT	Megan Louise Saleeba
RESPONDENT	Yarram Court Management Pty Ltd (ACN 053 864 074)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	14 and 15 June and 1 July 2016
DATE OF ORDER	12 July 2016
CITATION	Saleeba v Yarram Court Management Pty Ltd (Building and Property) [2016] VCAT 1157 (12 July 2016)

ORDER

Order the Respondent to pay to the Applicant \$12,705.90.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the Respondent	Mr A. Stanish, Director

REASONS

Background

1. The Applicant Miss Saleeba (“the Owner”) is the Owner of a semi-detached house in South Melbourne (“the House”) that was constructed by the respondent builder (“the Builder”).
2. The director of the Builder is a Mr Stanish, who is a registered builder.
3. By this proceeding the Owner, seeks damages with respect to alleged defects in the basement of the House. The Builder denies the defects and says that, in any case, damages with respect to the defects claimed were sought in earlier proceedings which were settled by the parties following a mediation at this tribunal.

The hearing

4. The matter came before me for hearing on 14 June 2016 with two days allocated. The Owner appeared in person and the Builder was represented by its director, Mr Stanish.
5. I heard evidence from the Owner, her expert, Mr Goodbrand and also a Builder, Mr Jurcevic, who carried out rectification work on the basement of the House. For the Builder, I heard evidence from Mr Stanish and from his expert witness, Dr Eilenberg. It was apparent during the hearing that there was a considerable degree of antipathy between the Owner and Mr Stanish.
6. Amongst the material produced by the Owner was a report from a Dr Cameron Jones, a microbiologist and mycologist. He inspected the House on 11 March 2015 and provided a report of 41 pages dated 13 April 2015. Dr Jones was not called to be cross-examined on his report but it was referred to by the parties and I have read it in full. Dr Jones took samples from all parts of the House and cultured these on agar slides. His conclusions are set out in his report and are referred to below.
7. After hearing the evidence and submissions I informed parties that I would provide a short written decision.
8. On the following day, an email was sent to my email address by the Owner wishing to re-agitate certain matters and put further material before me. The Owner was informed by registry that if she wished to make further submissions or rely upon further material she would need to apply to have the proceedings re-opened for that purpose. Such an application was made and came before me for hearing on 1 July 2016. Both the Owner and Mr Stanish appeared. Most of what was said on that occasion concerned matters that had already been dealt with. Nonetheless I told them that I would take into account what each of them said on that day.

The House

9. The House is one of a pair of houses constructed by the Builder for a Mr O’Shannessy, who moved into the other of the two houses upon completion.

10. It was common ground that the building permit for the construction of the first floor of the two houses was issued on 31 March 2006, a permit for the demolition of the existing building on the site was issued on 3 April 2006. A building permit for Stage II of the construction was issued on 12 May 2006. The occupancy permit for the House was issued on 26 February 2007.
11. Shortly after completion, the House was purchased by the Owner's husband, Mr Dutton, on 14 March 2007. It has since been transferred to the Owner.
12. The Owner said that they were shown over the House by Mr Stanish and upon settlement, all of the purchase money for the House was paid over to Mr Stanish and his wife instead of to the vendor. Mr Stanish said that he received the money in payment for his work in constructing the two houses. It would seem from the evidence that the vendor of the House and Mr Stanish had some arrangement whereby Mr O'Shannessy provided the land and Mr Stanish built the two houses.
13. Following settlement the Owner and her husband moved into the House and lived there for just under two years. The House was then let to tenants and has been rented out since then when it has not been under repair.
14. The Owner said that in January 2015 she was contacted by the tenants of the House who complained about damp and mould issues which, they alleged, came from the basement. In March 2015, she engaged a mould expert, Dr Jones, to investigate the allegation that there was mould in the House. According to Dr Jones' report, numerous deposits of mould were detected of various types in different parts of the House. However his conclusion was that the causes of the mould were more related to the activities of the occupants than to any defect in the House itself.
15. Mr Stanish pointed out that there had been no issue with the basement, which has been used as a laundry, for six years. He said that the problem with ventilation only arose when there was a change of tenant and the new tenants used the basement excessively for drying clothes. That view certainly seems to be supported by Dr Jones but it does not exculpate the Builder if the basement was constructed as a laundry with inadequate ventilation.
16. In March 2015 the tenants broke their lease and vacated the House due, the Owner says, to these issues. She then had the basement waterproofed and re-plastered and then incurred a reletting fee for the agent to obtain a new tenant.

Implied warranties

17. The Owner relies upon the warranties implied into the building contract by s. 8 of the *Domestic Building Contracts Act 1995* ("the Act"). That section provides as follows:

"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 ^[4];
- (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.”

18. By s.9 of the Act, the Owner as a subsequent owner of the House is entitled to the benefit of these warranties.

The basement

- 19. The plans for the House, which were stamped by the relevant building surveyor and form part the building permit, show a basement accessed from the interior of the House by a staircase.
- 20. According to Mr Goodbrand, the basement area of both houses appears to have been constructed at the same time and the party wall between the two houses divides the excavated area into the two basements. The other three external walls of each basement are shown in the plans to be set well in from the external walls of the House in order to allow for a battering of the face of the excavated soil. The limited height of the basement ceiling and the stepping in of the walls may well have been driven by the need to avoid the foundations for the basement encroaching upon what is shown in the engineering drawing drawings as being the angle of repose of the soil that founds the footings of the external walls of the House. However, as constructed, the basement extends much closer to the front and back external walls of the House than is shown on the plans. No point was taken about this in the expert evidence.
- 21. According to Mr Goodbrand, the engineering drawings required the excavation for the basement between the natural ground and the three walls to be filled with

a compacted granular backfill, separated from the wall by a membrane, and with an agricultural drain at footing level to take away any surface water. I accept that interpretation of the plans.

22. That is not the way the walls have been constructed. An agricultural drain appears to have been installed which drains into a sump in the basement. However, the space between the excavated face of the ground and the walls has not been filled at all. It is simply empty and there is no membrane on the exterior face of the basement walls. It is simply bare block work.
23. Mr Stanish produced a letter from the engineer to the effect that the engineering drawing in question gives details for a typical basement construction and saying that a waterproof membrane and compacted backfill would not be required because the basement is not a habitable room. If that were the case, it would have been open to the Builder to seek a variation to the contract to construct the basement walls in the way in which they have been constructed and to have amended plans sealed by the relevant building surveyor. However that was not done. It was the Builder's responsibility to build in accordance with the plans that were approved by the relevant building surveyor and it has not done so.
24. This proceeding relates solely to the lack of waterproofing and ventilation in the basement.

Basement or laundry?

25. The basement has been used by the occupants of the House as a laundry since the House was first occupied. The major issue in this case is whether the basement was constructed so as to be used as a laundry.
26. The plans sealed by the relevant building surveyor show that laundry facilities were to be provided under the stairs in the garage. That was not done. There is no supply of water or drainage in this area, no power, nor any other provision for the installation of a washing machine, dryer or laundry trough.
27. Both the Owner and Mr Stanish pointed out the lack of space in the area that was specified in the plans and the Owner said that someone paying rent of the magnitude charged for the House would not want to wash clothes in the garage.
28. The Owner pointed to the plan of the basement attached to the contract of sale which shows cabinetry at one end of the basement and what appears to be a place for a washing machine between the two cabinets. One of these cabinets has in at what appears to be a laundry trough. She also produced the sales brochure she and her husband were given when they purchased the House which describes the area in the basement where the two cabinets and space are depicted, as a laundry.
29. Mr Stanish's evidence about this was most unsatisfactory. He steadfastly denied that the two cabinets, the trough and the washing machine space were put there so that the area could be used as a laundry. He said that the two cabinets incorporating a trough were simply cabinetry. He said that the water supplied to the area was required because of the drainage sump beneath the trough.

30. There is no other laundry provided in the House, nor any provision for a clothesline. When it was pointed out to him that the Building Code of Australia (“the Code”) required that an area must be provided for the washing of clothes he suggested that one of the bowls of the kitchen sink could be used for the purpose and the washing machine could be placed in the space left for a dishwasher.
31. His evidence in this regard is not believable. There can be no doubt that what he constructed in the basement was intended to be used a laundry and that it was constructed by him as such. He was aware that the ceiling height was inadequate for the purpose yet he did not obtain a dispensation for the area to be used as a laundry, nor does he seem to have considered the desirability of providing any ducted ventilation for a clothes dryer which he must have known would be required in the absence of a clothesline. What was provided was a small single fan which vented into the ceiling space between two floor joists. This ceiling space was open at one end where it vented into the underfloor space which itself has little ventilation.
32. According to the Owner, she and her husband used the washing machine and dryer in the basement without any problems. They used the fan to vent the air. After the House was let she said that one of the tenants had a bed in the basement.

Ventilation

33. At the time of construction there was no other ventilation at all in the basement except for the ceiling fan referred to which was over the laundry cabinetry. There were some external wall ventilators at footpath level in the street which vented the subfloor area under the front porch. Between that area and the subfloor space adjacent to the basement the only ventilation was a space between the services pipes and the masonry that supported the front wall. The rear of the subfloor has a similar space left between the services pipes and the masonry.
34. When this arrangement was explained to Mr Goodbrand he said that he thought that the spaces that between the service pipes and the masonry were probably sufficient to vent the subfloor space but they did not vent the basement.
35. As part of the recent renovations Mr Jurcevic has increased the size and capacity of the fan and also installed fixed wall ventilation in the basement walls, which vent into the subfloor space. This appears to be operating satisfactorily.

Prior proceedings

36. The Owner said that, since she and her husband purchased the House, she has made 11 separate insurance claims as a result of the Builder’s defective construction of the House. She detailed these as follows:
 1. Repairs and repainting of dining room ceiling following failure of the front balcony’s waterproof membrane (2010)

2. Repairs to the studio bathroom which included replacement of carpet in studio, shower and bathroom floor following failure of the waterproof membrane (2012)
3. Repairs and repainting of basement and installation of waterproofing following the failure to waterproof the basement walls (2012)
4. Repairs and repainting again at dining room ceiling following another failure of the front balcony's waterproof membrane (2013)
5. Repairs to rear balcony following poor quality workmanship and failure of the waterproof membrane (2013)
6. Replacing the front veranda following poor quality workmanship and failure of the waterproof membrane (2013)
7. Repairs and repainting again in the basement and installation of waterproofing following the failure to waterproof the basement walls (2015)

She added: “

“In addition to the above we have also made four (4) separate insurance claims for loss of rent due to the above events occurring.”

Water ingress and mould

37. In January 2012 the House was inspected by an assessor for CGU insurance. According to the inspector's report there was a mould build up at the bottom level of the plaster walls in the internal basement which, according to the report, was then used as a bedroom and kitchen.
38. According to this report, the inspector advised the Owner's estate agent that the mould build up was related to the breakdown of the membrane of the brick external walls which had failed to perform its duty to stop water infiltrating into the building. A scope of works the inspector recommended was included in the report. It does not appear that the inspector examined the rear of the walls because if he had done so he would have ascertained that in fact there was no membrane there to break down.
39. Some repairs then seem to have been undertaken in 2010. The tiled balcony floor was stripped, waterproofed and refinished and work was undertaken for the damaged ceiling below. More work was done in 2012.
40. Further water damage was complained of in 2013 and, on 1 October 2013, Mr Goodbrand inspected the House again for CGU insurance. In the course of his inspection Mr Goodbrand noted the presence of some mould at the foot of the basement walls which he said was most likely due to moisture flowing around the side to the low point and then dampening the plasterboard wall lining, leading to mould infestation.
41. Thereafter, extensive work appears to have been done on the House including the internal balcony walls and the balcony.

The present claim

42. On 20 April 2015 the Owner brought the present proceedings against the Builder, claiming:

“Reimburse me for all costs incurred to repair the failure and faulty waterproofing of basement at the property”

43. The amount claimed in the application was \$52,527.50, detailed as follows:

Basement repairs	\$48,800.00
<u>Additional expenses related to claim</u>	
Express post envelope	\$ 14.40
Express post envelope	\$ 14.40
Biological health services report	\$ 1,375.00
Express post envelope and claim to VCAT and respondent	\$ 26.90
SES group inspection report	\$ 1,422.30
Printing of claim for VCAT and respondent	\$ 349.00
Insurance Policy Excess	TBC
Transport costs	TBC
Flight to attend mediation	<u>TBC</u>
	<u>\$52,527.60</u>

44. By the time of the hearing the claim had grown to \$76,355.00 but the evidence given at the hearing was that the losses claimed were as follows:

TRPM Services	\$55,970.00
JP Flynn waterproofing northern and western walls of the basement	\$ 1,280.40
Excess on insurance claim	\$ 100.00
Mr Goodbrand – cost of report	\$ 1,422.30
Biological health services	\$ 1,375.00
Biological health services	\$ 330.00
Loss of rent	\$11,101.25
Rent differential	Not ascertained
Cleaning 12 May 2015	\$ 330.00
Re-letting costs	\$ 2,334.17
Reprinting documents	\$ 274.34
Express post 12 June 2015	\$ 14.18
City of Port Phillip building file	\$ 91.00

The Builder's defences

45. The Builder filed and served Points of Defence, stating that the Owner's claim has no tenable basis in fact or law and that the claim has previously been settled in proceeding D1152/2013.
46. At the hearing, Mr Stanish raised the following arguments. He said:
- (a) *that the basement was a wet type basement with a sump and self-actuating sump pump. He said that this design allows water ingress into the sump to be pumped out.* It is true that the basement has a sump pump but it is also true that the basement is lined with plaster and it was constructed as a laundry. I do not accept that it was constructed to be wet.
 - (b) *that since the basement was not a habitable room it is not required to be waterproofed.* This again was not established because it was constructed as a laundry and must comply with the Code requirements for that. According to Mr Goodbrand, being a space within the building used by occupants, it must be provided with a means of ventilation with outdoor air which will maintain adequate air quality.
 - (c) *that the Owner has reduced the subfloor ventilation by removing vents that were installed by the Builder.* The vents referred to vented only the subfloor space under the front porch. They did not vent the basement. The evidence clearly established that ventilation of the basement has been improved as a result of the works the Owner has undertaken.
 - (d) *that the mould has been caused by excessive drying of clothes in the basement by the tenants without appropriate ventilation.* In this regard, Mr Stanish referred to the following passage from the report of the Owner's mould expert, Dr Jones, that the Owner has filed:

"I also need to articulate that even on the day of the inspection, the basement contained laundry facilities that were in use and were generating considerable heat and humidity. There does not appear to be adequate exhaust for the laundry. The elevation in local relative humidity and attendant condensation downstairs in the basement is equally likely to be due to the use of the washing machine and presumably un-vented dryer. This could have caused the mould the occupants are referring to. At basement level, there was only one area of wall that showed some minor moisture damage. Inspection through the manhole of the basement walls shows that there is a solid soil embankment, but despite the occupant discussing the claim that the basement leaks, I could not find evidence of this apart from in one small section of the wall at the base of the stairwell, that has been swab tested.... I am of the opinion that despite the fact the current occupants/tenants maintained that the basement is the source of their alleged mould problem(s) at the property, the data does not support this claim..... The mould that was quantified using a viable culture suggests that this may be due to the laundry use at the basement level generating condensation. I am of the opinion that the mould is caused by condensation and not water/moisture ingress by external walls."

These findings are not surprising, given the failure of the Builder to provide ventilation for a drying machine and proper ventilation for a laundry. The defect complained of by the Owner is the lack of appropriate ventilation in the laundry. The report referred to goes on to consider mould elsewhere in the House but the conclusion reached was that it was not related to the basement.

- (e) *that the claim now brought was previously brought in proceeding D1152/2013 which was settled at mediation and it is not open to the Owner to make the same claim again.* I accept that submission for the reasons given below, but the argument is only valid to the extent that the claims now made were the subject of the earlier proceeding.
- (f) *that the basement is not a laundry.* It is quite clear that the Builder built the basement as a laundry and intended it to be used as such.
- (g) *that even if the basement was a laundry, the floor was water resistant in accordance with the Code.* I think that is right in regard to the floor but not in regard to the bottom of the walls along the skirting boards which, according to Mr Goodbrand, should have been made waterproof. However I think that this part of the claim is defeated by the settlement of the earlier proceeding in any event.
- (h) *that the Owner has failed to properly maintain the sump pump resulting in the failure of the pump to pump out water from the sump.* This was not established on the evidence.

47. The only one of these defences that has merit is the reliance upon the terms of settlement. The Builder says that all claims with regard to its failure to waterproof the basement have now been settled.

The Earlier Proceeding - D1152/2013

48. On 18 October 2013 the Owner commenced proceeding D1152/2013 against the Builder claiming:

“Reimburse me for all costs incurred relating to repairs of 1. Front Balcony 2. Rear Balcony 3. Front Veranda and damages (\$10,000 due to financial loss).”

49. A list of amounts claimed is included in the application. All of these appear to relate to the front and rear balconies and front veranda as well as internal and external balcony works. The total claimed was \$50,363.30. However the application includes the words:

“Please note additional costs are expected following lodging of this form. They will be emailed to VCAT & Respondent when received”,

50. Included in the materials supporting the application was a quotation from JP Flynn for waterproofing to the basement. The document, which was filed by the Owner, says that the scope of works was to apply waterproofing to the internal basement walls for a price of \$1,280.40.

51. Also filed by the Owner in that proceeding was an invoice from JP Flynn which she said was for “waterproofing to basement”, although the invoice itself does not identify what the work was. The amount charged was \$640.20.
52. The proceeding was listed for mediation on 10 December 2013. On 6 November 2013, more than a month before the mediation place, the Owner’s husband, Mr Dutton, who was acting on behalf of the Owner, sent to the Tribunal and to Mr Stanish an email stating as follows:
- “Please find attached the final claim figure of \$65,307.62 or claim reference D1152/2013.
- All invoices relating to this claim have now been emailed to VCAT and the respondents. The respondents had been copied in on this email.”
53. The attachment to this email sets out a long list of claims totalling the amount stated. Included in the list were the following:
- | | |
|---|------------|
| “Costs for waterproofing basement due to water damage (November 2012) | \$1,280.40 |
| Insurance company’s excess payments on basement repairs due to water damage November 2012.” | \$100 |
54. The amount of \$65,307.62 was repeated in an email dated 19 November 2013 that Mr Dutton sent to Mr Stanish, offering on behalf of the Owner to accept that sum from the Builder.
55. The mediation took place on 10 December 2013. The Owner was represented by her husband, Mr Dutton, and Mr Stanish represented the Builder. The proceeding was resolved on terms whereby the Builder agreed to pay to the Owner \$47,500 to settle the claim. The terms of settlement do not state that the settlement sum relates only to certain parts of the claim and there is nothing on the file to excise the amounts relating to the waterproofing of the basement.
56. The Owner says that the two amounts claimed in the earlier proceeding with respect to the waterproofing of the basement were “claimed in error”. . She pointed out the amounts represented 2.1% of the total claim 2.9% of the settled sum. She said that the present claim is for damages arising from non-compliance with the building permit. She said that the work done by JP Flynn was narrow in scope, being simply to apply waterproofing to the internal basement walls. That appears to have been the case.
57. Within the context of the Act and the warranties implied into the building contract by section 8 and enforceable by subsequent Owners by reason of section 9, each breach of a warranty potentially gives rise to a separate cause of action (see *Meier v Balbin* [2015] VCAT 306 and the cases there referred to).
58. In general, a party bringing a proceeding against a builder must include in his claim any defects of which he is aware at the time (*Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45) but recovery of damages with respect to those defects of which he is aware will not preclude him from taking further

proceedings with respect to defects that become apparent later on (*Meier v Balbin*).

59. Where a claim is made seeking damages for defective building work, an applicant must prove:
 - (a) that there has been a breach of the contract;
 - (b) that he or she has suffered a loss arising from the breach;
 - (c) the amount of the loss.
60. Once the defect is found and a breach of the building contract is established, damages are recoverable to compensate the applicant for the loss suffered arising from the breach. However once those damages are assessed and awarded, the applicant cannot return to the Tribunal at a later time and say that they were inadequate and seek more. In regard to each breach, once the damages are awarded they are assessed once and for all.
61. Similarly, if a claim is settled by agreement at mediation, the applicant receives the consideration offered by the builder in full satisfaction of all of the alleged breaches that fall within the claim that was the subject of the negotiation, unless the agreement states to the contrary.
62. In the present case the loss claimed at the time of the mediation included the cost of waterproofing the basement. The breach of contract alleged was therefore the failure of the respondent to waterproof the basement when it should have done so. The cause of action is that alleged breach, not the damage claimed to have arisen from it.
63. It is clear from the manner in which the preceding case was conducted that, at the time of the mediation, part of the claim was an allegation that the Builder failed to waterproof the basement. That alleged defect was said to be a breach with respect to which damages were sought. All loss and damage arising from that alleged breach should have been claimed on that occasion. When the proceeding was settled the settlement necessarily included any claim for damages with respect to that breach and the Owner cannot now come back for more.
64. Insofar as the present claim relates to the failure of the Builder to properly waterproof the basement the claim must fail. However the allegation that the basement was not properly ventilated for use as a laundry has not previously been made and so the claim with respect to the loss suffered from that breach has not been resolved and is still open.

The expert evidence

65. According to Dr Jones, an area of plasterboard in the basement immediately on descent using the stairwell shows some minor visible mould and water damage. In the table on page 20 of his report he described the risk arising from this as being severe. Also severe in this table was the risk arising from mould that he found on the window sill of the nursery, which is directly above the basement. He used infrared thermal imaging to detect temperature differences in order to

reveal trapped water or moisture but this did not reveal any significant areas in the House, including the basement. He said there was no evidence of moisture indicated in the walls, floors and ceilings. He concluded on page 21 of his report:

“Therefore, notwithstanding the fact that there is some issue with ventilation at the basement, potentially some minor water damage, the alleged mould issues with this property are not clearly linked to building defects”.

66. The internal linings of the laundry were replaced in 2012. Amongst the owner’s material is a report from Pipe and Cable Investigation Services Pty Ltd dated 17 August 2012 which refers to basement water damage and pooling. The author of the report concluded that the water damage originated from the front footpath through a hole beside a Telstra Junction pit. According to a letter dated 25 October 2012 the footpath, which appears to have been the source of the water flow, was reconstructed on 10 October 2012.
67. Shortly thereafter, in November 2012, the Owner’s insurers engaged JP Flynn, Builders, to strip the plaster from the walls of the basement and repair the damage caused by the water ingress. The Owner and her husband then engaged the same company to waterproof the internal face of block work walls in the basement at a cost of \$1,280.40. This is the amount that was claimed in the previous proceeding and claimed again in the present proceeding, although the Owner said that it was claimed again in this proceeding by mistake.
68. According to a further report from JP Flynn dated 26 July 2013, water entered the basement on 12 and 13 July 2013 during a storm period causing further flooding to the basement which they recommended should be claimed on the Owner’s insurance.
69. On 1 October 2013 Mr Goodbrand reported on the leaking rear balcony that appears to have been where the water came from. On 21 October 2013 the Owner’s husband Mr Dutton sent an email to the Builder asking why the basement was not properly waterproofed.
70. The previous proceeding, D1152/2013, was then issued and was subsequently settled at mediation.
71. On 2 March 2015, following the further complaints from the tenants referred to above, JRPM Services quoted \$48,800 to remove and reinstate the internal linings from the basement, including the tiles from the basement floor and the basement staircase, grind off the black primer that had been previously applied by JP Flynn, Builders, reseal the perimeter of the basement with antifungal silicone and refit the vanity units. The Owner and her husband accepted this quotation and the work was done. This is the amount that the Owner is now seeking to recover.
72. On 24 March 2015 the Owner’s husband engaged Mr Goodbrand’s company to inspect and report on the House again. The conclusion of the report was that, so long as there was no moisture barrier installed to the external block walls, the basement area will be prone to further damage because, it was said, it was clear

from the recent site visit that water still enters the affected area particularly during rains.

73. On 25 March 2015 JP Flynn Builders inspected the property at the request of CGU insurance. It appears from the assessment report that the Owners claim to the insurer was: "Mould in the basement has rendered the property uninhabitable".
74. On 9 April 2015 the House was inspected again by Mr Goodbrand in company with Mr Jurcevic who had by this time removed all of the internal plaster lining and cabinetry from the laundry. Mr Goodbrand took photographs and said that it was clear that the mould problem had escalated significantly.
75. Mr Goodbrand pointed out that, since the ceiling in the basement was only 1.8 m high, it was in breach of the Code because, he said, the minimum height required for a habitable room is 2.4 m and the minimum height required for a laundry is 2.1 m. He also said the laundry must be provided with the means of ventilation with outdoor air which will maintain adequate air quality. He said the mechanical air handling system installed in a building must control the circulation of objectionable odours and the accumulation of harmful contamination by micro-organisms, pathogens and toxins. He pointed out that the only ventilation to the entire basement was a single ceiling-mounted fan above the laundry area that did not discharge to the outside but rather, discharged into a very limited space between the basement ceiling and the floor above, the limitation being the timber floor beams supporting floor.
76. He said that, given the use of the basement is a laundry with the resultant heightened ambient humidity, the low ceiling and the lack of compliant ventilation, he was of the opinion that the mould was caused by condensation and not water moisture from the external walls.
77. He noticed that the moisture content was elevated for the stairs and said that the timber had begun to rot at this point and should be replaced.
78. Mr Goodbrand recommended that the room be properly ventilated both with permanent and natural passive cross-flow ventilation as well as additional mechanical ventilation that automatically activates when the laundry activities commence, and continues to operate for a period thereafter. He also recommended that the floor and walls of the laundry be properly waterproofed according to current building regulations. He said that nothing could be done about the ceiling height.
79. Dr Eilenberg inspected the House on 15 December 2015. He did not dispute that a laundry requires natural ventilation but he said that the plans that he was given showed that the basement was constructed as such and not as a laundry. He said that on this basis, the room would not require ventilation.
80. In terms of waterproofing, he said that, although Section 3.8.1 of the Code provided that the entire floor of a laundry shall be water resistant, he said that a concrete slab meets these requirements.

Conclusion

81. I am satisfied there has been a breach of the implied warranties under section 8 of the Act which the Owner is entitled to enforce by reason of section 9. The Builder has constructed a laundry with inadequate ceiling height, inadequate waterproofing around skirting level and most importantly, inadequate ventilation.
82. Unfortunately for the Owner, the claim with respect to inadequate waterproofing has been compromised and is no longer available. The only claim that is still actionable is the claim with respect to inadequate ceiling height and the lack of adequate ventilation.
83. As to the former, I suggested to the Owner that perhaps the measure of damages, if she should succeed, would include the cost of relocating the laundry services to the area shown on the plans which have been endorsed by the relevant building surveyor. She stated that she did not want to do that because she considered the location shown in the plans to be unsuitable. She said that she proposed to seek a dispensation to allow her to continue to use the basement as a laundry, notwithstanding the low ceiling height. There was no evidence given as to what this would cost, if anything, and no damages were sought in regard to that.
84. That leaves the damages with respect to inadequate ventilation. I am satisfied on the evidence that the mould on the plaster linings in the basement seen in the photographs is due not to water penetration but rather, to condensation due to the lack of ventilation. That appears clearly from the passage relied upon by Mr Stanish from the expert's report.
85. I am satisfied from Mr Goodbrand's evidence that the ventilation was inadequate and that the works carried out by Mr Jurcevic were necessary. The cost of carrying out those works is properly claimable by the Owner, insofar as they relate to the claim for inadequate ventilation. The difficulty that I have is that I have no direct expert evidence of the cost of simply replacing the linings and improving the ventilation.
86. Some clue as to an appropriate allowance is to be found in the quotations that have been tendered by the Owner.
87. A property assessment report by CGU insurance dated 27 January 2012 estimated the cost of making good the basement at \$4,500.00 but the scope of works involved is not stated in any detail
88. There is an undated quotation from Unique Building Services that, according to the Owner, was given on 31 October 2012 to replace the plaster in the basement. The scope of works is:
 - (a) disconnect all plumbing \$ 633.50
 - (b) remove and store cabinetry \$ 691.00
 - (c) remove and dispose of plaster and replaster walls and ceiling \$2,073.00

(d) replace skirtings and architraves	\$ 311.00
(e) re-paint to match existing	<u>\$1,267.00</u>
Total	<u>\$4,975.50</u>

89. There is a quotation from JRPM Services dated 3 October 2012 for what appears to be a similar scope of works in the basement. The amount quoted was \$9,430.00. I do not understand why this quotation is so much higher than the others.
90. These quotations are now quite old. A further matter to be considered is that some of the costs incurred, such as removing the cabinetry, would have been required in any event in order to carry out the work with respect to which I can make no order. The cost of that part of the work should be apportioned.
91. Since the onus of proving her loss is on the Owner I think that I should take a conservative approach. The cost of providing the ventilation is unknown. A new fan had to be obtained and fitted, the internal linings of the laundry had to be removed and replaced and repainted and then ventilators had to be placed in the walls. Taking all these matters into account I assess the cost of repairs at \$8,000.00.

The loss of rent claim

92. On 3 September 2013 the House was let by the Owner and her husband to a Mr Stephens for a period of two years from 21 September 2013, at the monthly rental of \$4,563.00.
93. According to the Owner, the tenant vacated the House because of the mould problem, yet the report by Dr Jones establishes that the House was not rendered uninhabitable simply because the ventilation in the basement was inadequate. Indeed, that report suggests that the mould problem was largely due to the activities of the occupants themselves. In those circumstances I am unable to find that it was reasonable for them to vacate the House or that it is reasonable to make an order against the Builder with respect to the loss of the tenancy.
94. However the House had to be vacated in order for the repairs to be carried out. It seems to me that the greater part of the time taken in the rectification work done by Mr Jurcevic related to the much larger scope of works required in removing the flooring tiles, drying and waterproofing the concrete slab and replacing the tiles. I cannot make any orders with respect of that part of the claim because it has been compromised.
95. The proportion of rectification time related to the problems caused by the lack of ventilation is very difficult to assess. No direct expert evidence has been given of how long it would take to remove and replace the plaster, upgrade the ceiling fan and put in the fixed wall ventilation. Since the onus is on the Owner I should adopt a conservative figure and so I shall allow one week's rent as having been lost while that work was undertaken.

Other items claimed

96. Claims were made in the application for the costs the Owner has incurred for experts' reports and also for the issuing fee. These are really costs items but they were raised and claimed at the hearing and it is desirable to avoid the inconvenience to the parties of a further hearing just on the question of a relatively modest claim for costs.
97. The reports of Mr Goodbrand and Dr Jones were of great value in resolving this matter and the costs of obtaining them were properly incurred. A clear breach of the contract by the Builder has been demonstrated and Mr Stanish's denial of the obvious fact that the basement was constructed as a laundry was quite untenable and a great deal of time was taken up arguing over what was really unarguable. In these circumstances, I think that it is appropriate to order that these out of pocket expenses incurred by the Owner should be paid by the Builder. There was some suggestion by the Owner of a claim for her own time in preparation of her case and the stress she and her husband have gone through. It is not the practice of the Tribunal to award amounts for a party's time or for the stress of litigation.

Orders to be made

98. There will be an order that the Respondent pay to the Applicant the sum of \$12,705.90, calculated as follows:

Cost of rectifying the lack of ventilation for the laundry	\$8,000.00
Loss of one week's rent or repairs were undertaken	\$1,053.00
Report of Mr Goodbrand	\$1,422.30
Reports of Dr Jones	\$1,705.00
Issuing fee	<u>\$ 525.60</u>
Total	<u>\$12,705.90</u>

SENIOR MEMBER R. WALKER