CITATION:	*Nykamp v Demountable Sales & Hire Pty Ltd* [2010] NTMC 051
PARTIES:	ROBYN NYKAMP v DEMOUNTABLE SALES & HIRE PTY LTD
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20924506
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HEARING DATE(s):	10 and 11 August 2010
JUDGMENT OF:	Tanya Fong Lim SM

CATCHWORDS:

Consumer Law –implied terms – workmanlike manner - fitness for purpose –– rectification - s 64 *Consumer and Fair Trading Act* (NT)

Damages –causation –loss of income - enforcement of illegal contracts –s 65 *Building Act* (NT)

Practice and Procedure – pleadings – issues beyond pleadings – particulars – Rule 5.09 Local Court Rules (NT)

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council [1977] 52 ALJR 20 at 26
Holloway v McFeeters [1956] 94 CLR 470

Bradshaw v McEwans Unreported High Court (27th April 1951)

Bellgrove v Eldridge [1954] 90 CLR 613

REPRESENTATION:

Counsel:

Plaintiff:	Mr Liveris
Defendant:	Mr Roper

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	T S Lee

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 051
Number of paragraphs:	101

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20924506

BETWEEN:

ROBYN NYKAMP
Plaintiff

AND:

DEMOUNTABLE SALES & HIRE PTY LTD
Defendant

REASONS FOR JUDGMENT

(Delivered 27 August 2010)

Ms FONG LIM SM:

1. Ms Nykamp bought a demountable from the Demountable Sales and Hire (DSH). She bought the demountable for the purpose of renting it to her daughter for $100.00 per week. DSH manufactured the demountable and Nykamp arranged for the transport and installation of the demountable on her property. Soon after the installation of the demountable, in September 2008, Ms Nykamp's daughter Michelle, moved into the demountable. There was never any certificate of occupancy issued for the demountable. A few weeks after Michelle moved into the demountable she noticed the linoleum of the bathroom floor was lifting. Ms Nykamp immediately contacted DSH who sent Mr Dodds around to rectify the problem which he did. Sometime later, the plaintiff claims from about November 2008 through to February 2009 stains started to appear on the floor and then black spots. Ms Nykamp contacted DSH in late February to complain and when Mr Dodds attended on the second occasion, he found the linoleum to be lifting and there to be a mould infestation growing on the plywood beneath the linoleum. The

dispute before the Court is in relation to the growth of mould and the effect that had on the flooring. The questions before the Court are, is DSH responsible for the fault in the flooring, what should be done to get the problem rectified and how much that rectification should cost.

2. Ms Nykamp also claims she has lost income of $100.00 per week because of DSH's breach of contract to provide a demountable fit for the purpose of human habitation. DSH disputes that they have breached the contract in anyway and if they had, then the claim by Ms Nykamp for the cost of rectification is unsustainable and unreasonable. DSH also counter claims $1650.00 for the cost of renting a container for storing Michelle's furniture in for longer than agreed.

3. The Court was provided with evidence in chief by way of affidavit by all witnesses and those witnesses were then cross-examined. Ms Nykamp, Michelle Nykamp, Mr Klishans (a microbiologist) Mr Izod (the building certifier), Mr Gabriel (structural engineer), Mr De Zylva (mechanical engineer specialising in Air-conditioning) and Mr Quick (builder) all gave evidence for the plaintiff. Mr Tannos and Mr Oshiro (directors of DSH) and Mr Dodds (vinyl layer) gave evidence for the defendant.

4. **The Pleadings -** The Local Court is a Court of pleadings. The pleadings must contain a summary of facts upon which the parties wish to rely upon, nominate any statutory provisions upon which the party wishes to rely and specify the remedy (see Rule 5 Local Court Rules). The purpose of pleadings is to ensure the parties are aware of what case they have to meet. For example a party cannot plead a case in breach of contract and then require the defendant to answer a claim for negligence.

5. In the present case Nykamp has pleaded a contract between herself and DSH which was in part in writing and part oral. She does not plead the particulars of what pieces of writing and the conversations she claims constituted the terms of the contract. Nykamp included in the terms of contract an implied

term that the demountable would be constructed in a workmanlike manner and fit for purpose. She relies on the common law and s 64 of the *Consumer and Fair Trading Act* (NT).

6. Nykamp claims DSH has breached its contract by supplying a demountable which was not of merchantable quality or fit for purpose. The breach of the implied conditions is particularised in paragraph 8 of the Substituted Statement of Claim as follows:

> " (a) the plywood flooring laid in the Demountable was of an inferior quality
>
> (b) in mid to late October 2008 the linoleum in the bathroom of the Demountable began to lift
>
> (c) Vapour seal was not applied to the floor in the Demountable"

7. Nykamp pled a further complaint that the repairs to the linoleum were not of merchantable quality because the linoleum continued to lift throughout the demountable, allowing moisture to get into flooring and consequently the growth of mould. Nykamp claims the mould infestation makes the demountable unfit for human habitation. There is nothing in the pleadings about how the repairs were not of a workmanlike manner and how the repairs caused the rest of the linoleum to lift.

8. In her Statement of Claim Nykamp originally claimed alternative remedies of :

> " 1. The replacement of the damaged demountable with a new demountable to the value of $32,807.60 and free installation; or
>
> 2. The repayment of $33,307.60 plus all costs associated with the installation of the demountable being a total of $44,961.60"

9. Those remedies were abandoned at hearing and the only remedy claimed was for the cost of rectification to the flooring of the demountable and the loss of income of the rent for that demountable.

10. Nykamp also pleads that DSH had been negligent and particularised the negligence in the same terms as the breach of contract.

11. **The issues** – the issues before the Court are many legal and factual.

(a) What were the terms of the contract? In particular was it a term of the contract that a certain type of plywood would be used for the flooring, that the linoleum in the bathroom would not lift and that vapour seal would be used on the floor?

(b) Do the Pleadings allow Nykamp to claim the demountable was not constructed in a workmanlike manner?

(c) Were there any implied terms of the contract? Does the *Consumer and Fair Trading Act* apply to the supply of the demountable?

(d) Did DSH breach any of the terms of the contract? Was there anything DSH was required to do under its contract that it omitted to do or did do but to a substandard level which resulted in the growth of mould under the linoleum?

(e) Were the repairs undertaken by Dodds in October of workman like manner and if not did they cause the subsequent lifting of the linoleum?

(f) Was DSH negligent because they used inferior plywood, the linoleum in the bathroom had lifted and vapour seal was not used on the floor?

(g) If DSH can be held liable for the lifting of the linoleum, then what are Nykamp's damages. What is reasonable and necessary to be done to rectify the problem? How much would it cost to fix? Did Nykamp suffer economic loss of rent because of a breach by DSH of its contractual obligations?

(h) Did DSH suffer a loss for the extra rent it paid for the container which Nykamp refused to return after they demanded its return?

12. **Terms of the Contract**: The only evidence Nykamp has put before the Court in relation to the terms of the contract is that she had made some enquiries of the market and had some discussions with Mr O'Shiro of DSH about the purchase. She gave evidence of the price she paid and the date when the demountable was transported and installed on her property. She

accepted in cross examination that it was her responsibility to arrange for the transportation and installation of the demountable on her property and the certification of the demountable.

13. The evidence of DSH of the terms of the contract is contained in the affidavit of Mr O'Shiro and that evidence is not contested by Nykamp.

14. O'Shiro agrees there were some discussions about the purchase of a demountable and those discussions culminated in him providing to Nykamp a quote ("JO3" to his affidavit) which was accepted by Nykamp. He annexes a floor plan of the demountable agreed upon ("JO5") and states there was a variation to the initial contract to add a security door which addition was recorded in the invoice forwarded to Nykamp on 3 September 2009 ("JO6"). Nykamp did not challenge any of that evidence.

15. The quote specifies the types of materials and finishings to be used, specifically stating "No aircons" and "No hot water system". The floor is described as "Domestic grade vinyl over 17mm ply floor".

16. I find on the balance of probabilities that Nykamp contracted with DSH to supply a 12mx 3M 1 bed living unit to be constructed by DSH as specified in the quote.

17. **The Pleadings -** Nykamp has pleaded that the demountable was not constructed in a workmanlike manner and therefore not fit for purpose (see paragraph 8 of the Substituted Statement of Claim), DSH has been put on notice that it had to answer a claim that the demountable, particularly the flooring was not constructed in a workmanlike manner. DSH should be required to answer that complaint. The particulars in that pleading identified the quality of the plywood, the lifting of the linoleum in the bathroom and the failure to apply a vapour seal to the floor as the defects in the workmanship.

18. The only other reference to workmanlike manner is in paragraph 10 of the Substituted Statement of Claim and that is in reference to the repairs done to the linoleum when it first started lifting in the bathroom and that subsequent to repairs done there linoleum continued to lift.

19. While there is no specific subsequent pleading that these defects were causative of the whole of the floor lifting, it is clear from paragraph 11 of the Substituted Statement of Claim that Nykamp is claiming because the lifting of the linoleum allowed moisture to get in and caused the growth of mould.

20. It is open on the pleadings for Nykamp to argue that the demountable was not fit for purpose of human habitation because the flooring was not properly constructed and that is why mould got into the wood. Or that the repairs in the bathroom were not properly done allowing the rest of the linoleum to lift and as a consequence mould grew.

21. **Implied Terms –** Common Law - DSH submit given there are clear terms of contract as set out in the documentation of the DSH the Court should not imply further terms to a contract unless:

> "(1) It must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that "it goes without saying";
>
> (4) it must be capable of clear expression;
>
> (5) it must not contradict any express term of the contract".
>
> See *BP Refinery (Westernport) Pty.Ltd v Hastings Shire Council* [1977] 52 ALJR 20 at 26

22. In particular there should be no implied term that DSH would construct using particular methods or materials unless it was included in the quote

because there is nothing to stop the contract from being completed without those implied terms.

23. This argument is flawed. *BP Refinery (Westernport) Pty v Ltd v Hastings Shire Council* supra, does not limit the inclusion of implied terms introduced by statute eg those under the *Consumer and Fair Trading Act*. Further in the present case does not exclude the implication of the term that the demountable would be constructed in a workmanlike manner that must go without saying.

24. Given the above, I find that it is an implied term of the contract that the construction of the demountable be completed in a workmanlike manner.

25. Application of *Consumer and Fair Trading Act* (NT) - DSH submits parts 5 & 6 of *Consumer and Fair Trading Act* do not apply to the supply of the demountable because s 5 excludes fixtures on land and clearly a demountable is a fixture on land. That submission was unhelpful and is not sustainable. Section 5(2) excludes from the definition of consumer a person who has received goods where the goods acquired for certain purposes being:

> (a) for the purpose of re-supply; or
>
> (b) for the purpose of using them up or transforming them, in the course of a business, in or in connection with a process of manufacture or production,
>
> and in that subsection as it has effect for the purposes of Parts 5 and 6, the term also does not include goods which are acquired, or held out as being acquired, for the purpose of using them up or transforming them, in the course of a business, in or in connection with the repair or treatment of other goods or of fixtures on land.

26. Defence counsel submitted because the demountable is a fixture on land then that provision excludes the application of Parts 5 and 6 of the Act. While this section is drafted in a most unhelpful way, when broken down into its phrases, it is clear that the reference to “of fixtures on land” must be

read with the phrases “in the courts of business” and “in or connection with the repair or treatment of”. That is, for the purposes of parts 5 and 6 of the Act, the Parts which deal with implied warranties and subsequent remedies, a person who has taken the supply of goods “in the connection with the repair or treatment of fixtures on land” is not a consumer for the purposes of parts 5 and 6 of the Act.

27. The supply of the demountable in question, is not in my view the supply of goods for “or in connection with the repair or treatment of fixtures on land”, it is the supply of the item which is going to become the fixture on the land.

28. If the contract had been for the supply of timber for the repair of the demountable which had already been fixed to the land, then that supply to the person who in the course of business was undertaking the repair would not invoke parts 5 and 6 because that person would not be a “consumer” because of the operation of s 5.

29. I find that the provision of parts 5and 6 of the *Consumer Affairs and Fair Trading Act* do apply to the transaction between Nykamp and DSH and therefore the implied condition of fitness for purpose is part of the contract by operation of s 64 of the *Consumer and Fair Trading Act* given it was accepted that the demountable was supplied for the purpose of a residence.

30. **Has DSH breached the implied terms of contract to construct the demountable in a workmanlike manner and to supply a demountable fit for purpose.**

31. There is no dispute that the lifting of the linoleum and the growth of mould caused the demountable to be uninhabitable for a period of time. There is no dispute the purpose for which the demountable was purchased was for Nykamp’s daughter to reside in it. There is no dispute that the mould and the lifting of the linoleum would have required the daughter to vacate while the flooring was repaired.

32. It is agreed that the mould requires moisture to prosper and because there was mould growing on the plywood there must have been moisture at some stage.

33. The cause of the lifting of the linoleum and the growth of mould are the real issues:

(a) was the plywood used of inferior quality?

(b) did the floor lift because of the original method used to fix the linoleum to the plywood without the use of a vapour seal?

(c) did the floor lift because of the growth of the mould?

(d) did the mould grow because of the type of plywood used or the method used to apply the linoleum was flawed?

34. The Court heard from several experts. Mr Klishans, a microbiologist, gave evidence of the conditions in which mould grows, the results of his tests and his theory of how the moisture had entered into the wood and under the linoleum. Mr Gabriel, a structural engineer, gave evidence of the compliance of the building with the drawings and the type of plywood used. Mr Izod the building certifier. Mr De Zylva, mechanical engineer, who explained how air-conditioners worked and how moisture could be introduced in reference to temperatures inside and outside of the demountable. Mr Quick the builder who installed the demountable and Mr Dodd the person who built the floor and laid the linoleum.

35. Is the plywood of inferior quality? - Mr Gabriel gave evidence that the plywood used was not as specified in the certified drawings for the demountable. The flooring in the drawings he produced were described as "T & G 15 mm F11 Flooring with liquid nails". The "T & G" standing for "tongue and groove" technique of fixing the boards together. Mr De Zylva also made comment that he thought the flooring was of a poorer quality than Australian plywood. Mr Oshiro gave evidence that the plywood used was "Boral Floorwood" which is the material used in all of the demountables

constructed by DSH. When referred to the letter by Boral regarding the standard of "Boral Floorwood", Mr De Zylva withdrew his comment about the quality of the floorboards.

36. If I accept the evidence of Mr Gabriel and that the lack of "tongue and groove" boards is contrary to the specifications of the approved plans that may give some force to Nykamp's contention that the flooring was of an "inferior quality". The pleadings were not specific as to what was "inferior" about the "quality" and it is not clear from Mr Gabriel's evidence that he was of the opinion that the plywood installed was inferior to the "tongue and groove" as specified in the plans, only that it was different as to what was specified. The evidence of Mr O'Shiro was that "Boral Floorwood" was used in the floors and that product is described as "tongue and groove" in the promotional material from the manufacturer. I find that the plywood used did comply with the plans and Mr Gabriel must be mistaken.

37. Mr Dodds and Mr O'Shiro claim that the flooring used is the same material the company uses for all of its demountables and there was no problem with others. Neither Mr Dodds nor Mr O'Shiro was asked to respond to the claim that the flooring used was not in compliance with the plans.

38. DSH submit that as the plans and specifications were not part of the terms of the contract, they cannot be relied upon to set the standards to which DSH should be held. Even if the specifications could be implied as part of the contract, given that DSH witnesses were not cross-examined on plans and Mr Gabriel did not say that the flooring used was inappropriate, I cannot be satisfied on the balance of probabilities the plywood used was of an "inferior quality".

39. <u>Was the method used to fix the flooring and vinyl appropriate method?</u> The method of constructing the flooring was explained by Mr Dodds. The floors were installed, sanded and a feather finished applied then the floors were left to dry overnight. This process was repeated twice. It was important for

the floor to dry completely before the adhesive and vinyl was applied otherwise the adhesive would not work. Mr Dodds is an experienced linoleum layer and claims not to have had a similar difficulty with flooring he has laid in many other demountables which were to be used as residences.

40. Dodds accepted that if the floor had been wet when it had been left to dry overnight, then that would cause a problem with the vinyl sticking to the wood. He conceded that the floor could have gotten wet when left overnight, however he did not think that was likely as the roof was already in place and he would expect to see signs of the moisture the next day.

41. Dodds also conceded that he did not apply a vapour seal to the plywood before fixing the vinyl, however that is not something that he usually does, nor is it something that he believes is necessary. Both Gabriel and De Zylva suggest that sealing the plywood is the only sure way of ensuring no further moisture ingress. De Zylva's conclusion was based on the premise that the plywood used was not of Australian standard. De Zylva concludes that

> "plywood performs poorly as a poor vapour barrier/ retarder. It is known that Australian Plywood has sufficient vapour retardant properties. The question could be raised as to the quality and source of the plywood used for the flooring of this building."

42. While De Zylva did retract his assessment of the quality of the plywood once referred to documentation which indicated it was Australian plywood, he maintained his position that any plywood conducted moisture.

43. De Zylva is a mechanical engineer specialising in air-conditioning systems and gave explanations of how the moisture could have got between the flooring and the vinyl. He opines that the flooring was a poor moisture retardant and a sealant on both the top and the bottom of the plywood would have assisted in preventing the moisture ingress and therefore the growth of mould. It was not put to De Sylva that possibly the moisture could have been introduced into the wood while the feather finish was drying.

44. What is clear from De Zylva's uncontested evidence is that where there is a higher moisture content outside than on the inside of the demountable, that moisture will try to move into the drier environment. The drier environment inside the demountable is caused by the air-conditioning. The reason for the mould growing between the floorboards and the vinyl is that the vinyl did not allow the moisture to go any further, therefore it got trapped between the layers and created a good environment for mould growth.

45. DSH submit an alternative hypothesis is that the air-conditioning was run at a temperature too cold and for extended periods of time and that caused the dampness. This proposition was not supported by De Sylva. His view is that if the temperature was colder on the inside than the outside then that does not necessarily cause moisture to move into the cold area. The movement of moisture depends on the relative moisture content.

46. DSH submit that the circumstantial case against it has not been proven on the balance of probabilities because there is a reasonable alternative hypothesis. That alternative hypothesis put forward is that the air-conditioning was run at a temperature and for times which made it conducive for moisture to collect on the surfaces of the demountable and in this case on the floor.

47. DSH produced data from a temperature data collection they undertook in the demountable in March of 2009 which indicated temperatures were kept as low as 17.3 degrees at some times during the day. It is submitted that those temperature readings show Nykamp kept the air-conditioners at a very low temperature and therefore created the environment which caused the mould to grow. The accuracy of those readings is challenged by Nykamp who claims that the thermostat of the air-conditioning units cannot be set below 18 degrees. There is no evidence that the thermostats in the air-conditioning units were operational and properly calibrated nor is there evidence that the temperature data recorder was properly calibrated. In any event even if the

temperature of the demountable was kept at 18 degrees, there is no evidence that the colder the temperature the more likely moisture would form. The only evidence the Court has regarding the temperatures and the effect on moisture forming is that of Da Zylva whose opinion is that there only has to be a difference in temperature and a difference in moisture levels for the moisture to want to move between the areas. It is not necessarily the case that the colder the temperature inside the more likely the moisture would move.

48. Where there are circumstances from which competing hypothesis can be inferred it is for the Court to decide which of those hypothesis is more likely on the balance of probabilities. In *Holloway v Mc Feeters* [1956] 94 CLR 470 the High Court applied the reasoning of the High Court in another unreported matter *Bradshaw v McEwans Pty Ltd* (27 April 1951) where their Honours found that it was only necessary for the Court to be satisfied that :

> "according to the course of common experience the more probable inference from the circumstances…..By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood."

49. Even if I find that the more probable inference to be made is that keeping the air-conditioning set at low temperatures for extended periods of time created the environment which encouraged that moisture ingress into the plywood that does not assist DSH.

50. The moisture would not have got into the floorboards had they been sealed. The manufacturer's description of the their product emphasises the "permanent waterproof glueline" (see annexure"JO7" to O'Shiro's affidavit) is a recognition that moisture can be an issue with plywood. The evidence of De Zylva also supports this view. I can be satisfied on the balance of probabilities had the floorboards been sealed top and bottom, moisture

would not have been able to permeate the floorboards and get trapped when it reached the barrier of the vinyl.

51. With the assistance of Mr Klishans' evidence I am also satisfied on the balance of probabilities that the trapped moisture created the ideal situation for the mould to grow. The evidence produced does not specifically address the issue whether the growth of mould caused the linoleum to lift as it did. On the second page of his report Mr Klishans' states:

> "The swab showed an unacceptable level of overall micro-organisms, since more than 1000 cfu/cm2 was obtained and this would be primary source, where these microbes are located. Their presence on top of the tile via bubbling and blistering due to their ability to penetrate layers indicates an unstable floor linoleum."

52. It was implicit in Mr Klishans' evidence that the microbes were the reason for the flooring bubbling and lifting.

53. DSH and Dodds' contention that they have built many demountables in the same method and have never had this problem cannot be given much weight in the face of the evidence of Mr De Zylva and Mr Klishans.

54. To assess whether it was reasonable to expect that the plywood be vapour sealed, I have to decide if DSH could have reasonably expected that an air-conditioner would be installed in the demountable given someone was going to live in it. If it is a reasonable expectation, then DSH ought to have constructed the demountable to take into account that reasonable expectation, in this case having sealed the flooring.

55. Comments from De Zylva that these units would be impossible to live in without air-conditioning can only be viewed as his personal opinion as there is no scientific data to support that contention. I can take judicial notice that during the wet season in the Northern Territory temperatures can be up to 36 degrees and 100% humidity which for most people is uncomfortable. It is also telling that DSH did sell demountables with the option of air-

conditioners installed and therefore it is most probable that they reasonably foresaw the likelihood of air-conditioners being installed and used in these demountables.

56. DSH ought to have foreseen the likelihood of an air-conditioner being used in this demountable and they were responsible to construct the demountable in such a way to avoid the ingress of moisture into the unit. DSH ought to have foreseen air-conditioners would create an environment (drier) inside the unit and that moisture would seek to enter the unit from the outside. They ought to have foreseen unsealed plywood would allow moisture in if not sealed whatever the source of the moisture.

57. I find that DSH did not construct the demountable in a workmanlike manner by failing to vapour seal the floorboards.

58. **Were the repairs undertaken by Dodds not of a workmanlike manner?** Nykamp alleged the repairs were not of merchantable quality and particularised that breach as:

> "(a) the linoleum on the floor in the demountable continued to lift
>
> (b) the linoleum on the floor throughout the demountable has lifted".

59. The particulars do not detail what was wrong with the repairs to make them not of merchantable quality and there was no evidence adduced to support any claim that it was the repairs in 2008 that were causative of the continued lifting of the linoleum. It seems Nykamp abandoned this part of her claim at the hearing and therefore it must fail.

60. **Negligence:** The claim for damages for negligence can be dealt with simply. While Nykamp has claimed negligence she has not specified a duty of care and the breach of duty of care is particularised as:

> "(a) the plywood flooring laid in the demountable was of inferior quality;

(b) in mid to late October 2008 the linoleum in the bathroom of the demountable began to lift;

(c) Vapour seal was not applied to the floor in the demountable."

61. There is no allegation that DSH had a duty of care to ensure the flooring was of a particular quality, to ensure the linoleum would not lift or that vapour seal would be applied to the floor or that duty of care had been breached. DSH ought not be expected to guess or assume what Nykamp is claiming is their duty of care nor ought they be expected to guess or assume how Nykamp says they breached that duty.

62. Counsel for Nykamp made no submissions on the claim for negligence either in initial submissions or submissions in reply. Given those circumstances Nykamp has either abandoned her claim in negligence or has not properly pleaded negligence and therefore cannot be successful in that claim.

63. **What damages are Nykamp entitled to?** The original claim was for the cost of a new demountable plus the costs of installation. That claim cannot be sustained. Nykamp can only claim what is reasonable and necessary to remedy the defects and bring the demountable to conform with the contract (see *Bellgrove v Eldridge* [1954] 90 CLR 613).

64. Nykamp's claim is in two parts:

(a) the cost of rectification of the flooring;

(b) the lost income from the rent she expected from her daughter.

65. **Cost of rectification:** Nykamp has properly claimed for the rectification of the flooring. Having found the floor was not constructed in a workmanlike manner, it is clear the cost of providing Nykamp with a vinyl covered floor free of lifting and mould is a proper basis for damages. There is a clear causal link between the breach of contract and those costs. The question is what the necessary and reasonable costs of rectification are.

66. Klishans and De Zylva gave opinions on the solution of how to rectify the flooring. Klishans discussed two solutions in his report being:

(a) floor sanded back to wooden section, the glue and linoleum be removed and then new sealant applied on the floor then new linoleum applied;

(b) complete removal of the floor.

67. Klishans preferred the option of complete removal because his testing of the "cross section of the material from above the wooden floor" (my underlining) showed the mould had permeated right through the material "so it cannot be treated".

68. In cross-examination Klishans conceded he did not take a cross section of the plywood and therefore could not say with certainty that the mould was growing in all layers of the wood. He did confirm the mould was growing between the wood and the linoleum because that is where most of the moisture was situated and that the spores could have travelled in with the moisture or have been present on the wood before the moisture collected there.

69. De Zylva suggested two options were available virtually identical to the options discussed by Klishans and he recommended the first option of:

> "inner surface of the floor of the demountable be stripped of the vinyl covering and treated with "mould killer" and sanded down to clear of all traces of mould… The inner and outer surface should then be sealed with low permeance vapour barrier with all screw penetrations of the floor and other leakage paths tightly sealed off with suitable moisture sealants for tropical weather applications."

70. He warns there is a risk in this solution because the mould may be embedded within the depth of the wood and therefore hard to treat.

71. The second option of removal of the floor is only suggested by De Zylva if the recommended rectification is:

> "considered labour intensive and costly, then the replacement of the floor would be required."

72. Gabriel also considers both options and does not specifically prefer one method over the other. In cross-examination he accepted that if the plywood did comply with the specifications of the plans ie "tongue and groove 15mm", then the first option of sanding back and cleaning the board and relay with new linoleum would be sufficient.

73. All of the witnesses put forward as experts in their fields indicate two options for rectification and have different reasons why one option may be elected over the other.

74. Klishans' opinion must be given due weight, he is the only witness who had expert knowledge of the behaviour of mould. His suggestion that the whole floor be replaced was based on the premise that the mould had permeated all the way through the thickness of the floorboards and therefore would regrow unless the floorboards were replaced. There is no dispute that this may have happened, however Klishans conceded that he had not taken a cross section of the boards at the time of his inspection and could not be sure that the mould had permeated through the full thickness of the boards.

75. The discussion by Klishans of the behaviour of mould spores in his report and in cross-examination indicates several ways in which the mould spores could have been introduced into the space between the floorboards and the linoleum. The spores could have been present in the wood when it was supplied, they could have travelled in water arising out of flooding, airborne spores could have come down with moisture before the linoleum was laid or the spores could have possibly travelled through the wood with the moisture. Klishans did not reach the conclusion that the spores travelled through the wood he did not specify how the spores could have got there.

76. I am unable to find on the balance of probabilities how the mould came to be in between the floorboards and the linoleum nor am I able to find on the

balance of probabilities that the mould has permeated the whole of the boards.

77. Dodds and Quick produced quotes on how they would fix the problem and costings as to those solutions.

78. Quick's quote was produced on 20 October 2009 and the first part of that quote included a comment :

> "I have concluded if the floor can be sealed immediately it can be saved".

79. Quick then priced that option at $4,500.00.

80. Dodds' solution and the first option provided by Quick were the similar, the vinyl had to be taken up, mould removed from the floorboards, sanded and bleached, and then the vinyl replaced. Dodds' quoted $1,400.00. Dodds does not mention the sealing of the floorboards before the replacement of the vinyl.

81. Another curious feature of the quotes is that Quick included plumbing and electrical works in his quote to replace the whole floor but there is no mention of plumbing and electrical in the quote for the repair of the floor.

82. Dodds accepted that he did not include the removal and replacement of the toilet bowl in his quote and placed a cost of about $140.00 for that task, however he did not accept there would be any need for electrical work.

83. It is clear from Quick's quote that his view on 20 October 2009 was if the repair option was taken immediately, there would be no need for the full replacement of the floor. This evidence, together with the evidence of Klishans supports a finding on the balance of probabilities that at least as of 20 October 2009 the floorboards were not in such a bad state that repair were not possible.

84. Nykamp may argue that because the floors have not yet been repaired it is more likely that the mould has permeated throughout the floorboards. There is no evidence about what has happened with the demountable since the inspection by Quick in October 2009. No evidence of any work being done, whether the air-conditioners have been run, whether the demountable has been ventilated and the floors dried out, or even anecdotal evidence from Nykamp that the mould has got worse. I cannot be satisfied on the balance of probabilities of the present condition of the floorboards.

85. Even if I could find the present condition of the floorboards now require replacement, Nykamp must do all that is necessary to mitigate her loss. She must act reasonably to mitigate her loss and what is reasonable depends on the circumstances. It is important to note that the onus of proof is on the defendant to prove the plaintiff did not take all reasonable steps. In the present case DSH refer to Quick's quotation and point out that had Nykamp undertaken the repairs at that time, there would not have been a need to replace the boards. It could not be argued that in negotiations with DSH was the cause of the delay because the Quick and De Zylva's opinions were subsequent to the negotiations failing. If I could find the floorboards are now in need of replacement, then I might have found that Nykamp failed to mitigate her loss by not undertaking the repairs when advised to do so, if I had evidence of her financial ability to undertake those repairs.

86. Given the above I find that the reasonable and necessary solution to the problem is the repair of the floorboards and relaying of the linoleum and not the replacement of the whole floor.

87. The cost of the repair is slightly problematic. I have two quotes for the repairs for similar work. It is clear from Dodds' quote and evidence that he did not include in his quote the sealing of the floor after the removal of the mould and therefore Quick's quote, brief that it may be in detail, must be

preferred because he includes the sealing which is necessary from the evidence of De Zylva, Klishans, and Gabriel.

88. I therefore assess the cost of repair to be $4,500.00.

89. Loss of income – It is agreed that Nykamp intended to rent the demountable to her daughter at $100.00 per week. Since her daughter moved out in October of 2009 Nykamp has not relet the demountable and it is safe to assume the mould problem is one reason why that has not occurred.

90. DSH submit while they accept there may have been a loss of income because of the flooring issue, Nykamp is not entitled to damages for that loss because she did not have the right to rent the demountable out as there was no certificate of occupancy. It is conceded there was no certificate of occupancy and Nykamp relied on the advice of Mr Izod, a building certifier that it was alright to allow her daughter to move in.

91. It is submitted by DSH that the Court should not grant damages for a loss of income which arose from an illegal activity, that is the occupation of a premises for which a certificate of occupancy had not been issued (see s 65 of the *Building Act* (NT)). I have to agree with DSH on this issue. It would not be appropriate for a Court to order loss of illegal income as part of a damages claim, therefore Nykamp's claim for loss of income must fail. There was no certificate of occupancy for the demountable so any agreement for the rental of the demountable is unenforceable because of the unlawful occupation of the demountable. Any loss of income from that agreement cannot be the basis of any claim for damages. It would be contrary to public policy for a Court to allow that claim.

92. Nykamp's claim for loss of income must fail.

93. **Counterclaim - Did DSH suffer a loss for the extra rent it paid for the container which Nykamp refused to return after they demanded its return?** During the negotiations between the parties DSH provided a

container to Nykamp for the storage of her daughter's possessions while the repair of the flooring was being addressed. The container was provided to Nykamp on 6 May 2009 on the assumption that some agreement could be reached for the repair of the floor.

94. On 18 May 2009 DSH wrote to Nykamp and confirmed the provision of the container and advising that if the matter was not resolved by 31 May 2009, the hire charges of the container would have to be reviewed (see "JO13" to Mr O'Shiro's affidavit).

95. After some negotiation involving an officer of the Office of Consumer Affairs, the parties could not come to an agreement and DSH requested the return of the container by 30 June 2009. The container was not made available for collection by Nykamp and was returned on 13 October 2009.

96. Nykamp defends this claim on the basis that her daughter had nowhere else to put her property until she found other accommodation in October 2009. There was no pleading by way of Reply which sets out the basis for that defence, so I am left to deduce from the evidence the basis for that defence.

97. There was no obligation upon DSH to provide storage for Nykamp daughter's possessions and once DSH demanded the return of the container, Nykamp was required to accede to that request.

98. I find the container was provided as part of the negotiations to resolve the dispute. The letter of 18 May 2009 made that clear. Once those negotiations failed and DSH made it clear the container be returned, Nykamp was obliged to return it.

99. DSH was liable to pay rental on the container at $330.00 per month from 30 June 2009 monthly in advance (see "JO10" of O'Shiro's affidavit) and claims four months rental, $1,320.00, (up to October 2009 when the container was returned) as an expense they have incurred because of Nykamp's failure to return the container.

100. There will be judgment in favour of DSH on the counterclaim for $1,320.00.

101. **Final Orders:**

1. Judgment in favour of the plaintiff for $4,500.00 plus interest at 10.5% pa from October 2009 being $1.29 per day (the approximate date the plaintiff advised the defendant of the defect).

2. Judgment in favour of the defendant for the sum or $1,320.00 plus interest at 10.5% pa from 30 June 2009 being $0.38 per day.

3. Costs reserved.

Dated this 27th day of August 2010

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Tanya Fong Lim
STIPENDIARY MAGISTRATE