

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP369/2016

### CATCHWORDS

*Domestic Building Contracts Act 1995* – s 8 - implied warranties as to domestic building work - allegations of defective workmanship - proof of defects - reliance upon expert's report although expert not called – *Victorian Civil and Administrative Tribunal Act 1998* – s 98 - Tribunal bound by the rules of natural justice but not the rules of evidence – s 102 - Tribunal must allow party to call evidence - nature of an expert's report - weight to be given to report where expert not called.

<b>FIRST APPLICANT</b>	Anthony Coghlan
<b>SECOND APPLICANT</b>	Dionne Coghlan
<b>FIRST RESPONDENT</b>	Construc Builders Pty Ltd (ACN 106 741 539)
<b>SECOND RESPONDENT</b>	Regional Contracting Pty Ltd (ACN 119 342 344)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	1 May 2017
<b>DATE OF ORDER</b>	3 July 2017
<b>CITATION</b>	Coghlan v Construc Builders Pty Ltd (Building and Property) [2017] VCAT 992

### ORDER

1. Order the Respondent to pay to the Applicants the sum of \$251,398.40.
2. The counterclaim is dismissed.
3. Costs reserved.

**SENIOR MEMBER R WALKER**

**APPEARANCES:**

For Applicants

Mr A Ritchie of Counsel

For First Respondent

Mr D Duggan, Director

For Second Respondent

(Struck out as per order 23.11.16)

## REASONS

### Background

- 1 The Applicants (“the Owners”) are the owners of two town houses in Pascoe Vale (“the Units”) which have been referred to in the hearing as “No.26” and “No.26A”. The Units were constructed by the Respondent (“the Builder”) pursuant to a contract dated 31 May 2013 (“the Contract”) which was entered into on or about that date.
- 2 The Owners seek damages from the Builder with respect to allegedly defective and incomplete works in regard to each of the Units. The Builder counterclaims for money allegedly outstanding under the Contract including a claim for the supply of premium robe doors and for extra plumbing.

### The hearing

- 3 The matter came before me for hearing on 1 May 2017 with five days allocated. Mr A Ritchie of Counsel appeared on behalf of the Owners and the Builder was represented by its director, Mr D Duggan.
- 4 I heard evidence from the first owner, Mr Coghlan, and expert evidence from a building consultant, Mr Beck, from a mechanical engineer, Mr Brodribb, who gave evidence concerning the air-conditioning, and from a plumbing consultant, Mr Quick.
- 5 For the Builder, I heard submissions and cross-examination from Mr Duggan but he did not give any sworn evidence himself. However, he sought to rely upon a number of expert reports prepared by Mr Ryan, a building consultant, but did not call him to give evidence.
- 6 Mr Ritchie said that, since Mr Ryan was not called and was not able to be cross-examined, I should not look at his reports.
- 7 An expert witness’ report that accords with the practice note will set out the expert’s observations and express his opinion concerning them. What the expert says in that regard is generally not able to be contradicted, in that, it is most unlikely that anyone could say that the expert did not make the observations or form the opinions that he has expressed in the report. Whether those opinions are accepted or not depends on a number of matters, principally, whether any facts upon which the opinions are based have been established by the evidence as a whole. The observations recorded by the expert might not accord with the observations of other witnesses or the facts as found by the Tribunal. The expert’s opinion must also be weighed against other expert opinion.
- 8 By s 98 of the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal is bound by the rules of natural justice but it is not bound by the rules of evidence and it may inform itself on any matter as it sees fit. This Tribunal commonly relies upon expert reports, quotations and other

documents where the author of the document has not been called, giving these documents such weight as appears to be appropriate in the circumstances of the particular case.

- 9 By s 102, the Tribunal must allow a party a reasonable opportunity to call and give evidence. Mr Ryan's reports were produced and sought to be relied upon by the Builder as part of its case. They had previously been served and it is apparent from the Scott Schedule that the Owners' representatives had prepared their case on the basis that they would be relied upon. It was only during the hearing that it was known that Mr Ryan would not be called.
- 10 Since the reports have been served and are sought to be relied upon by the Builder as part of its case I should look at them and give them such weight as seems appropriate in the circumstances, bearing in mind that the observations recorded in the reports were not supported by sworn evidence and that Mr Ryan was not available for cross-examination.
- 11 Mr Ritchie submitted that I should give them no weight at all but I am satisfied that Mr Ryan made the observations and formed the opinions that he described in his reports. The evidentiary value of the opinions is weakened because he was not able to be questioned about them but that is not a reason to ignore the reports altogether.
- 12 Mr Ryan's responses to the matters raised by Mr Beck and Mr Quick appear in the Scott Schedule and, in most instances, Mr Ryan agreed with the criticisms that were made.
- 13 At the conclusion of the evidence I informed the parties that I would provide a written decision.

### **Claim**

- 14 At the start of the hearing, Mr Ritchie informed me that the damages sought by the Owners had been reduced, due to the correction of a mistake in the assessment of the cost of repairs. He said that the amount claimed was as follows:

(a) Cost of rectifying defective work or No.26	\$ 150,383.00
(b) Cost of rectifying defective work in No.26A	\$ 138,600.00
(c) Loss of rental on Unit 26 November 2014 to November 2016 for 104 weeks at \$500 per week	\$ 52,000.00
(d) Cost of alternate accommodation during rectification	\$ 11,970.00
(e) Cost of removals, storage and cleaning	\$ 4,235.00
(f) Packing and unpacking costs	\$ 4,646.40
(g) Storage	\$ 420.00
(h) Cleaning	\$ 1,440.00
(i) Loss of amenity	<u>\$ 5,000.00</u>
<b>Total claimed</b>	<u><b>\$ 368,689.50</b></u>

- 15 The loss of rental claim was abandoned during the hearing after it became apparent that the evidence would not support it.
- 16 The Builder's counterclaim is for an unpaid progress payment and \$1,209.29, being \$1,176.00 for the supply of premium robes and a further \$433.29 for additional plumbing. However, no sworn evidence was given on behalf of the Builder to support the counterclaim and so it must be dismissed, leaving only the Owners' claim.
- 17 There do not seem to be any Contractual issues to be determined. Rather, it is a question of ascertaining whether the work was defective or incomplete and, if so, what the financial consequences of that are.

### **The Contract documents**

- 18 According to the Contract, the work was to be carried out in accordance with 11 sheets of architectural plans prepared by "In Style Drafting" and 10 sheets of engineering drawings prepared by P &J Dalglish Pty Ltd.

### **The defects and incomplete work alleged**

- 19 The matters raised in the expert reports of Mr Beck and Mr Quick, and responded to by Mr Ryan in his report, were summarised in two Scott Schedules prepared by Mr Ritchie, one for each Unit.

### **No.26**

- 20 The defects were as follows:

- (a) Ensuite shower \$ 7,149.00

There was no preformed shower base used. Instead, the shower base is fully tiled and intended to be graded to the waste. Mr Beck said that the tiling of the shower recess has only a limited fall and the floor of the ensuite falls away from the drain. He said that testing revealed that water exited the shower enclosure around the screen and pooled in the middle of the floor. He said that he was unable to determine if a water stop had been installed for the shower recess which he said is required for this type of shower but he noted that there was no calcification and there were no delaminating floor tiles evident. He removed the cover from the shower drain and found no evidence of a waterproof membrane extending down the throat of the drain.

Mr Ryan agreed that the fall was inadequate and that the floor tiles fell away from the shower recess. He noted that there was no floor waste in the bathroom to collect water outside the shower area and he agreed with Mr Beck that the installation was defective.

Mr Beck costed this defect at \$7,149.00, allowing for the replacement of the bathroom floor and the bottom two rows of wall tiles and the installation of the required water stop and membrane. To the total cost of labour and

materials he added a Builder's margin of 30% for overheads and profit and 10% for GST. This margin of 30% was applied to all of the assessments that he made. I accept that it is a reasonable margin for rectification work.

Mr Ryan's rectification figure was \$1,875.00 for the rectification of the shower base and the first floor bathroom shower floor tiles. In arriving at his figure he used the same margin and added a contingency for the shower base of 5%.

Mr Beck acknowledged during cross-examination that the problem of an inadequate fall could be fixed by installing a shower door at a cost of \$1,350.00 but he said that you would still have the problem of the absence of a shower stop which he said could allow water to exit under the tiles.

I accept Mr Beck's opinion and prefer his assessment of over that of Mr Ryan. Looking at the two scopes of work I think that Mr Beck's seems to be more comprehensive.

(b) Lightweight external cladding and window flashing \$ 14,375.00

Mr Beck said that the lightweight cladding installed to the upper story of the building, which was polystyrene foam cladding, has not been sealed, it is cut too short over the lower story roof flashings and articulation joints and the sill window flashings have been rendered over. He assessed the cost of rectification at \$14,375.00. Since that is less than Mr Ryan's figure, it will be allowed.

(c) Plastering and painting \$ 8,837.00

Mr Beck said that the painting and plastering was serviceable but that some locations require further work because, when viewed in the manner indicated in the 2007 edition of the *Guide to Standards and Tolerances* ("the Guide"), irregularities in the plasterboard could be seen, as could colour variations in the ceilings. There are a number of photographs in his report to support his observations. He assessed the cost of rectification at \$8,837.00. Mr Ryan agreed that there were some areas of plastering and painting that required work and assessed the cost of rectification at \$9,630.00. Mr Beck's figure will be allowed.

(d) Set out – alfresco area \$ 1,344.00

Mr Beck said that the roof over the alfresco area does not continue in the same line as the main building. The relevant photograph in his report shows roof screws that are out of alignment. Mr Ryan agreed with his observations but considered it a minor defect. Mr Beck assessed the cost of rectification at \$1,344.00 whereas Mr Ryan assessed it at \$636.00. Comparing the two costings Mr Ryan allowed four hours for a plumber and

one hour for a painter, whereas Mr Beck has also allowed for a carpenter to square up the facade. I think Mr Beck's scope of works is more appropriate and will allow his figure.

(e) Roof, stormwater, flashings and cappings Assessed by Mr Quick

Mr Beck said that there were significant defects with the roof, the flashings and the stormwater and that is borne out by Mr Quick's evidence. The cost of rectifying those defects is dealt with in Mr Quick's report but, in his own costings, Mr Beck has allowed an amount of \$1,966.00 to remediate any mould. It is made up of \$475.00 for a mould remediation specialist to ensure that all mould in the ceilings was eliminated and make good any consequential damage to the plasterboard and paint the ceiling. There is already a substantial allowance for repainting. In the absence of any evidence as to the existence of mould, I am not satisfied as to this item.

(f) Brickwork \$ 1,058.00

Mr Beck pointed out that the brick perpend in the south wall of the garage exceed the tolerances in the Guide. Mr Ryan agreed but suggested that since the wall was on a narrow walkway, the defects would not be apparent to a person walking down the side of the Unit. However, he agreed that an appropriate course was to render the wall, which is what Mr Beck has costed. Since the existence of the defect is acknowledged, Mr Beck's assessment of \$1,058.00 will be allowed. I note that this is less than the amount assessed by Mr Ryan.

(g) Upper storey internal floor levels \$ 10,826.00

Mr Beck said that the upper storey floors to both Units are out of level by more than the allowances in the Guide, causing the doors to rub on and scratch the surface of the timber flooring. Mr Ryan acknowledged that was the case. Mr Beck's assessment of \$10,826.00 will be allowed.

This is a major item because, according to Mr Beck, it involves removing all the furniture from the areas where there are floorboards and storing it in the garage. Mr Beck said that the occupants would be required to relocate from the dwelling for a week to allow for the removal and reinstatement and that he expected the entire upper storey floor would require sanding and repolishing as there is no breakable line.

Mr Beck acknowledged during cross-examination that the floor could be sanded but he said that it was 10mm out of level over two metres and the floor could not be sanded so as to level it. I accept that opinion.

(h) Lower storey timber floor \$ 4,735.00

The lower storey timber floor was flooded accidentally and although the damaged floorboards were replaced by the Builder, the replacement boards are badly cupped. Mr Beck considered that this was due to the Builder not properly drying the substrate before replacing the boards. Mr Ryan agreed that the floor was defective. Mr Beck's assessment of \$4,735.00 will be allowed.

(i) Heating and cooling \$ 13,240.50

There were to be two ducted air-conditioning systems installed in each Unit, one servicing each floor. Each system comprised an internal unit in the ceiling to which the ductwork was connected and an external unit to cool the refrigerant. The Builder installed the ductwork and the internal units but not the external units. Thereafter, the Owners installed their own air-conditioning systems.

Mr Beck noted that the heating and cooling was not operational at the time of handover and that another consultant, Mr Brodribb, had provided an expert report in regard to that, which contained a scope of works and cost of rectification. Mr Beck included this cost in his own report but did not make any assessments himself. Mr Ryan said that the heating and cooling was operational at the time of his inspection which I note was on 28 June 2016.

Mr Coghlan said that, when the Owners moved in, there were internal units but not external ones, and that the heating and cooling system was not complete. He said that the Builder never came back to finish the heating and cooling and that the Owners had to get someone else to do it. The following invoices were produced from the contractor they engaged, J&J Heating Proprietary Limited, for the supply and installation of the four external units with four matching internal units.

Invoice 31 May 2016	\$ 17,529.00
Invoice 18 August 2016	\$ 1,030.00
Invoice 24 October 2016	\$ 7,922.00
<b>Total paid</b>	<b><u>\$ 26,481.70</u></b>

Mr Coghlan said that he was informed by the contractor that did the installation that the two internal units that had already been fitted by the Builder were obsolete and had to be replaced because they would not match the current model of external units to which they would have to be connected. That opinion was supported by Mr Brodribb who added that he thought the charges made by the contractor engaged by the Owners were fair and reasonable.



In the course of replacing these internal units a further amount of \$1,914.00 was paid by the Owners to a carpenter to remove internal linings to facilitate the replacement. However, that amount has not been claimed.

I am satisfied that the two internal units that the Builder supplied were obsolete and required replacement and that the money spent by the Owners in replacing them and completing the installation was a justified expense. Mr Brodribb conducted his inspection after the two replacement systems had been installed by the Owners and concluded that they were inadequate. He said that the units themselves had more than the required capacity but that they had not been installed correctly.

He said there were fundamental mistakes in the air delivery system in that they were undersized and required replacement. Mr Brodribb said that the system the Builder roughed in was two sizes too small to adequately cool the Unit. He suggested that the shortfall in capacity could be made up in each Unit by a 5 kW electric wall-hung split system located on the ground floor living area, which would cost approximately \$2,800.00 including GST, and an additional 3.5 kW split system which would cost approximately \$2,300.00 including GST.

Mr Duggan said that the installation was incomplete and suggested to Mr Brodribb that the positioning of the vents, which he had criticized, might have been put in by the Owners. He also said that the positioning of the vents might have been due to the position of structural members. Mr Brodribb said that the Builder should have had a ductwork plan and put in bulkheads if necessary. There is no evidence whether such a plan was prepared and I cannot assume either the existence or the absence of such a plan. There is also no evidence as to precisely how much of the work Mr Brodribb observed was done by the new Contractor and how much was the work of the Builder.

Mr Beck's calculation of the cost of rectifying the system in Unit 26 was \$20,554, being one half of the amount spent by the Owners, plus \$5,100.00 for the two additional split systems recommended by Mr Brodribb plus an added margin and GST on that amount of \$5,100.00.

I have no difficulty in finding that the amounts the Owners have had to pay to replace the two obsolete units and complete the installation is recoverable. That is, \$13,240.50 per Unit. However, it seems to me that, if the installation was considered to be below capacity that is something that should have been addressed when the Owners took responsibility for completing the air-conditioning of the two Units themselves. What is now sought seems to be the cost of making good a system they have installed themselves. I do not think that is the responsibility of the Builder.

(j) Internal staircase \$ 808.00

It was acknowledged that the timber staircase does not have slip resistant treads. I will allow Mr Beck's assessment of \$808.00 to provide them.

(k) External penetrations \$ 471.50

Mr Beck said that some external penetrations had not been sealed and he allowed four hours for a plumber to seal them. Mr Ryan said they were sealed at the time of his inspection. I will allow Mr Beck's figure of \$355.00 which, with the margin and GST, becomes \$471.50.

(l) Squeaking floors \$ 400.40

Mr Beck said that there was squeaking in the upper storey floors. He said that, according to the Guide, floors that squeak in trafficable areas within the first 24 months are defective. He has allowed four hours for a carpenter to peel back the carpet in the doorways to the bedrooms and install screws to eliminate the squeaking. I will allow his assessment of \$280.00 which, with margin and GST, becomes \$374.00.

(m) Front door \$ 128.70

The front door has been supplied with only two hinges. Mr Beck said that is insufficient and that for a door of that size and weight it should have a third hinge. Mr Ryan did not agree. Although there was no evidence of the hinges failing, I think I must prefer Mr Beck's opinion since he was present at the hearing and able to be questioned on the issue. I will allow his figure of \$90 which, with margin and GST becomes \$128.70.

(n) Skirtings not square

Mr Beck said that the skirting around doors and hallways are not straight. Since I have allowed the cost of replacing the floorboards the skirtings will need to be removed and replaced anyway. It is not appropriate to make an additional allowance for this item.

(o) The linen cupboard has no handles \$ 124.41

This was acknowledged and the same amount will be allowed.

(p) Hinges \$ 965.25

Mr Beck said that the installation of some of the screws had caused door jambs to split and some screws had not been supplied. Mr Ryan said that he was told by Mr Coghlan that he had installed larger screens where screws were missing. That allegation was not put to Mr Coghlan in cross-

examination. Moreover, the Builder should have installed the correct screws instead of leaving it to a lay person to provide screws which might not be the correct size. I will allow Mr Beck's costing of \$675.00 plus margin and GST, which becomes \$965.25.

(q) Cavity sliding door \$ 687.50

The door has significantly bowed, causing the handle to damage the frame. This was acknowledged. I will allow Mr Beck's figure of \$595 which with margin and GST becomes \$687.50.

(r) Architraves and skirting

Mr Beck said that some of the architraves and skirting have come apart at the joins. Mr Ryan said that the gap between the plaster wall and the back of the skirting was very minor and not considered it to be a defect. Since I have already allowed for general plastering and repainting and also the replacement of the floorboards which will require the removal and replacement of architraves and skirting boards, I do not think that it is appropriate to make a further allowance for something that will be done anyway.

(s) Gas line \$ 39.33

Mr Beck pointed out that the material that has been used for the gas line is not UV resistant and Mr Ryan acknowledged that it had to be protected from UV light. Mr Beck allowed \$95 for an hour's work by a plumber to do that whereas Mr Ryan allowed \$78.65 for the same defect on both Units. There will be plumbers and painters on-site to attend to the major items and this in itself is such a minor item that it is unlikely to cost any more than Mr Ryan's figure. I will allocate one half of the figure to each Unit.

(t) Dishwasher \$ 286.25

There is no dishwasher kickboard. Mr Ryan agreed. Mr Beck allowed \$225 for the supply and installation of a kickboard. Mr Ryan allowed \$200. Each is an estimate of the cost of supplying the item and fitting it, onto which must be added the Builder's margin and GST. They are both allowances and there is no reason to prefer one figure over the other. I will allow a base figure of \$212.50, resulting in a final allowance of \$286.25.

(u) Weep holes \$ 296.00

Mr Beck said that weep holes in the masonry need to be cleaned of render. Mr Ryan agreed. I will allow Mr Beck's figure of \$220 which, with margin and GST becomes \$296.00.

(v) Shower wall void \$ 128.70

Mr Beck said that the aluminium lip provided in the showers of both dwellings could allow moisture to enter the frame of the building. Mr Ryan did not agree. He acknowledged that there was a lip of approximately 1mm on the shower recess aluminium angle but said that there was no evidence of moisture damage or water entering the cavity. It is difficult to see much detail in the photograph in Mr Beck's report concerning this item but the angle appears to be the tile edging in the shower recess. On balance, I prefer Mr Beck's opinion that it should be sealed and I accept his base figure of \$90 for doing so which, with margin and GST becomes \$132.00.

(w) Cupboard latch \$ 92.95

Mr Beck said that the latch for the linen cupboard was poorly installed but did not say in what respect. Mr Ryan said he was unable to locate any defect but I accept Mr Beck's evidence of his observation and his base figure of \$65.00 which, with margin and GST, becomes \$92.95.

(x) Balustrade

Mr Beck said that the balustrade at the top of the internal staircase was out of level. The accompanying photograph shows this to be a dwarf stud wall at the top of the staircase void, which is sheeted on all faces in plaster. The photograph shows a spirit level on an angle from where it abuts the wall to the head of the stairs. Mr Ryan said that the variance was only 5mm and could not be noticed from a normal viewing position. Mr Beck did not say how much out of level it was or over what distance. If it is only 5mm over an unknown distance, and cannot be noticed from a normal viewing position in accordance with the Guide, I prefer Mr Ryan's opinion and can find no defect.

(y) Window trims and alfresco posts

These are mentioned in the Scott Schedule in regard to this Unit but are not explained in the body of Mr Beck's report, although he has made an allowance of \$500 with respect to them in his costings. There is no evidence to establish a breach on the part of the Builder in regard to these items. I note that there are defects of this nature dealt with in the report relating to the other Unit and it may be that their inclusion in the Scott Schedule in regard to this Unit was a mistake.

(z) Metal deck roof installation \$ 26,952.00

Mr Quick said that the roof had been installed with an incorrect grade. He said the fall was only .7 degrees whereas the minimum required is 1°. He

also said that the roof trays extended too far into the gutter, there is a badly damaged metal deck roof rib on the upper roof and, on the upper flat roof below the eaves, the roof sheeting has been fixed through its tray. Mr Duggan disputed the findings as to the fall on the roof. He questioned Mr Quick about his methodology in measuring it and suggested to Mr Quick that the results might have been due to expansion or contraction. Mr Quick denied that that was the case. Mr Ryan agreed with Mr Quick's criticisms. I am satisfied that the falls were as measured by Mr Quick and that the defects he referred to are established. Mr Quick also pointed out that the foam cladding will have to be adapted to allow for the greater slope of the roof and in order to fix some of the problems which he identified relating to the flashing beneath the cladding.

There is a substantial difference in the costings for rectifying these defects. Looking at the respective costings and the allowances that have been made, I note that Mr Ryan has made no allowance for replacing the foam cladding in the areas where the flashing has to be replaced and that he has allowed to re-use the existing roof sheeting. Mr Quick said that the existing sheeting could not be re-used because it would not carry a manufacturer's warranty. I prefer Mr Quick's costing and will allow his figure of \$26,952.00, including contingencies, margin and GST.

(aa) Roof flashings \$ 15,097.00

Mr Quick said that the parapet cappings are ponding because they have not been graded back to the Unit, the foam cladding does not overlap the apron flashing by the required degree, the pressure flashings and apron flashing were not correctly installed in a number of instances, there is a general lack of fixings to the cappings in the apron flashing, the downturn of the apron flashing does not have an anti-capillary break installed, there are a number of openings in the flashings which will allow vermin to enter, flexible rubber flashings have received an excessive amount of silicon, in some locations and the capping does not overlap the apron flashing to the required degree. Mr Ryan agreed with each one of these criticisms. Mr Quick's costings of these items total \$15,097.00 whereas Mr Ryan's costings, which are of a different scope of works but deal with a number of the same items, total \$14,503.00. Because the scopes of work are not the same it is not possible to make a direct comparison. Examining the items in Mr Quick's costings I accept his figure as being appropriate.

(bb) Box gutters \$ 9,560.75

Mr Quick said that the gutters are ponding at the outlets, they do not discharge through their ends as required by AS/NZS 3500.3:2003, light fittings have been fixed inside the gutter which might be affected by rain water, the box gutter of the upper roof has been fixed through its side and

the pop outlets had been extended too far into the rain heads, making them difficult to clean. Mr Ryan agreed with all of these criticisms. Mr Duggan said that Mr Coghlan, who was an electrician, did all the electrical work and that it was done after the plumbing. I accept that the Builder is not responsible for any lights installed by Mr Coghlan. Deleting those costs from the costing prepared by Mr Quick, the cost of rectification becomes \$9,560.75, including 10% for contingencies plus margin and GST. That figure will be allowed.

(cc) Boundary trap and overflow relief gulley

Mr Quick said that the boundary trap shaft and property inspection shaft covers have not been correctly installed. He said the ground vent should be at least 150mm above ground level and it is not. He said that the overflow relief gulley is required to be 150mm below the flood level of the lowest fixture in the property which, he said in evidence, was the shower waste. Mr Ryan agreed that was the case but pointed out that the ground levels have not yet been established. I note that landscaping is listed amongst the excluded items in Schedule five of the Contract. Since the adequacy or otherwise of these fittings is judged according to the ground level and since the ground level is to be established by the Owners, I do not find any defect in what the Builder has done. It will be for the landscaper to take account of Mr Quick's evidence in setting the ground level while landscaping around these fittings.

(dd) Solar hot water service \$ 3,554.10

Mr Quick said that the exposed copper pipes servicing the hot water service are required to be sealed to prevent the run-off from affecting the roof surface. He said that the base of the frame supporting the hot water service was required to have rubber insulation installed and that the solar collector was undersized. He said that it should be 5m<sup>2</sup> whereas it is only 3m<sup>2</sup>. Mr Ryan said that the area of the collector was a recommendation only and was not compulsory. The specification contains no detail about the hot water service to be provided. Consequently, it would have to be one that was reasonable in the circumstances. Since the only evidence that I have in this regard is that of Mr Quick, I must accept his opinion that what has been provided is inadequate and also his costing of the rectification which totals \$3,554.10 with contingency, margin and GST.

**No.26A**

21 The defects in Unit 26A were similar to those in Unit 26 and the same considerations generally apply. They were as follows:

(a) Ensuite shower \$ 7,149.00

The shower base used is the same design and again, the tiling of the shower recess has only a limited fall. The floor of the ensuite falls away from the drain, water exits the shower enclosure and pools in the middle of the floor and no water stop was installed. There was no calcification or delaminating floor tiles evident and no evidence of a waterproof membrane extending down the throat of the drain.

Mr Ryan agreed that the installation was defective.

Mr Beck costed this defect at \$7,149.00, being the same figure as the other Unit. Mr Ryan's figure was \$1,951.50.

Again, I prefer Mr Beck's assessment.

(b) Lightweight external cladding and window flashing \$ 14,375.00

Mr Beck recorded the same observations concerning the lightweight cladding installed to the upper storey as for Unit 26. Mr Ryan acknowledged that the installation was defective. Again, I accept Mr Beck's assessment of the cost of rectification, which is \$14,375.00 and is less than Mr Ryan's figure.

(c) Plastering and painting \$ 8,838.00

The same observations were made here by Mr Beck as for Unit 26. The painting and plastering were said to be serviceable but further work is required because irregularities in the plasterboard and colour variations could be seen from a normal viewing position as specified in the Guide. Mr Ryan agreed that further work was required. I accept Mr Beck's assessment of \$8,838 which is less than Mr Ryan's figure.

(d) Set out – alfresco area \$ 1,344.00

Mr Beck said that the roof over the alfresco area has the same fault as in Unit 26. The same considerations apply and Mr Beck's figure will be allowed.

(e) Roof, stormwater, flashings and cappings Assessed by Mr Quick

This item is dealt with below. Again, in the absence of any evidence as to the existence of mould I am not satisfied that the allowance should be made for mould remediation.

(f) Upper storey internal floor levels \$ 10,826.00

The same defect is present in the upper floor levels of this Unit also. Mr Beck's assessment of \$10,826.00, which is the same as for Unit 26, will be allowed.

(g) Heating and cooling \$ 13,240.50

This item has been discussed above. It is appropriate to allow to the Owners one half of the amount they spent to purchase replacement units and complete the system. The rest of the claim is not justified for the reasons already given.

(h) Internal staircase \$ 808.00

This timber staircase also does not have slip-resistant treads. Mr Beck's assessment of \$808.00 will be allowed.

(i) External penetrations \$ 507.65

Mr Beck said that some external penetrations had not been sealed in this Unit also. The same allowance will be made.

(j) Squeaking floors \$ 400.40

Mr Beck said that there was squeaking in the upper storey floors of this Unit also. I will allow his assessment in the same amount for the same reasons.

(k) Front door \$ 128.70

The front door has also been supplied with only two hinges. The same allowance will be made.

(l) Architraves not level and straight \$ 843.70

Mr Beck said that some door architraves were not level and straight. Mr Ryan said that no defect was evident. There is a photograph in Mr Beck's report showing a spirit level over a doorway but I cannot see in the photograph what he is referring to. Nevertheless, Mr Beck has sworn that there is such a defect and so I will allow his assessment which, with margin and GST, is \$843.70.

(m) Damaged tiles \$ 128.70

Mr Beck said that there were damaged tiles and assessed \$87 plus margin to repair them. Mr Ryan said that one tile in the bathroom was damaged. I



will allow the amount claimed which, with margin and GST, becomes \$128.70.

(n) Hinges \$ 965.25

The same observation was made in regard to this Unit and I will allow the claim for the reasons already given.

(o) Cavity sliding doors \$ 306.00

Mr Beck said that the cavity sliding doors had not been completed, the caps for the screw heads had not been installed and painting is incomplete. Mr Ryan agreed and assessed the rectification cost at \$306.00. Mr Beck's higher costing is for exactly the same scope of works as is set out in his costing to replace the warped cavity sliding door in the other Unit, including the cost of replacing a door. From this I conclude that that is not a costing of the scope of works that he has recommended for this item in this Unit but a costing with respect to the scope of works in the other Unit. In the absence of any other costing I accept Mr Ryan's figure.

(p) Architraves and skirting

In view of the other allowances made, I do not think that it is appropriate to make a further allowance for something that will be done anyway.

(q) Gas line \$ 39.33

This claim is established and the calculation of the amount allowed is detailed above.

(r) Alfresco sliding door frames \$ 321.75

Mr Beck said that the door frame for the alfresco was not properly fixed. Mr Ryan agreed. I will allow Mr Beck's costing of \$225.00 which, with margin and GST, becomes \$321.75.

(s) Weep holes \$ 296.00

The same allowance with respect to the weep holes will be made for this Unit also for the same reasons.

(t) Shower wall void \$ 128.70

The same fault with respect to the shower wall was present in this Unit and the same allowance will be made.

(u) Window draft seals \$ 92.95

Mr Beck said that there is no cover strap or cover plate installed above the front windows. Mr Ryan agreed. I will allow Mr Beck's costing of \$65 which, with margin and GST comes \$92.95.

(v) Damage to doors

Mr Beck said that the installation of the door handles for the entry cupboard had damaged the door and the door jamb was broken. Mr Ryan agreed. I will allow Mr Beck's costing of \$470.00 plus margin and GST, which is \$672.10.

(w) Lower storey shower base \$ 121.55

Mr Beck said that the floor tiling around the shower grate is very rough. Mr Ryan agreed. I will allow Mr Beck's figure of \$85 plus margin and GST, which is \$121.55.

(x) Alfresco posts \$ 92.95

Mr Beck said that the alfresco posts were not painted. Mr Ryan agreed and said that it was incomplete work. I will allow Mr Beck's costing of \$65 which, with margin and GST, becomes \$92.95.

(y) Boundary fences

Mr Beck said that the boundary fences had been left propped and damaged. He does not say what the damage was or how he thought it was caused. The photograph in his report is of an old paling fence and one end of the bottom plinth board has come away from the post. There is no evidence that the Builder is responsible for the condition of the fence. From its apparent age, it was not constructed by the Builder.

(z) Metal deck roof installation \$ 28,273.00

Mr Quick said that, with this Unit also, the roof was installed with an incorrect grade. He said the fall was only .7 degrees whereas the minimum required is 1°. He also said that the roof trays extended too far into the gutter. On the basis of what he said, and the photographs in his report, I accept that evidence. His costing for replacing the roof, with contingencies, margin and GST, was \$28,273.00 which will be allowed.

(aa) Roof flashings \$ 15,097.00

Mr Quick said that the parapet cappings are ponding because they have not been graded back to the Unit, the foam cladding does not overlap the apron flashing by the required degree, the pressure flashings and apron flashing were not correctly made and installed in a number of instances, there is a general lack of fixings to the cappings in the apron flashing, the downturn of the apron flashing does not have an anti-capillary break installed, there are a number of openings in the flashings which will allow vermin to enter, flexible rubber flashings have received an excessive amount of silicon, the flashings at the base of the clerestory windows rely upon a bead of silicon sealant which will break down and the capping does not overlap the apron flashing by the required degree. These are largely the same complaints as with the other Unit and Mr Ryan agreed with the criticisms made. Again, I adopt Mr Quick's costings because those done by Mr Ryan were for a different scope of works.

(bb) Box gutters and rain heads \$ 10,475.96

Mr Quick said that the gutters are ponding at the outlets, that they do not discharge through their ends as required by AS/NZS 3500.3:2003, light fittings have been fixed inside the gutter which might be affected by rain water, the box gutter of the upper roof has been fixed through its side and the pop outlets had been extended too far into the rain heads, making them difficult to clean. Mr Ryan agreed with all of these criticisms. Since Mr Coghlan installed the lights, the costs resulting from their removal will be deducted from the costing prepared by Mr Quick. The cost of rectification then becomes \$10,475.96, which includes contingencies, margin and GST.

(cc) Boundary trap and overflow relief gulley

I am not prepared to allow this item for the reasons given above. The soil level around these fittings will be set by the landscaper.

In addition to the above figures, Mr Beck has allowed for preliminaries for both Units of \$6,074.00 each, making a total of \$12,148.00. The main item of expense in each case was Builder's warranty insurance and scaffolding. The total cost of rectification is therefore as follows:

Defects Unit 26	\$ 121,157.34
Defects Unit 26A	\$ 114,800.09
Preliminaries	<u>\$ 12,148.00</u>
<b>Total</b>	<u>\$ 248,105.40</u>

### **The other claims**

(a) Cost of alternate accommodation during rectification

The amount claimed was for 30 days accommodation in a serviced apartment sufficient to accommodate the Owners and their two young children. According to the evidence, the Unit will be uninhabitable for only one week and not 30 days. At the rate of \$399 per night for seven days, that amounts to \$2,793.00, which will be awarded.

(b) Cost of removals, storage and cleaning

The evidence is that it will be necessary to move furniture and contents from the areas where the flooring is to be replaced. In item 6 of his costings, Mr Beck said: "Carefully remove any furniture from locations of lower storey floorboards and store in garage. Contained in costing below." In regard to cleaning, the costings provide for a rectifying builder to take control of the whole project and charge a 30% margin. That builder will need to leave the site clean following the work as part of its contract. Apart from that, I will allow \$500.00 for a cleaner to clean both Units after the departure of the rectifying builder.

(c) Packing and unpacking costs

I am not satisfied that the Owners will incur any such costs.

(d) Storage

The only evidence that I have concerning storage is that it will be in the garage and no expense will be incurred in that regard.

(e) Loss of amenity

An amount of \$5,000.00 is claimed as compensation for loss of amenity. Damages of this nature are not awarded as a matter of course. It is apparent from the cases where they have been awarded that some very substantial discomfort or inconvenience must be shown beyond what might be expected from the mere presence of defects in the dwelling. In the present case, when the Owners moved in they were without air-conditioning for a while but both Units were otherwise serviceable and able to be lived in comfortably. I am not satisfied that this is an appropriate case in which to award damages for loss of amenity.

## **Conclusion**

2. The total damages to be awarded for defective workmanship, alternate accommodation and cleaning are \$251,398.40 and there will be an order that the Builder pay that sum to the Owners. Costs will be reserved for further argument.

**SENIOR MEMBER R WALKER**