

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D314/2007
(Related Files: D825/2004, D172/2006 & D178/2006)

CATCHWORDS

Domestic building work – appeal against decision of insurer – builder directed to do work – direction not complied with – defective work proven - insurer seeking monetary order against builder in appeal proceedings – only prior decision by insurer directed builder to do work – no counterclaim by insurer – whether monetary order can be made – adjourned for further submissions

APPLICANT	D & M PYO Construction Pty Ltd
RESPONDENT	VMIA (Building Domestic (HIH) Indemnity Fund)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	4 February 2008
DATE OF ORDER	28 March 2008
CITATION	D & M PYO Construction Pty Ltd v VMIA (Domestic Building) [2008] VCAT 574

ORDER

1. The appeal is allowed as to the following numbered items listed in the schedule attached to the respondent's decision, namely, 10, 11, 34, 49, 54, 57, 62, 66, 67, 72, 74, 76, 77, 78, 80, 83, 84, 85, 86, 87, 89, 97, 99, 100, 101, 103, 111, 114, 117, 120, 124, 131, 142, 143A, 145 and 152.
2. As to the rest of the decision of the Respondent made on 18 April 2007, subject to the findings made in the accompanying reasons for decision as to the scope of work, the appeal is dismissed.
3. This proceeding together with proceedings D825 of 2004, D172 of 2006 and D178 of 2006 are fixed for directions on a date as soon as practicable to be fixed by the Registrar for submissions as to the further conduct of all proceedings.

SENIOR MEMBER R. WALKER

Background

- 3 The building of which the Units form the greater part was constructed by the Builder pursuant to a major domestic building contract it entered into with its own director, Mr Pyo, and his wife. An examination of this document would lead one to doubt that it was an arms length transaction. No provision is made for a building period, liquidated damages, prime cost items or provisional sums. The registered building practitioner appears to have been Mr Pyo himself. The building to be constructed comprised the eight Units and also one commercial lot. The owner of the commercial lot is not a party to any of these proceedings. Mr Pyo claimed that there had been no meeting of the Body Corporate to authorise the claim and submitted that I should therefore find that it was not authorised. However there is no evidence as to that and I am not prepared to look behind the actions of the Body Corporate's solicitor to see whether he was properly instructed. Further, since all of the owners of the residential units support the decision it is clear that any resolution of the members of the Body Corporate would authorise what has been done.
4. After completion of the building, the Units were sold by Mr and Mrs Pyo and with one exception now belong to the persons who are the Applicants in D172 of 2006 and the Respondents in D178 of 2006. The exception is Unit 8, which has been sold by Mr and Mrs Uzel to a Mr and Mrs Karahan. The Karahans are not on the record of any of the proceedings but since the owners of the Units and the Body Corporate led no evidence in support of their appeal in proceeding D172 of 2006 that is of no consequence. The relevant proceeding is D314 of 2007 which is the appeal by the Builder against the Fund's Current Decision which all the Unit holders support. I am satisfied that Mr and Mrs Karahan are aware of these proceedings and, along with the other Unit holders, are content to rely upon the Fund to defend its decision and abide by the Tribunal's determination of the appeal.
5. Domestic building insurance for the project was provided by HIH Casualty and General Insurance Limited ("HIH") and certificates of insurance dated 7 October 1999 for all but Unit 6 have been tendered. It is not suggested that there was no Certificate issued for Unit 6. It is just that the certificate has not been found. The Fund is, by reason of the statutory support scheme, the current entity standing in the shoes of the original insurer, HIH.

The claims

6. There were a number of claims made for indemnity under the domestic building insurance policy. Disputes concerning the Fund's decisions in regard to these were the subject of the earlier proceedings described above. It is unnecessary to go into them in detail since the Fund no longer intends to implement them.
7. On 6 June 2005, by order made in proceeding D825 of 2004, the Tribunal fixed a mediation date three months afterwards for the purpose, which is expressed in the order, of allowing the owners to submit a claim for all

defects for all Units and the common property. Pursuant to this arrangement, new claims were lodged on 3 August 2005 under cover of a letter from the solicitor for the Owners and the body corporate to the effect that they superseded all earlier claims.

8. The new claims were based upon an inspection of the building made by an engineer, Mr Djurovitch whose detailed report accompanied them. On 15 February 2006 the Fund forwarded its decision on the new claim to both the owners' solicitors and the Builder's solicitor, together with a bulky schedule, setting out which items had been accepted. This was the revised decision referred to above. In essence, most of the items claimed were accepted but some had been rejected. Both the owners and the Builder appealed.
9. On 26 March 2006 the Tribunal made the following orders:
 - (a) In proceeding D285 of 2004, all orders were suspended except for a costs order but the file was to remain pending;
 - (b) In proceeding D172 of 2006 (the owners' appeal) the Builder was joined as a respondent.
 - (c) In proceeding D178 of 2006 (the Builder's appeal) the Builder was joined as a respondent.
10. Following compulsory conferences, the Final Decision was made by the Fund on 21 March 2007 granting indemnity for the matters set out in an attached schedule. It directed the Builder to rectify the listed defects within 4 months. There was some dispute as to whether this was received by the Builder and a further copy was sent on 19 April 2007.
11. On 18 April 2007, by proceeding D314 of 2007, the Builder appealed against the Final Decision.

The hearing

12. The matter came before me for hearing on 4 February 2008. The Fund was represented by Mr Powell of counsel and the Builder was represented by its director Mr Pyo. His son also attended. A number of the Unit holders were present but were not represented. Arrangements were made with them for an inspection of the building but none of them gave evidence.
13. Mr Pyo sought an adjournment due to late service of some of the Fund's material. This related to a witness statement concerning the cost of rectifying all of the defects for which liability had been accepted. I refused the adjournment for reasons given orally at the time but indicated that I would deal only with the question whether the decision should be upheld or set aside. If the appeal were unsuccessful I would then consider what to do with the Fund's claim for a monetary order against the Builder.
14. Although it was the Builder's appeal, it was not legally represented and since the proceeding really concerned the appropriateness or otherwise of the Final Decision, I directed that the Fund lead its evidence first.

15. The facts giving rise to the making of the various decisions and the appeals were established by an affidavit of the Fund's solicitor, Mr Collier. He was not cross-examined. The substantial witness for the Fund was its expert, Dr Eilenberg.
16. Cross examination of Dr Eilenberg took place on site on Tuesday 5 February 2008. In regard to each item, Dr Eilenberg pointed it out, confirmed his view as to it and Mr Pyo and his son then asked questions in cross-examination about it. We then moved to the next item. The process took approximately 4 hours.
17. The hearing resumed thereafter at 55 King Street and I heard further evidence from Mr Pyo.
18. Having heard the evidence of the parties and having had the benefit of the visit to the premises during Dr Eilenberg's cross-examination I make the following findings as to the defects. In the following paragraphs I adopt the numbering system used in Dr Eilenberg's report. As to each item the paragraph commences with a summary of Dr Eilenberg's description of it, taken from his report.

The defects

Unit 1

19. **Item 1** - Excess water pooling into the east balcony due to inappropriate grading of the balcony floor and inadequate drainage provision.

From my own observation, this item is proven.

20. **Item 2** – There is no item 2.

21. **Item 3** - Colourbond cladding to the balustrade wallings is excessively buckled due to insufficient mechanical fixings, also support failures and cladding problems.

The Builder pointed out that most of the area in question was in fact roof space and common property. However it is plain from my inspection that the Colourbond balustrade walling system installed by the Builder was inadequately supported. It has fallen over and been put up again on a number of occasions. The support system used was to bolt the balusters to the balcony and provided lateral support by means of thin metal braces. Even if the light weight fencing would have otherwise been adequate (and I am not satisfied that it would have been) the support system has completely failed. Attempts have been made to brace it from the external wall of the building and pieces of timber and metal have been installed by the Body Corporate and by the Builder in a number of places to try and give it some rigidity and stop it from falling off the building. In one place, between Units 1 and 2, there was a short section of fencing joining the perimeter fence to the wall of the building which would have provided it with some lateral support had it been better anchored to the wall of the building. This was lying on the ground. The Builder claimed that the unit holders took it

down but an inspection of the wall and the fence shows that it was inadequately fixed in any event. I am satisfied that the metal balustrading will all have to be replaced with something more satisfactory. This item is proven.

22. **Items 4 and 5** – On the north side of the balcony obvious and unsightly jointing is evident to the base of the northern rendered walling to the inner face of the wall.

This was apparent on inspection. These items are proven.

23. **Items 6 and 7** – On the south balcony, there is evidence of excessive water pooling to the balcony due to inappropriate grading of the balcony floor and inadequate draining provisions.

The Builder maintained that the problem is due to the failure of the unit holders to clean out the drains, to them allowing debris to accumulate and, in regard to short section of fence mentioned above, placing a piece of wood beneath it which stopped the free flow of water. I am not satisfied that that is the cause of the pooling. One of the downpipes is directed to drain directly onto the roof instead of down a nearby drainpipe and it does not seem to me that the provision for disposal of the stormwater was at all adequate. There was also evidence of water penetration into the unit from this side of the building. Accordingly these items are proven.

24. **Item 9** – Timber flooring. Widespread gapping, excessive bounce/deflection and peaking of timber flooring throughout the premises.

This item is common in all of the units and in one unit (Unit 5) the floor has been replaced entirely. There is no claim with respect to the floor in that unit because it was the subject of an insurance claim under a household policy. The problems I was shown were similar in all units namely, many gaps, some being very substantial, and movement of the floor boards. The Pyos' evidence was that the system used was to lay the boards onto a rubber material and not attach them to the underlying slab. The boards were only glued to each other. Dr. Eilenberg said that the boards should have been properly secured and that the number and size of the gaps are well beyond tolerance, as are the peaking and movement in the floors. I accept his evidence. This item is proven. All the floors except for Unit 5 will have to be replaced.

25. **Items 10 and 11** – these were abandoned on site.

Unit 2

26. **Item 12** - The hot water service is located in the south balcony and there is no way of gaining way to access to it except by removing the flyscreens to bedroom 1 or bedroom 2 and climbing through a window.

At the moment, since the short section of fence referred to above is lying on the ground, access can be achieved by going through Unit 1 and walking the length of the balcony, assuming the occupier of Unit one will permit it. The

Builder argues that this is really a roof space and not a balcony. That is true but it is still a location where it has chosen to locate the hot water service. Dr Eilenberg says that the installation of the hot water service where it cannot be accessed is contrary to the regulations. It is a gas hot water service. Section 8 of the *Domestic Building Contracts Act 1995* implies into the contract a warranty by the Builder that the work will comply with all laws and legal requirements including the *Building Act 1993* and the regulations made under that Act. The Builders maintains that the way the architect designed the building in this way, which would be surprising, but no plans have been tendered to demonstrate that. This item is proven.

27. **Item 13** - Excessive water ponding throughout the south balcony due to inadequate drainage.

This “balcony” is a continuation of the balcony referred to above in my comments on items 6 and 7 and the same observations apply. The Builder suggests that the Owners should take greater care in removing debris from this area but until such time as a doorway is put in to allow access to the area that would be difficult because the area is inaccessible without climbing through a window. This item is proven.

28. **Item 14** – The south balcony balustrade does not comply with standards and is extremely unstable.

This item is proven. I repeat the comments made in regard to Item 3.

29. **Item 15** – Excessive water pooling to the west side of the balcony due to inappropriate grading of balcony floor and inadequate drainage provisions.

This item is proven. It is clear from the staining on the balcony that ponding has occurred and I accept Dr Eilenberg’s evidence that there is inadequate provision for the water to escape.

30. **Item 16** – Excessive deterioration to the metal protected coating and supporting posts, an item common throughout the building.

The steel balustrades and supporting posts were painted but the paint has broken down and the steel is rusting. In some places the underlying metal is quite badly pitted. Dr Eilenberg suggested that the appropriate thing to do is remove all the existing balustrading and either replace it or have it sand blasted back to sound metal and galvanise it. While this was being done, a temporary balustrade would need to be put in place. I accept the builder’s evidence that this is not practicable because the balustrade has been welded together on site and, to remove it, one would have to cut it into sections. It seems to me that it ought to be possible to strip it back and repaint it on site with some proper materials. I accept the Builder’s evidence that it was painted with a Dulux product called “gun metal” but whether because this was an inappropriate product or whether it was improperly applied, it is clear that the paint has broken down very rapidly, exposing the metal to corrosion. I accept Dr Eilenberg’s evidence that this should not have occurred. The rails will need to be stripped back to bare metal, treated, with

any pitting filled, and then recoated so as to provide a long lasting finish. This same solution ought to be adopted throughout the building. Apart from the break down of the paint, the balustrade seems structurally sound. This item is proven

31. **Item 17** – Water damage and staining is evident in the fibre sheet soffit linings, i.e., to the underside of the Unit 3 balcony above.

I observed that damage and accept Dr Eilenberg's opinion that the cause of the leak is from the terrace above.

32. **Items 18, 19 and 20** - Timber flooring (gaps and movement).

I make the same comments in regard to this flooring as for Unit 1. The flooring will have to be replaced.

33. **Item 21** - There is excessive variation in the clearances between the top and sides of the front door and surrounding frame.

This was apparent on inspection. The door will have to be taken down and re-hung to provide even spacing around it. This item is proven.

34. **Item 22** – The junction between the timber floor in the kitchen cabinet kickers is grouted instead of being sealed with a flexible corking compound.

I accept Dr Eilenberg's evidence that a flexible compound should have been used. This item is proven.

35. **Item 23** –There is an unfinished plaster wall lining at the rear of the free standing stove.

The area behind the stove has been tiled to provide a ceramic splash back. However the tiles do not extend below bench height to provide protection to the plaster wall behind the stove. When the hinged glass lid of the cook top is lowered a gap of bare plaster is visible over the top of the stove. This is most unsightly. I accept Dr Eilenberg's evidence that it is not good workmanship and that it needs to be sealed, primed and finished with a matching gloss paint.

36. **Item 24** - The splashback tiling beneath the rangehood has gaps at the top. This item is proven. It is curious that this gap has been left.

37. **Item 25** – Severe water damage is evident to the vanity unit laminate side panel.

Mr Pyo pointed out that the cabinet was installed very close to the shower screen. This is true but that is the way his company built it. He suggested that the source of the water that damaged the end of the vanity might have come from the top of the unit itself. However the construction of the basin makes this unlikely. The more likely source is that suggested by Dr Eilenberg, which is the shower. Mr Pyo also pointed out that the shower base is lower than the bathroom floor which, he suggested, makes it unlikely that the water would have travelled up from the base. It seems to

me that the likely source is through inadequate sealing of the shower screen to the tiled wall or floor. In any event, I accept that if the work had been done properly the damage would not have occurred. This item is proven.

38. **Item 26** – The ceramic tiling junctions within the shower enclosure are grouted instead of being sealed with flexible corking compound and the grout has cracked and dislodged.

This item is proven. I accept Dr Eilenberg's evidence that a flexible compound should have been used.

39. **Item 27** – Tap spindle holes through the ceramic wall tiling within the shower enclosure have not been sealed.

I accept Dr Eilenberg's evidence that they should have had some silicone applied to seal the gap between the fitting and the tiled surface. This item is proven.

40. **Item 28** – The junction between the ceramic floor tiles and perimeter wall/skirting tiles has been grouted instead of sealed with a flexible compound.

I make the same comments in regard to this item as for item 26. This item is proven.

41. **Item 29** – Hairline cracking is evident to ceramic floor tiles between the bathroom entry door and the showering closer.

The tiles are large and the cracks are quite noticeable. I accept that this is a defect and the item is proven.

42. **Item 30** – A ceramic tile to the base of the bathtub protrudes excessively exposing a sharp edge.

I was shown the tile. This item is proven.

43. **Item 31** – An excessive gap exists beneath the metal trough cabinet and the adjoining plaster wall linings.

This was demonstrated. The item is proven.

44. **Item 32** – The door to the metal trough cabinet was never installed by the builder and does not fit.

The door was on site and did not appear to have been fitted. This item is proven.

45. **Item 33** – The boards in the toilet floor have excessive gaps.

This was pointed out. The item is proven.

46. **Item 34** – There is distortion to the base of the fixed doors to the rear of the bathroom shower enclosure.

I inspected the fixed doors but could see no defect. This item is disallowed.

47. **Item 35** – Water damage to architrave head of window in bedroom 2.

I was shown the damage and accept Dr Eilenberg's evidence that it is a defect. This item is proven.

Unit 3 –

48. **No number** – There is excessive gapping between floor boards and excessive bounce deflection and peaking of timber flooring.

The same problems existed in this unit with the floor as in the other units. I accept that the flooring will have to be replaced. This item is proven.

49. **Items 36, 37, 40 and 42**– The skirting is coming away from the wall in the entry and living area.

These need to be refixed. These items are proven.

50. **Item 38** – The wall separating the living area and the kitchen exhibits twist at the base.

This was quite noticeable and I think that the work suggested by Dr Eilenberg is justified. The item is proven.

51. **Item 39** – The junction of the floor and kitchen cabinet kick plates is grouted instead of a flexible sealant.

I accept Dr Eilenberg's evidence that this was an unsuitable material. This item is proven.

52. **Item 41** A gap between the window architrave and the bench is filled with some hard material which is cracking and coming away.

The same comment can be made in regard to this item. This is also proven

53. **Item 43** – Water staining over ceiling over shower around fan.

A similar stain is seen around the vent pipe above the hot water service (**Item 48**). In both instances, the ceiling space will have to be checked for leaks and, after fixing whatever the source of water was, the ceilings will need to be repainted. Both items 43 and 48 are proven.

54. **Item 44** – Ceramic tiling is not level around the waste outlet, with excessive lipping.

This was demonstrated on site. I accept that the middle tile will have to be removed and replaced with a properly laid tile to avoid the problem.

55. **Item 45** – The junction between the floor and wall tiling has not been grouted with a flexible sealant.

The same problem exists with **Item 47**. In both instances the grout will have to be replaced with flexible sealant. Both items are proven.

56. **Item 46** - The shower/bath bottom rows of tiles are drumming in the one loose.
This was demonstrated. Indeed, it looks as though one of the tiles is about to come out. The item is proven.
57. **Item 49** – The hot water unit has no tray under it.
This is true but there is a floor waste immediately adjacent to the hot water service and there does not appear to be any requirement for a tray in these circumstances. This item is disallowed.
58. **Item 50** – There is a 20 mm gap between metal trough cabinet and adjoining plaster wall in the laundry needs to be filled.
This was demonstrated. This item is proven.

Unit 4

59. **Items 51, 55, 60.** These items involve lengths of skirting that have come away from the walls.
They all need to be re-attached and each of these items is proven.
60. **Item 52** – Skirting joint rough and unsightly.
This was pointed out. It needs to be sanded back and refinished. This item is proven.
61. **Item 53** – The encased opening between the living and meals area is excessively twisted and out of plumb, particularly to the west side of the opening.
It is certainly twisted and out of plumb but the question was, what is the appropriate standard and whether it is beyond tolerance. Dr Eilenberg said that the appropriate standard at the time under the Guides to Standards and Tolerances allowed walls to be within plus or minus 5mm from the perpendicular in any 3 metres of height. What I observed was well beyond that. This item is proven.
62. **Item 54** – There is extensive undulation along the length of the plaster wall to the south side of the kitchen.
I was unable to see anything here and I am not satisfied about this item. The item is disallowed.
63. **Item 56** – Unfinished plaster wall lining to the rear of the free standing stove.
This item is allowed for the reasons given earlier.
64. **Item 57** – The timber reveals of the architrave to the meals area exhibit evidence of minor water damage.
I could not see this. Possibly it has been repaired. It is not proven and so this item is disallowed.

65. **Item 58** – The plaster work around the ceiling mounted sprinkler head is considered to be finished in an unworkmanlike manner.

This was pointed out. The item is proven.

66. **Item 60** - The strip covering the floor surfaces between the hall and bathroom is poorly installed.

At the time of Dr Eilenberg's original inspection the ends were loose. They have since been nailed down but it seems to me that they need to be fixed properly. They are quite unsightly. I accept they were not installed properly in the first place so this item is proven.

67. **Item 61** – The carpet strip into bedroom 1 is inadequately fixed.

This was pointed out. It may be that the strip is too narrow or has simply been put in the wrong place but it needs to be attended to. This item is proven.

68. **Item 62** – Water staining of sealant to plaster cornice.

This had been fixed at the time of my inspection and is no longer claimed.

69. **Item 63** – Damage to end panel of vanity unit.

This damage is essentially the same as for the other vanity units facing a shower recess. In each case water damage radiates up from the corner where the wall meets the floor closest to the shower recess. I accept that the water damage has been caused through inadequate sealing of the shower recess so this item is proven.

70. **Item 64** – Sharp tile edges to the splayed external corners of the bath hob.

This was shown to me and the item is proven.

71. **Item 65** – Water staining evident over shower enclosure to ceiling fan.

I saw the staining. This item is proven.

72. **Item 66** – Plaster wall lining behind the bath is unworkmanlike.

This had been attended to before my visit.

73. **Item 67** - Water staining to the plaster cornice in the laundry.

This had also been fixed.

74. **Item 68** – Gap under overhead cupboard.

This gap should have been filled. This item is proven.

75. **Item 69** – At the rear of the laundry cabinet tiles, grout instead of flexible sealant has been used.

This item is allowed for the same reasons similar items have been allowed.

76. **Item 70** – At the junction of the laundry trough tiles, grout instead of flexible sealant has been used.

This item is allowed for the same reasons similar items have been allowed.

77. **Item 71** – There is a protruding nail in the laundry window reveal.
The nail does protrude. This item is proven.
78. **Item 72** – Ceramic floor tiling has been inappropriately cut adjacent to the floor waste.
Having examined the floor tiling and heard from the parties I am not satisfied that this is the case. This item is disallowed.
79. **Item 73** – There is water damage in the robe to bedroom 1.
This was demonstrated. This item is proven.
80. **Item 74** – The sprinkler head is not sealed to the ceiling in Bedroom 1.
Having examined the sprinkler head I think it was adequately installed. This item is disallowed.
81. **Item 75** – The sprinkler head is not sealed to the ceiling in Bedroom 2.
There is a gap between the head and the whole cut in the ceiling which needs to be attended to. This item is proven.
82. **Items 76 and 77** – These items related to the robes in Bedroom 2 and they had been attended to before my visit.
83. **Item 78** – The timber quad around flooring is missing in some places.
The difficulty with this item is determining whether that was part of the work done by the Builder. The Builder denies that it was and in the absence of contrary evidence this item is disallowed.
84. **Item 79** – Gapping in floor boards.
The same problem exists here as in other units. The floor needs to be replaced. This item is allowed.

Unit 5

85. **Item 80** – Defective floor boards.
All of the flooring has been replaced in this unit following a claim against another insurer. This item is no longer claimed against the Builder.
86. **Item 81** – Unfinished wall to rear of stove.
This allowed for the same reasons as similar items in other units.
87. **Item 82** – Excessive damage to the end of the vanity unit adjacent to shower.
This shows the same problem as in the other units and is allowed for the same reasons.
88. **Item 83** – Damage to cornice over shower.
I saw none. This item is disallowed.
89. **Item 84** – Excessive lipping in floor outside bathroom door.
This item is no longer claimed.

90. **Items 85-87** – have been attended to and are no longer claimed.

91. **Item 88** – Stain on ceiling over shower.

I was shown the stain. This item is proven.

92. **Item 89** – Slight water staining to plaster cornice.

I could not see any. This item is disallowed.

Unit 6

93. **Items 90 and 94.** Skirting boards coming away from the wall.

These need to be attached. Both items are proven.

94. **Item 91** - Defective flooring.

This is allowed for the same reasons as in the other units. The floor will have to be replaced.

95. **Item 92** – The junction of floor in kitchen cabinets is grouted in lieu of a flexible sealant.

This item is allowed. As previously stated, a flexible sealant should have been used.

96. **Item 93** – Damage to end panel of vanity unit.

This is allowed for the same reasons as for the other units.

97. **Item 95** – Flooring in toilet.

This flooring is similarly defective and will have to be replaced. This item is allowed.

98. **Item 96** – There is water damage evident in wardrobe in bedroom 1.

This item is proven.

99. **Item 97** – Water staining evident to plaster cornices.

This had been fixed prior to my inspection.

100. **Item 98** - Possible leak from a drain staining the ceiling of Unit 4 below.

There is evidence of water leaking onto the ceiling below which should not be occurring. The source of the leak must be located and repaired. This item is proven.

Unit 7

86. **Item 99** - There is a vertical hairline crack above the front entry door.

The Builder claims this was initially rejected by the insurer as being within tolerance. Having inspected the crack it is less than 1mm in width. I agree it is within tolerance.

87. **Items 100 and 101** - Hairline cracking around the front entry door.

I find that these are also within tolerance.

88. **Items 102 and 104** - Vertical hairline cracking above the cased opening between the front room and the living area.

This is more than 1mm. It is not within tolerance and will have to be repaired.

89. **Item 103** - Skirting adjacent to front entry is coming away from the wall.

This had been repaired

90. **Item 105** - Water damage to kitchen ceiling

This damage is substantial and quite obviously large quantities of water have come through the ceiling when the shower in Unit 8 is used. It is related to **Item 122**. The source of the leak in Unit 8, almost certainly the shower, needs to be repaired and the damage in this unit made good. This item is proven.

91. **Item 106** - Excessive gap between the floor and the kitchen cabinets.

This is proven. The floor needs to be replaced for other reasons which will deal with this problem.

92. **Item 107** - The junction of floor in kitchen cabinets is grouted in lieu of a flexible sealant.

This item is proven. As previously stated, a flexible sealant should have been used.

93. **Items 108 and 109** - Damaged tiles in the laundry and the bathroom have been replaced but do not match existing.

This is certainly the case. The replacement tiles look very different. The tiles were replaced in response to an earlier claim which the insurer accepted and the Builder claims that the Insurer's inspector agreed that the replacement tiles did not need to match. I do not accept that what has been done is an adequate repair of the earlier defective tiling. The tiles have to match and if it is necessary to retile the whole floor to achieve that, then that is what must be done now. This item is proven.

94. **Item 110** - Excessive gaps between floor boards in the toilet.

This is proven. It is a small area and the Pyos suggested that the boards could be moved but this does not address the reason the gaps appeared in the first place, which is due to an inadequate method of laying them. I think this floor also needs to be replaced.

95. **Item 111** - Skirtings coming away from the wall in the rear hallway

I saw nothing wrong with the skirting there. This item is disallowed.

96. **Item 112** - Cornices in Bedroom 1 water stained.

This item is proven.

97. **Item 113** - Cornices in dividing wall to the bedrooms water stained.

This item is proven.

98. **Item 114** - Crack in cornice mitre

I saw nothing wrong with the cornice. This item is disallowed.

Unit 8

99. **Items 115 and 116** - Defective flooring.

This relates to excessive gaps and bounce and deflection. As with the other units, the flooring will have to be replaced.

100. **Item 117** - Some of the quad in the flooring is missing

There is the same difficulty with this item as discussed before, namely, whether that was part of the work done by the Builder. In regard to this unit there was no specific denial that the Builder put it in but since there is some doubt in the matter this item is disallowed.

101. **Item 118** - The junction of floor in kitchen cabinets is grouted in lieu of a flexible sealant.

This item is proven. As previously stated, a flexible sealant should have been used.

102. **Item 119** - There are six hairline cracks in the bathroom tiles.

This is certainly so and the tiles should be replaced. The real issue between the parties was whether the whole floor should be replaced if, as seems likely, the replacement tiles cannot be matched. In this regard I accept Dr Eilenberg's view that, if matching replacement tiles cannot be found the whole floor must be retiled.

103. **Item 120** – Grout instead of flexible sealant was used in the bathroom.

This has already been fixed.

104. **Item 121** – The junction between the floor tiles and the wall tiles is grouted instead of sealed with a flexible sealant.

This item is proven

105. **Item 122** – Source of water staining to Unit 7 below.

This is dealt with in **Item 105**. The source of the leak must be found and repaired. From the volume of water involved and the fact that it occurs when the shower is used, it is clear that something is wrong with the waterproofing of the shower or the drainage of the shower recess. I do not accept the Builder's suggestion that it is to do with the way the shower is used by the occupant of Unit 8.

106. **Item 123** – Two loose lengths of skirting.

These need to be attended to. This item is proven.

107. **Item 124** – There is considerable water staining to the plaster ceilings on the southern side of Bedroom 1.

This has already been fixed.

108. **Item 124A** – There is excessive deterioration to the metal balustrading.

This relates to Item 16 and I refer to my comments in regard to that item.
This item is proven.

Common Body Areas

East Foyer/Stairwell

109. **Item 125** – Electrical cabling to the front door is exposed in the East Foyer

Bare wiring is not exposed but the wiring has not been run through conduits and the finish is very rough. I accept Dr Eilenberg's evidence that it needs to be reinstalled properly through conduits and grommets. This item is proven.

110. **Item 126** – Water staining / deterioration to the plaster cornice in the eastern stairwell.

I accept Dr Eilenberg's evidence that this must be repaired after the source of the leak is identified and fixed. This item is proven.

West Foyer/Stairwell

111. **Items 127 and 128** – Water staining / deterioration to the plaster cornice and ceiling in the western stairwell.

I accept Dr Eilenberg's evidence that this must be repaired after the source of the leak is identified and fixed. This item is proven.

112. **Items 129** – Water staining / deterioration to the timber skirting boards on the first floor foyer in the western stairwell.

I accept Dr Eilenberg's evidence that this must be repaired after the source of the leak is identified and fixed. This item is proven.

113. **Item 130** – Electrical cabling to the front door is exposed in the West Foyer

This is similar to the situation in the Eastern Foyer. In both cases the installation is very rough and needs to be rectified. I accept Dr Eilenberg's scope of works is required. This item is proven.

114. **Item 131** – Plaster linings to skylight shaft badly finished.

Some work appears to have been done on that. This item is not proven although I note that the whole foyer will have to be repainted as a result of the repair work referred to above and so the disallowance of this item is probably of no practical significance.

Car Park

115. **Item 132 - 3** – There are numerous water leaks in the car park.

I saw evidence of leaking in a number of places. In one place, someone has installed some ordinary guttering to collect the leaking water and direct it to a suitable drainage point. That is not a suitable long term solution. The source of the leaks must be located and fixed. This item is proven.

Facade

116. **Item 134** – Decorative moulding has fallen off.

How this occurred is not explained but it was high up on the wall in a position where it could not have been forcibly removed. I infer that it has fallen off due to not having been fixed correctly. It will need to be replaced and the wall made good. This item is proven.

Main eastern entry

117. **Item 135** – Deterioration of metal supports.

These have deteriorated. Dr Eilenberg says they should be removed, new ones manufactured and hot-dip galvanised and repainted. I think this would give the Owners more than they paid for, which was for properly painted supports. I accept the Builder's view that they can be painted and I think the scope of works should not go beyond stripping them back to bare metal and properly painting them. This item is proven.

118. **Item 136** – Considerable water damage to the soffit lining.

The Builder suggested that this was caused by windblown rain but I am not satisfied that this is the case. The more likely source is through the roof from inadequate drainage. In any case, considering the age of the soffit and the fact that it is undercover, the extent of the deterioration is unacceptable and would not have occurred had the portico been properly constructed.

119. **Item 137** – External letter boxes exhibit an unacceptable level of corrosion.

The Builder suggested that the letter box set was a proprietary item that is simply showing the signs of its age. I think it was not suitable for the purpose. Part of it appears to be stainless steel and other parts are rusting. It needs to be replaced with another unit of reasonable quality.

Main West Entry

120. **Item 138** – Deterioration of the metal supports on either side of the entry

I repeat what I said in regard to **Item 135**. The same applies here.

121. **Item 139** – Considerable water damage to the soffit lining.

I repeat what I said in regard to **Item 136**. The same applies here.

122. **Item 140** – Evidence of overflow via the box gutter to the portico roof

Dr Eilenberg says this is due to an inadequate sized guttering. The guttering should have been of an appropriate size. This item is proven.

Unit 3 external

123. **Item 141** – Box gutter small and difficult to clean

This item is proven.

124. **Item 142** – Balustrade and walling low.

I was not satisfied as to this item.

125. **Item 143** – Vertical cracks in fibre cement sheet in balustrade wall.

There was such cracking. This item is proven.

126. **Item 143A** – Fibre cement panelling has come away and been replaced with plywood

No one was able to show me this. I am not satisfied as to this item.

Unit 4 external

127. **Item 144** – Cracking in fibre cement at joints

There was such cracking. This item is proven.

128. **Item 145** – Sky light loose

I was not satisfied as to this item. Some work appears to have been done to the skylight since Dr Eilenberg's inspection.

129. **Item 146** – Detailing to the fascia has come adrift/Cracking in joints

These items are proven.

130. **Item 147** – The fascia fibre cement sheet has broken away.

This item is proven.

Unit 5 – North Terrace

131. **Item 148** – The fibre cement sheet panelling to the face of the terrace has come away

This item is proven.

132. **Item 149** – Timber quad to the soffit lining has dislocated

This item is proven.

Unit 8

133. **Item 150** – Widespread cracking to the fibre cement sheet cladding.

There was such cracking. This item is proven.

134. **Item 151** – A small section of the light weight moulding has broken away.

This item is proven.

Roofing

135. **Item 152** – The roof gutter is too small and is holding water

This was not shown to me on site and it is uncertain whether any such problem has been fixed. I am not satisfied as to this item.

Rectification or compensation?

136. Throughout the inspection, Mr Pyo and his son said in regard to each of a number of non-contentious items that they would attend to it. I said to them more than once that they should not assume that they will have that

opportunity. All I can do in this proceeding is decide the issue raised, that is, the appeal against the Final Decision.

137. At the start of the hearing Mr Powell indicated that the Fund would seek a monetary order against the Builder for the cost of engaging another builder to carry out the work. A witness statement as to the amount the rectification would cost was filed and served, although late.
138. I cannot see how I can make a monetary order against the Builder in proceeding D314 of 2007 as presently constituted. There no counterclaim, there is also no decision by the Fund that it or the Builder pay any amount to the Owners of the Units or to the Body Corporate. If such a decision is to be made, it may be that the Builder will seek to appeal against it. As to the other proceedings, no monetary relief is sought against the Builder in those either.
139. Since I indicated to the parties that I would deal with this aspect of the matter separately, I will direct that this matter be listed for directions before me as soon as possible. At that time I will receive any further submissions concerning the orders that I can make in the proceedings as presently constituted in the light of the findings of fact I have made.
140. In the meantime, the following order is made in proceeding D314 of 2007:
 - (a) the appeal is allowed as to the following items, namely, 10, 11, 34, 49, 54, 57, 62, 66, 67, 72, 74, 76, 77, 78, 80, 83, 84, 85, 86, 87, 89, 97, 99, 100, 101, 103, 111, 114, 117, 120, 124, 131, 142, 143A, 145 and 152.
 - (b) As to the rest of the decision of the Respondent made on 18 April 2007, subject to the findings made in the accompanying reasons for decision as to the scope of work, the appeal is dismissed.
 - (c) This proceeding together with proceedings D825 of 2004, D172 of 2006 and D178 of 2006 are fixed for directions on a date as soon as practicable to be fixed by the Registrar for submissions as to the further conduct of all proceedings.

ROHAN WALKER
SENIOR MEMBER
DOMESTIC BUILDING LIST