VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D288/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building – defects – damages for breach of warranties – how assessed – evidence – expert's duty to Tribunal

APPLICANT	Gary Levin
RESPONDENT	C & J Designer Homes Pty Ltd (ACN: 005 236 144)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	2 – 5 March 2015. Submissions on 25 May 2015
DATE OF ORDER	5 June 2015
CITATION	Levin v C & J Designer Homes Pty Ltd (Building and Property) [2015] VCAT 808

ORDER

1. Order the Respondent to pay to the Applicant $76,415.81.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr K. Oliver of Counsel
For the Respondent	Mr J. Forrest of Counsel

REASONS

Background

1. The Applicant ("the Owner") is the owner of a property in Wicklow Street Ormond. The Respondent ("the Builder") is and was at all material times a builder.

2. By a domestic building contract dated 16 April 2007 ("the Contract") the Builder agreed to build a house on the property ("the House") in accordance with certain plans and specifications forming part of the Contract.

3. The House was completed in May 2009 whereupon the Owner took possession. Shortly afterwards he contacted the Builder complaining about water ponding on the rear patio. He was told that he should wait until the end of the three month maintenance period and then send a list of items of concern and they would all be dealt with together. Pursuant to this advice he sent a list of defects to the Builder on 16 August 2009.

4. Thereafter there were various meetings over a period during which the Builder attended to some matters but not others. The Owner had a variety of complaints but the most significant related to water ingress, some of which the Builder blamed on unusually heavy weather.

5. Despite a number of attempts by the Builder the majority of the Owner's complaints were not answered or addressed to his satisfaction. Finally, in July 2013 he engaged a building expert, Mr Brownhill to inspect the House.

Assessments of the alleged defects

6. Mr Brownhill's first report, which is dated 3 July 2013, identified sixteen defects and assessed the cost to rectify them at $85,918.80, allowing for a Builder's margin and GST.

7. Mr Brownhill carried out a further inspection on 8 July 2014 and reported a total of twenty defects with a total rectification cost of $120,662.30.

8. Copies of these reports were provided to the Builder which then sought advice from its own building expert, Mr Cheong. Mr Cheong inspected the House on 20 August 2014 and produced a report in which he agreed with some of Mr Brownhill's findings and disagreed with others. He assessed the cost of fixing the defects that he found at $28,803.06, if they were to be rectified by someone other than the Builder.

9. Mr Brownhill's original costings were done on a "charge out rate". This was criticized by the Builder's solicitors and so in a supplementary report dated 3 November 2014 he reassessed the costings on an hourly basis.

10. In his further supplementary report dated 19 February 2015 he arrived at the figure of $97,728 for the cost of rectification assessed on a charge out rate. This compared with his costing of $95,446.71 if assessed on an hourly rate.

11. On 19 January 2015 I ordered that the experts confer in an effort to limit the areas of difference and prepare a joint Scott Schedule setting out a comparison of their respective positions. This was done and it was signed by the experts.

12. The Scott Schedule contains columns for the opinion of each expert as to each alleged defect and the means of rectification. In another column was a statement as to the extent of the agreement or disagreement concerning the item.

13. Although the Scott Schedule had been signed by Mr Cheong, he resiled from what he stated in it during the hearing in some respects, saying that the Builder was unhappy with him signing the Scott Schedule.

14. The primary duty of any expert is to the Tribunal, not to the party that engages him. If experts confer and reach agreement as to their opinions and record that agreement in a Scott Schedule then that is presumed to be a record of their respective opinions at that time and whether that suits one or other of the parties is immaterial. Of course, an expert is entitled to change his mind. The important thing is that he expresses his own opinion when he gives his evidence.

15. Mr Oliver submitted that I could not be confident that Mr Cheong was giving evidence of his independent opinion. I will make no such general finding but where either expert appears to have changed his mind on an issue I will take into account that he was formerly of a different opinion.

The hearing

16. The matter came before me for hearing on 2 March 2015 with five days allocated. Mr K. Oliver of Counsel appeared for the Owner and Mr J. Forrest of Counsel appeared for the Builder.

17. The only lay witness was the Owner who adopted his witness statement. I visited the site on the first day with the parties and their experts and legal representatives and the various items in dispute were pointed out to me.

18. The evidence of Mr Brownhill and Mr Cheong was given concurrently and then they were cross examined individually by Counsel. This took until the final day of hearing. Counsel then requested some days to prepare final submissions.

19. The matter was adjourned to 12 March 2015 for submissions. Unfortunately, due an administrative mistake, the hearing was postponed and it did not come back before me until 25 May 2015, when Counsel made their closing submissions.

The cladding

20. The main area of debate concerned the light weight polystyrene cladding of the upper storey of the House. Mr Oliver submitted that the Contract provided that it was to be in accordance with a cladding system known as

"Insulclad". Mr Forrest said that there was no contractual requirement that that system be used.

21. The Specifications provided for "100mm medium density foam to light weight external walls" without any further description. Architectural drawing A4 dated 2 January 2007 (*Tribunal Book p.233*) detailed the cladding as being "INSULCLAD FOAM EXTERNAL CLADDING".

22. Clause 16.0 of the Contract provides (inter alia):

> "If there is any inconsistency between these contract conditions and related contract documents they take priority in the following order:
>
> - these Contract conditions;
> - the Specifications; then
> - the Plans."

23. Mr Forrest said that there was such an inconsistency and the Specifications take priority. He submitted that it was therefore open to the Builder to use any foam cladding that matched the description in the Specifications.

24. I do not think there is any inconsistency between the Specifications and the Plans. The former describe the cladding system in general terms whereas the Plans describe it specifically.

25. Moreover, according to the evidence, polystyrene cladding is not a deemed-to-comply cladding system within the meaning of the *Building Code of Australia* ("the Code") and it was necessary for the Builder to satisfy the Relevant Building Surveyor that the system that it proposed to use was an approved alternative solution that would meet the performance requirements of the Code.

26. I am satisfied that the Contract required the Builder to use the Insulclad system for the lightweight cladding on the House. Whether or not it did so is unknown. No evidence has been given by the Builder as to what system was used and no documentation has been discovered which might have identified it, despite the Owner's solicitors having pressed for such discovery.

27. Mr Oliver contended that Mr Forrest had conceded at the start of the case that the Insulclad system had not been used but Mr Forrest said that he made no such concession. Although I recall that there was some discussion on the subject at that time I have no note of any concession. In any case, nothing turns upon whether or not the concession was made because the evidence relied upon by the Owner is that the Insulcad system was not followed anyway and the Builder does not assert that it was.

The defects

28. Of the twenty defects claimed there was agreement about many of the matters that were previously in dispute. The main issue related to the

polystyrene external cladding as to which there was considerable debate concerning methods of rectification.

29. Submissions were made by both counsel concerning the manner in which damages for defective workmanship should be assessed. I was referred to the cases of *Robinson v. Harman* (1848) 154 ER 363 at 365; *Bellgrove v. Eldridge* [1954] HCA 36; and *Tabcorp Holdings v. Bowen Investments Pty Ltd* [2009] HCA 8.

30. On that subject, in the case of *Clarendon Homes Pty v. Zalega* [2010] VCAT 1202, I said (at para 157):

> "I think the following principles concerning the assessment of damages for the breach by a builder of a domestic building contract can be spelled out from the cases referred to:
>
> (a) Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract *(Bellgrove);*
>
> (b) The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt *(Bellgrove);*
>
> (c) Reasonableness is a question of fact *(Bellgrove)* and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position *(Tabcorp per Rares J.)*;
>
> (d) In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole The decision in *Ruxley* suggests that account can be taken of the following matters at least:
>
> (i) Whether and to what extent the work, although not in conformity with the contract, is nonetheless serviceable;
>
> (ii) Whether and to what extent the defect has affected the value of the work or the building as a whole;
>
> (iii) The cost of rectification, the proportion that the breach bears to the cost of rectification and whether the cost of rectification would be wholly disproportionate to the real damage suffered by reason of it;.
>
> (iv) The likelihood that, if rectification cost is awarded, the sum so ordered will actually be spent on rectification. Obviously, a successful plaintiff can spend his damages as he sees fit but this

may be a useful indicator of whether the amount sought is greater than the real loss suffered.

Quite obviously, this list is by no means exhaustive. Other matters might be relevant according to the facts of the particular case. For example, the innocent party might have elected to accept the non-conforming work, whether by taking the benefit of it or otherwise; the owner might have waived the breach or so acted after becoming aware of the breach as to create an estoppel or to make rectification impracticable. There might also be many circumstances in which it could be argued that an award of rectification cost would give the innocent party an uncovenanted profit *(Radford)*.

(e) If it would be unreasonable in the circumstances to award rectification cost, what damages will compensate the owner for the breach? Matters to be taken into account might include:

(i) the magnitude of the breach;

(ii) the significance of the breach to the owner;

(iii) whether the owner, after becoming aware of the breach, has acted unreasonably so as to make rectification more expensive;

(iv) whether and to what extent an owner might have accepted a benefit from the non-conforming work that should be taken into account;

(v) since the breach is not to be rectified, the reasonable cost of mitigating the effect of it;

(vi) compensation for any lesser appearance or functionality;

(vii) loss of amenity;

(viii) if it appeared likely that less than complete rectification would be undertaken, the cost of that.

Again, this is not intended to be an exhaustive list. It must not be forgotten that the object is to fully compensate the innocent party for the breach but not provide him with an "uncovenanted profit"."

The expert evidence

31. Mr Forrest criticized Mr Brownhill's costings as having been made "on the run" but I do not think that they were. Full breakdowns were given and the figures were gone into during the hearing. He suggested that, because Mr Brownhill's assessments changed during the interlocutory stages and the hearing, his costings should be considered unreliable. As stated above, Mr Brownhill assessed the costing on two different bases following criticism by the Respondent's solicitors and that produced two different figures, although the difference between them was not large. Further adjustments were made following his discussions with Mr Cheong.

32. It is not uncommon for costings of experts to change and evolve as more defects are discovered, further information is provided, different methods of

rectification are explored or discussions take place between the experts. Mr Cheong's assessments also changed.

33. Mr Forrest also said that, because Mr Brownhill had quoted to rectify the work, he was not approaching the task of assessment as an independent expert. Certainly, what someone will want to be paid for doing work is not necessarily the same as what it would reasonably cost in the marketplace to have it done. Someone else might be willing to do it for a lesser price.

34. Mr Forrest said that Mr Brownhill was advocating his preferred method of rectification as a quoting builder. The methods that he proposed were certainly his preferred methods or he should not have suggested them. I must be satisfied that what is suggested is the appropriate course to adopt and I must also be satisfied as to the costing. In considering Mr Brownhill's evidence I am aware that he has quoted to do the work but that does not mean that I should reject his evidence if I prefer it to that of Mr Cheong.

35. I will deal with the items in the order set out in the Scott Schedule.

Item 1.1 Repairs to leaking balcony.

36. The upper floor of the House is clad in polystyrene panels which have been rendered. The upper balcony at the front of the House has been constructed up to the wall and the face of the polystyrene wall extends down below where the top of the balcony abuts the House. Water is leaking from the balcony into the House. It is agreed that the interface between the wall and the balcony should not have been constructed in this way.

37. As stated above, on construction drawing A4, the foam cladding to be used is identified as "INSULCLAD FOAM CLADDING". Reference has therefore been made by Mr Brownhill throughout his report to the requirements of that foam cladding system as set out in the Insulclad installation manual ("the Insulclad manual").

38. The direction in the Insulclad manual relevant to this item was that the bottom edge of the cladding must be kept clear of any adjacent surface by a minimum of 40mm. The wall cladding should therefore have stopped above the balcony tiling by 40mm and the gap should then have been flashed.

39. Mr Brownhill said that an aluminium flashing installed against the timber frame and behind the cladding is essential to avoid moisture penetration through the cladding. He referred to the detail in the Insulclad instructions as to how it should have been constructed.

40. He said that, in order to rectify the defect, the balcony tiles near the external wall cladding need to be removed and a straight line cut into the polystyrene a minimum of 600mm above the balcony surface. The polystyrene can then be removed and an aluminium right angle flashing installed against the frame and fixed to the top of the cement sheet balcony substrate. The base of the flashing should then have a membrane applied, the tiles for the cladding replaced and the wall re-rendered. For this he

assessed a cost of $8,400.50 for labour and materials. Following preparation of the Scott Schedule, that figure was reduced to $6,059.50.

41. Mr Cheong produced a sketch of an alternate rectification method whereby the bottom of the wall panel would be cut out, the hole up to the level of the balcony tiles would be filled with screed and the front covered with a skirting tile which would then be over-flashed with a flashing cut into the polystyrene panel. Before being filled with screed the bottom cavity would have a flashing angle inserted to direct water from the gap between the tile substrate and the timber frame of the House. Weep holes would also be cut into the polystyrene to ensure drainage. For this he assessed a cost of $1,375.

42. Mr Brownhill said that weepholes could not be cut into the polystyrene because water would soak into the material. No detail was produced from the Insulcald manual to say that this would be acceptable.

43. It seems to me that the scope of works suggested by Mr Brownhill is closer to what would be necessary in order to meet the requirements of the Insulclad manual, which is what the Owner was entitled to under the Contract. It also appears to be a more thorough approach.

44. I do not think that it would be unreasonable to allow the Owner the cost of this scope of works. I have to bear in mind that the Owner will have to find someone to carry out the rectification work. The rectifying builder will be responsible for the finished job and I should not assume that such a person will be willing to undertake Mr Cheong's method, which seems to be rather experimental and have an uncertain outcome. It is more probable that any quoting builder will price the job using methods in line with the Insulclad manual which is an approved system. Mr Brownhill's method is more likely to reflect the true cost of repair and so his figure will be allowed.

Item 1.2 Repair soffit to front entry.

45. This item was agreed at $223.

Item 2.1 Junction between the lower garage roof section and the upper wall.

46. This junction is also leaking and it is common ground that it needs to be properly flashed. Mr Brownhill has suggested a similar repair method to the one to be adopted for the balcony.

47. He recommends cutting the polystyrene panels 600mm above the roof surface and installing a right angled aluminium flashing against the wall frame to fall away from the House which will extend a minimum of 200mm from the wall. The polystyrene is then to be replaced and made good. For this he assessed a cost of $4,025 but during the hearing this was reduced to $3,507.00.

48. Mr Cheong considers that unnecessary and suggests a less comprehensive scope of works. He says that part of the problem is due to the existing lead

flashing not having sufficient fall and this can be improved by cutting the bottom of the polystyrene panels higher so as to achieve a greater rake and installing a tuck flashing, which is an over-flashing on the external face of the polystyrene wall, the top of which is inserted into a groove to be raked into the face of the wall on an angle. For this he has assessed a cost of $886.

49. Again, I prefer Mr Brownhill's recommendation which seems to me to be directed to achieving what the Insulclad manual required. Mr Cheong's suggestion on the other hand would not give the Owner what was contracted for but rather, a method quite different from the recommendation of the manufacturer of the cladding. I do not think that it is unreasonable to allow Mr Brownhill's method and his costing of $3,507.00.

Item 2.2 Plaster ceiling in garage

50. This was damaged by the water leaks as a result of the previous defect. Rectification has been agreed at $625.

Item 3.Wall penetrations

51. There is a pergola at the front of the House and the beams penetrate through the polystyrene cladding at the front door. It is accepted that they have not been correctly sealed and there has been some water penetration into the wall cavity. The reworking of these flashings was initially agreed upon at $1,550.00 but that was reduced during the hearing to $!,429.50, which will be allowed

Item 4. The windows.

52. Mr Brownhill said that the upper windows were leaking. He produced photographs showing what he described as water damage to the window reveals. Mr Forrest pointed out that, in his first report, Mr Brownhill had described the defects in different terms but I see no significant difference. He said in his first report that the upper windows were leaking.

53. Mr Brownhill said that the required rubber seals have not been installed in the window frames on the upper storey and that the windows will need to be removed in order to install the seals. There is also an inadequate slope of the windows sills and no 5mm gap around the windows that Mr Brownhill says was required by the Code. He said that, as a consequence, there were leakages through the windows that need to be addressed.

54. Although no seals were visible, Mr Cheong said that it was by no means certain that the seals were not present and that they might simply have been covered with render. However he acknowledged that there was a defect, although he said that the sills could be rectified and the leaks could be addressed without removing the windows.

55. It was acknowledged that, if the rubber seals are present, they should be above the render to direct water away from the window. Mr Cheong said that the seals, if not present, could be inserted with the windows in situ and

demonstrated how he thought that could be done. Mr Brownhill disagreed that this was a practical course.

56. The Owner is entitled to be placed in the position in which he would have been had there been no breach. There is neither any evidence nor even any indication that these rubber seals have been fitted and I prefer Mr Brownhill's opinion that they have not been. It is not unreasonable to allow the Owner the cost of rectifying leaking windows.

57. As to the cost of rectification, a rectifying builder would probably cost this part of the job according to the time and materials expected to be required. I think it unlikely that he would assume that he would be able to fit these rubbers without removing the windows. I therefore prefer Mr Brownhill's opinion. His assessment of the cost of this item was $5,050.50 and Mr Cheong's was $2,622.50. During their joint evidence Mr Browbhill's figure was reduced to $4,875.50 by deleting the scaffolding and that will be allowed.

Item 5. Lower roof apron.

58. Mr Brownhill said that the apron flashings over the lower garage roof are incorrectly installed and can admit water from wind-blown rain. He has identified several faults.

59. First, although the flashing has been cut around the ribs in the roof sheeting, too great a gap has been left, allowing wind blown rain to pass between the roofing and the underside of the flashing.

60. Secondly, an over flashing suited to a brick cladding has been fitted which is unsuitable for use with foam cladding. He provided a detail of the flashing system required by the Insulclad manual. He has suggested a similar rectification method to the front flashing for which he originally assessed a cost of $1,769.50, which includes the next item.

61. Mr Cheong considered this to be a repeat of Item 2 but I do not accept that it is. It is a different roof. He suggested a similar treatment to his recommendation for Item 2. Again, I do not think that it is unreasonable for the Owner to receive what he contracted for and so I will allow Mr Brownhill's revised assessment which is $1,047.00, which includes the next item.

Item 6. Defective roof sheets.

62. It appears to be acknowledged that the roof sheets to the west near the front of the House are defective and have to be replaced. The cost is included in Mr Brownhill's costing of the previous item.

Item 7. Weep holes in brickwork.

63. These are obstructed and the cost of cleaning them out is agreed at $405.

Item 8. Upper storey cladding

64. The polystyrene cladding on the upper storey walls of the House has no PVC "L– bend" to protect the polystyrene from ingress of moisture as required by the Insulclad manual.

65. Mr Brownhill has suggested a similar repair method to the other items in regard to the flashing that is, cut the polystyrene in a straight line a minimum of 600mm above the roof surface, remove the excess, replace the polystyrene panel with the PVC "L-bend" and re-render the whole wall. For this he has assessed a cost of $2,805.00. In the Scott Schedule this was revised down to $2,530.00.

66. Mr Cheong suggested an alternative method involving the chasing of a raked groove into the polystyrene and the insertion of a tuck flashing, similar to what suggested for the front wall of the House over the garage. He constructed a model, which was tendered, to show the methodology that he would adopt. I also had the advantage of a DVD recording, indicating that the necessary groove could be cut fairly easily by a skilled tradesman.

67. Again, I have to assess what this is going to cost the Owner to rectify and I cannot assume that a quoting Builder will be willing to undertake the method proposed by Mr Cheong. I think the likelihood is that he will quote on a method to produce what is required by the Insulclad manual and therefore Mr Brownhill's method is more likely to reflect the true cost of repair. His revised figure will be allowed.

Item 9. The box gutter

68. The front wall of the House has a parapet behind which there is a box gutter into which the hip roof of the upper storey of the House drains. It drains in both directions to a rain head on each side of the House.

69. There is little or no fall in much of the gutter and the valley iron of the internal valley that runs into it has been flattened and bent in an effort to direct water towards the rain head on the west side. There is also an articulation in the parapet wall near where the valley drains and where water appears to have been pooling. The box gutter is leaking.

70. Mr Brownhill said that Section 3.5.2.4 of the Code required the box gutter to have a fall of a least 1 in 100 and suggested that it be reconstructed in order to achieve this fall. He said that to do this the parapet flashing capping would need to be removed along with the base timbers for the box gutter. The framing for the gutter could then be reconfigured to allow for a minimum step down of 30mm at the higher end of the gutter to form a tray so as to avoid water building up and flowing back into the tiled roof cavity. In essence, his methodology involves splitting the box gutter into two. For this he assessed a cost of $5,932.

71. Mr Cheong agreed that the box gutter needs to be reworked but suggested that this would be accomplished by a labourer, roof tilers and a carpenter to

rework the base boards and support timbers and then a roof plumber to rework the gutters and flashings. For that he assessed a cost of $1,200.

72. From the view it seems to me that the problem is more appropriately described by Mr Brownhill and that his greater scope of work will be required. I will allow his assessment of $5,932.00.

Item 10. Valley tiles.

73. Some valley tiles have been displaced. It is agreed that an amount of $450 should be allowed to refix them.

Item 11. Internal stair.

74. The bottom riser to the internal stair is too high. It was agreed that to reconfigure the stairs will cost $670.

Item 12. Sink.

75. Mr Brownhill says that there is no sealant between the sink and the underside of the vent and that this is required to avoid water penetrating into the joinery below. He has assessed $75 for that and that figure was agreed.

Item 13. Architraves.

76. There are gaps in the architraves in both windows and doors. This is an agreed item at a figure of $95.

Item 14. Unpainted PVC pipes.

77. It was suggested that these needed to be painted but it was finally agreed to delete this item.

Item 15. Edges of doors.

78. The tops and bottoms of the external and internal doors were not sealed. This is an agreed item and the figure to be allowed is $590.

Item 16. The exhaust fan.

79. The lower storey powder room exhaust fan was not ducted to the outside of the building. This item is agreed at $950.

Item 17. En suite shower base.

80. According to Mr Brownhill, water is leaking out of the shower base along the grout lines resulting in efflorescence in the tiling outside the shower. He said that this was confirmed with a thermal imaging camera. He concluded that there were excessive gaps and pockets under the tiles, caused by the method used to apply the adhesive with a notched trowel.

81. Mr Brownhill said that the shower screen, towel rails and shower base need to be removed, the base cleaned and a right angled water stop installed. He said that the base then needs to have a membrane applied and the tiles re-laid. He assessed the total cost at $1,795.00.

82. Mr Cheong offered two possible explanations for the efflorescence and said that it was an Owner-maintenance problem. He said that there was no evidence that the substrate was affected and that no rectification was required. However the thermal imaging photographs taken seem to support Mr Brownhill's opinion that water is escaping through the base and tracking along the grout lines.

83. Mr Cheong said that, if I were to find that the cause was as suggested by Mr Brownhill, he had a similar scope of works which was costed at $1,490.00. The work that he suggested was confined to the shower base itself.

84. I prefer Mr Brownhill's scope. Since the whole purpose of the rest of the work is to ensure that the base of the shower is watertight, it seems likely that a rectifying builder would want to replace or re-install the water stop to ensure that it was watertight.

Item 18. Rear paved area

85. At the rear of the House there is a large open area that has been concreted and tiled. Mr Brownhill says that it has insufficient fall. He says that the Code requires it to have a 25mm fall over the first one metre from the House. He said that he measured it as level or with a fall of only 6mm.

86. In his report Mr Brownhill said that to achieve the required fall one would have to break up the existing concrete and relay it and retile it which he costed at $13,065.

87. Mr Cheong suggested that a perimeter drain could be cut into the concrete with a grate on top and that could then be connected to the stormwater. In the joint report he costed this suggestion at $4,480.00.

88. The Contract did not provide for a perimeter drain. Whereas the reconstruction urged by Mr Brownhill would give the Owner what the Contract required, Mr Cheong's method would give him something different. Would it be unreasonable to order the reconstruction?

89. The paved area in question abuts two living areas; that is, the family area, which opens onto it through a wide doorway, and the meals area, which overlooks it through a window.

90. The same tiling has been used inside and outside which gives a "flow through" visual effect. Although it was not suggested that the drain would be particularly unsightly it would break the continuity of the tiling. The Owner would have to put up with the sight of it and he would also have the ongoing maintenance of cleaning it regularly.

91. The other point is whether this would be effective to drain the area. Certainly a perimeter drain would intercept water travelling in the direction of the House but it would not cause water to run off the area as rapidly as the greater slope required by the Code that would be achieved by the reconstruction.

92. For these reasons I cannot say that it would be unreasonable to allow the Owner the cost of reconstruction. Mr Brownhill reduced his figure during evidence on account of the cost of the tiles to $12,415.00 and that figure will be allowed.

Hole in flashing

93. This is covered by Item 6.

Bin hire

94. This was agreed at $990.00.

Further defects alleged

95. In a supplementary report provided at the hearing Mr Brownhill identified further defects as follows:

Painting ground floor ceiling

96. As part of the rectification of the plaster at the entry, Mr Brownhill allowed for the repainting of the ceiling at the entry. He suggested later that, because the ceiling is continuous and there is no demarcation point to which the fresh painting could be brought, the whole of the ground floor ceiling should be repainted to avoid a noticeable paint line in the ceiling. For that he has assessed a base cost of $1,980.00.

97. Mr Cheong said that this was unnecessary and that a skilled painter would be able to blend the new with the old so that it would not be noticed.

98. Having inspected the area I prefer the opinion of Mr Cheong.

Support to pergola beam

99. Mr Brownhill said that a crack that was noticed earlier in the front render had widened and that the pergola beam was inadequately supported. He assessed a cost of $160.00 to support the beam and make good the external finishes. The amount of $150 is claimed and since I am satisfied as to this item, that amount will be allowed.

Drummy tiles at porch entrance

100. Mr Brownhill said that a row of tiles on the front porch was drummy. He demonstrated this on site during the inspection. He assessed a base cost of $82.50 for rectification. The amount of $75.00 is claimed and since I am satisfied as to this item, that amount will be allowed.

Summary of defects and costings

101. The totals of these base allowances plus margin, contingency and GST is $76,415.81, calculated as follows:

Front balcony	$6,059.60
Repair soffit to front entry	$ 223.00
Garage roof	$3,507.00

Garage ceiling	$ 625.00
Wall penetrations at pergola	$!,429.50
Upper windows	$4,878.50
Lower roof	$1,047.00
Weep holes	$ 405.00
Upper cladding	$2,530.00
Box gutter	$5,932.00
Valley tiles	$ 450.00
Internal stair	$ 670.00
Sink	$ 75.00
Architraves	$ 95.00
Edges of doors	$ 590.00
Exhaust fan	$ 950.00
En suite shower base	$1,795.00
Rear paving	$12,415.00
Support for pergola beam	$ 150.00
Drummy porch tiles	$ 75.00
Bin hire	$ 990.00
Scaffolding	$ 2,500.00
Total	$47,909.60
Plus: Margin: 35%	$16,768.36
Contingency 10%	$ 4,790.96
Total cost	$69,468.92
Plus GST	$ 6,946.89
Total	$76,415.81

Order to be made

102. There will be an order that the Respondent pay to the Applicant $76,415.81. Costs will be reserved.

SENIOR MEMBER R. WALKER