VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D85/2009

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – agreement to supervise construction of luxury units for a fixed fee – form of Cost Plus Contract signed – Form of Contract as completed internally inconsistent and contrary to express agreement between the parties – impossible to give effect to the contract document as drawn – document void for uncertainty – clear evidence of oral agreement – Applicants engaging trades and purchasing materials directly – no margin to Respondent - Respondent acting as supervisor responsible to supervise with reasonable care and skill but no warranties given as to work or materials – claim against supervisor dismissed

APPLICANTS	Leon Mrocki, Harry Mrocki
RESPONDENT	Mountview Prestige Homes Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	31 August 2009 – 4 September 2009
DATE OF ORDER	21 December 2009
CITATION	Mrocki v Mountview Prestige Homes Pty Ltd (Domestic Building) [2009] VCAT 2649

ORDER

1. The Application is dismissed.

2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr M. Clarke of Counsel
For the Respondent	Mr B. Carr of Counsel

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D72/2009

APPLICANTS	Leon Mrocki, Harry Mrocki
FIRST RESPONDENT	Mountview Prestige Homes Pty Ltd
SECOND RESPONDENT	Blagoy Blogoev
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing and Assessment of Damages
DATE OF HEARING	31 August 2009 – 4 September 2009
DATE OF ORDER	21 December 2009
CITATION	

ORDER

1. The Application is against the First Respondent dismissed.
2. Direct that the assessment of damages payable by the Second Respondent to the Applicants be fixed for hearing before any member of the Domestic Building List on a date and time to be fixed by the Registrar.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr M. Clarke of Counsel
For the First Respondent	Mr B. Carr of Counsel
For the Second Respondent	No appearance

REASONS

The dispute

1 These two sets of proceeding are claims for substantial damages by the Applicants, Leon Mrocki and Harry Mrocki ("the Owners") against the First Respondent ("the Builder") and (in D72/2009 only) the Second Respondent ("Mr Blogoev") in regard to alleged defective and incomplete work in the construction of two luxury apartments in Brighton. Proceeding D72/2009 relates to the honing of the stone floors in the building and Proceeding D85/2009 relates to the other matters.

2 The building is architect designed and of quite unusual construction for a domestic residence. It is common ground that, as constructed, it exhibits a number of defects but the blame for many of these is disputed.

3 The agreement between the parties was very poorly documented indeed, making it very difficult to ascertain what its terms were. To complicate matters further, following the discovery of the defects the Builder and the various contractors working on site have made numerous attempts to fix them and the site was visited several times by experts for both parties but there is still no clear evidence as to what many of the underlying defects are or who is responsible for them.

4 Part of the work involved the honing of stone floor tiles and that was done by the Second Respondent. On 17 August 2009 it was ordered that the proceeding by the Owners against the Second Respondent were determined in favour of the Owners with damages to be assessed. The assessment was listed for hearing at the same time as the hearing of the claim between the principal parties.

The hearing

5 The matter came before me for hearing on 31 August 2009. Mr M. Clark of Counsel appeared for the Applicants and Mr B. Carr of Counsel appeared for the Builder. Mr Blagoev did not appear.

6 Although damages are sought in the Application, in view of the state of the evidence as to the defects and the cost of rectification Mr Clark sensibly indicated that the Applicants would seek orders that the Builder rectify the defective workmanship and the matters proceeded on that basis.

7 For the Owners I heard evidence from:

(a) the two Owners;

(b) Mr Ross Genovesi, a draftsman employed by the architect;

(c) the Building Surveyor, Mr Romanovski;

(d) Mr Cheong, an architect, in regard to the defects;

(e) a stone Expert, Mr Elliott, in regard to the honing of the stone floors;

(f) Mr Paris Christian, a labourer who worked on the site. He was employed by a company controlled by the Owners called Linara Properties Pty Ltd but said that Mr Vella told him that he, Mr Vella, was the Builder and that he, Mr Christian, was to do what he said. In evidence he said he was given instructions by a number of people including each of the Owners and another man who also worked for Linara Properties.

(g) a swimming pool consultant, Mr Schuilling.

In addition, witness statements were tendered without the witnesses being called from the following:

(h) Mr Barry Tanner, a Building Expert, attaching what he describes as "only a preliminary report" as to the defects;

(i) Mr John Rosier, a Quantity Surveyor, as to the cost of rectification. Mr Rosier's Report is based upon a scope of works that includes many items that would not be the responsibility of the Builder.

8. For the Builder I heard evidence from:

(a) Mr Martin Vella;

(b) Mr Adam Vella, Mr Martin Vella's brother, who was employed as the on-site foreman;

(c) Mr Rob Lees, a Building Consultant;

Background

9. The Applicants are real estate developers. The building comprising the two Unit development is at Lot 27, St Ninians Road, Brighton. Mr Leon Mrocki described St Ninians Road as the most exclusive street in Melbourne. It is common ground that the development was to be very expensive.

10. Although they are developers it was the intention of the Owners to live in the two apartments themselves. They are in a single building comprising a basement, two storeys and a roof area.

11. The Builder is a company controlled by Mr Martin Vella. Mr Vella is experienced in supervising the construction of high value residential developments and at the time he was first approached by the Owners in regard to this development, he was supervising such a project in Brighton not far from Lot 27.

12. In November 2006 the Owners obtained a town planning permit for the building. They were anxious to start construction as soon as possible and also to contain costs. Mr Harry Mrocki had obtained estimates of the cost of constructionn from a number of builders, based upon the town planning drawings which, at that time, were the only drawings in existence. The estimates they received from builders ranged from a little under $4 million to over $6 million.

13. Mr Harry Mrocki, who knew Mr Vella, rang him in November 2006 and asked him to price the job. A meeting took place on 27 November between Mr Vella and the Owners at which Mr Vella was shown six sheets of town planning and preliminary drawings. Mr Vella told them that he would prefer to do the construction for cost plus 10 percent. Mr Leon Mrocki suggested that he act as construction manager for a fee and that they, the Owners, would pay for the contractors, materials, plant hire and other costs. The meeting ended with Mr Vella agreeing to provide the Owners with a figure for his fee.

14. The following day Mr Vella informed the Owners that he estimated the cost of construction, excluding landscaping, external paving and swimming pools, at between $4.4 and $4.5 million dollars. The Owners insisted that the cost would be closer to $3.5 million and that he should base his fee upon that figure. Mr Vella then quoted a fee of 7% of $3.5 million, which was $245,000, but after negotiation with the Owners, it was reduced to $225,000. With GST the amount payable was agreed at $247,500. It was agreed that the landscaping and the paving would not be included in the work that he was to supervise.

15. Mr Vella then sought a form of contract from the HIA but was informed by someone at that institution that he could not enter into a construction management agreement under the licence that he had. He was advised to use a form of Cost Plus contract. He purchased and completed that form and, on 30 November 2006, it was executed by the Owners and by Mr Vella on behalf of the Builder.

16. There is nothing in the evidence to suggest that the contents of the Printed Contract were the subject of any negotiation or discussion. Indeed, it does not appear to me that the parties turned their minds at all as to what the document said. Since they signed it I conclude that they assumed that it recorded the agreement that they intended to enter into.

17. About halfway through the period of construction, Mr Vella complained to the Owners that the true value of the work that he was supervising was considerable more than the $3.5 million he had based the Builder's fee on. On 25 February 2008 he sent a letter requesting a further $30,000. This was agreed to by the Owners. I am not satisfied that the scope of works was increased to include the landscaping and the paving in exchange for that increase. Mr Leon Mrocki's evidence in this regard was rather vague, there was nothing put in writing about it and Mr Vella denies it.

The other contractual documents

18. At the time the contract document was signed there were only the six sheets of town planning and preliminary drawings in existence. Thereafter, the design was developed by the Architects and the Engineers. The

development of the design is demonstrated by the following chronology:

Date	Details
30 November 2006	A "Cost Plus" form of contract was signed by the Owners and by Mr Vella on behalf of the Builder with six sheets of town planning and preliminary drawings attached;
30 November 2006	Plans (Revision "B") prepared by GBG Architects Pty Ltd ("the Architects");
December 2006	Engineering drawings prepared by Antonov Snashall Pty Ltd ("the Engineers");
11 December 2006	Further plans (Revision "C") prepared by the Architects;
15 December 2006	Building Permit applied for;
21 December 2006	Revision "C" plans submitted to the council;
18 January 2007	Further plans (Revision "D") prepared by the Architects;
January 2007	Engineering computations prepared by the Engineers;
21 January 2007	Building Permit Stage 1 issued by the Building Surveyor, Mr Romanovski, authorising the construction of the basement and ground floor only;
9 February 2007	Structural Engineering drawings prepared by V.C. Gallagher Pty Ltd ("the Swimming Pool Engineer") for the swimming pools;
19 September 2007	Date of the Certificate of Compliance or the design issued by the Swimming Pool Engineer.

The Contract

19. The starting point is the printed form of contract that was used. That document ("the Printed Contract") is dated 30 November 2006 and is signed by Mr Vella and the Owners. The Printed Contract is a "cost plus" form of contract issued by Housing Industry Association Limited. The term "cost plus contract" is defined in the *Domestic Building Contracts Act* 1995 as follows:

> "Cost plus contract means a domestic building contract under which the amount the builder is to receive under the contract cannot be determined at the time the contract is made, even if prime cost items and provisional sums are ignored".

20. That was not the case here. It had been discussed and agreed between the parties that the only thing the Builder would receive for its own benefit would be its fee, which was the fixed sum of $247,500.00. It was not a Cost Plus arrangement that they intended to enter into.

21. On page 4 of the Printed Contract the Owners are identified as such and the builder is described as "Mountview Prestige Homes". The registered building practitioner is identified as Mr Martin Vella and his registered number is provided.

22. The "building works" are described as follows:

> "*2 apartments with basement* (Brief description) as set out in the Specifications and Plans. The **SPECIFICATIONS** include …… pages that were prepared and supplied by *CBG Architects*. There are *6* sheets of plans and they were prepared and supplied by *CBG Architects*. There are … sheets in the **ENGINEER'S DESIGN/S** and it/they/was/were, prepared by ….. for the **OWNER**". (sic.)

The italicised words and letters are in handwriting. The rest are what was printed on the form.

23. The six sheets of plans supplied by the architects are identified and are in evidence (Exhibit "M"). The space for the insertion of the number of pages of specifications has been left blank. The Owners say that specifications had been provided and Mr Vella says that they were not. Had they been supplied I think it likely that the relevant part of the clause would have been completed with the number of pages as it was in regard to the plans. When asked about this in cross-examination Mr Leon Mrocki said at first that Mr Vella "would" have been given a copy of the specifications at the time the contract was signed. He then said that he gave them to Mr Vella. I had the impression that he was uncertain about this. Mr Genovesi said that he first met Mr Vella in November 2006 and that they had the town planning drawings but he was unsure about the specifications. He later said that he had 6 to 8 meetings with Mr Vella and although he cannot remember having given the specifications to him he believes that he would have done so.

24. The evidence that Mr Vella was given the specifications is therefore supposition whereas Mr Vella exhibited no such uncertainty. He denied having received them. Added to that there is no description of specifications entered into the Printed Contract that was signed. On balance I accept Mr Vella's evidence that there were no specifications at that time. It is common ground that there were no engineer's plans provided.

25. The warranty insurer is identified as Lumley General Insurance and the name of the insured is said to be Martin Vella. The address of the land is given.

26. On page 6 of the Printed Contract there is provision for the inclusion of an estimated price in accordance with s.13 of the *Domestic Building Contracts Act*. No price has been inserted. Instead the block has been ruled out with the initials "N-A", presumably meaning "not applicable". There is also a box for the insertion of items that were excluded from the estimated price and the whole of this box has also been ruled out and the words "by Owner" have been inserted. The deposit on page 3 is said to be "$15,000.00 plus

GST". Planning approval and building permits are to be obtained by the Owners and the box where the Builder's margin for variations is to be inserted has been ruled out with "N-A" inserted. Also ruled out as not being applicable is the whole of Schedule 2, which allows for the insertion of provisional sums and prime cost items.

27. In Schedule 3 on page 12, the following provision for progress payments was inserted:

> "PROGRESS CLAIMS TO BE SUBMITTED BY THE BUILDER AT THE END OF EACH MONTH".

28. Schedule 4 sets out the cost of the building works. This is said to include the cost of all labour and materials, subcontractors, professional fees and insurance premiums together with the cost to rectify defects during the defects liability period unless the defects are due to faulty materials or workmanship. However at the bottom there is inserted the words: "By Owners".

29. Schedule 5 says that the Builder's Fee is a fixed sum of $247,500.00 but does not say when it is to be paid. For that, recourse must be had back to Schedule 3, which provides for progress claims to be submitted by the Builder at the end of each month.

30. Schedule 6 provides as a special condition:

> "ALL ACCOUNTS FOR PROJECT TO BE PAID BY THE OWNER
>
> MOUNTVIEW PRESTIGE HOMES TO APPROVE INVOICES FOR PAYMENT".

31. Schedule 7 provides, under the heading, "Excluded Items", that the Owners acknowledge that the building works do not include:

> "ALL EXTERNAL PAVING AND LANDSCAPING
>
> THIS WORK WILL BE DONE BY OWNERS".

32. Clause 11 sets out the statutory warranties appearing in s.8 of the *Domestic Building Contracts Act*, albeit in a simplified and paraphrased form.

What to make of the Printed Contract?

33. There is no claim for rectification but the Printed Contract does not record the agreement that the parties had agreed upon and to apply its terms in a manner consistent with their express agreement is impossible. I have already referred to the fact that the Builder was not to be paid the contract price that the document contemplated, being the cost of carrying out the work plus its margin, yet that is what a Cost Plus contract is and what the Printed Contract would require. Despite that, the part of the Printed Document that is intended to set out the Estimated Price is said by the parties to be "not applicable" and Schedule 4 dealing with the cost of the building works contains the words "BY OWNER". It had been agreed that they were to be paid directly by the Owners.

34. All the Builder was to receive was the agreed fee. Anything else would be paid by the Owners directly to the tradesmen or suppliers concerned. There are other problems with the Contract Document.

Description of the work

35. The Contract Document contains no proper description of the scope of works. The six sheets of plans referred to are mere town planning or design development drawings without any figured dimensions apart from those necessary to outline the building envelope. It would have been quite impossible, according to the expert evidence, to construct the building from those plans.

36. The word "Plans" is defined on page 17 as meaning:

> "the drawings showing a layout and design details of the building work with dimensions and elevations, including the engineer's design".

The six pages of plans do not answer that description. They show elevations but only a few dimensions.

37. The word "Specifications" is defined on page 18 as meaning:

> "The contract document that shows the full details of the building works includes the details of the materials to be supplied".

There were no such specifications.

38. The term "Engineer's design" is defined on page 16 as including:

> "a footing design or other structural design that has been prepared by a qualified engineer for the concrete footings, stumps, piers, or slab construction, or for particular part of the building works that require structural design, drainage design where appropriate and computations accompanying the foregoing".

There was no such engineer's design.

39. Clause 16 of the Printed Contract provides an order of preference in the event of any inconsistency between the contract documents but that can only be applied in accordance with the Printed Contract's terms and there are no plans specifications or engineer's design within the meaning of the Printed Contract.

40. The obligation of the Builder, according to the Contract Document, was to build in accordance with its terms and that was clearly impossible. It was contemplated by the parties that specifications, engineering drawings and dimensioned working drawings would be provided and that the Builder would build from these. The written contract documents, being the 6 pages of rudimentary plans and the Printed Contract contain nothing to this effect.

41. Clause 14 of the Printed Contract requires the Owners to supply a sufficient number of these documents to allow the Builder to construct the building works but that refers only to the plans, specifications and engineer's design within the meaning of the Printed Contract which in this case could refer at

most only to the six town planning or design development drawings which were clearly intended to be superseded by working drawings.

42. Further, in the absence of specifications, it would have been open to the Builder to use any materials it liked so long as it achieved a result equivalent to what was depicted in the six sheets of town planning drawings. Quite obviously, that was not contemplated by the parties.

Variations

43. Another substantial difficulty lies in the application of clause 21 which relates to variations. Since the building work is insufficiently described, it would have been impossible in most instances to determine whether something was a variation or not. This in turn would lead to difficulties in applying clause 33 in regard to variations if the Builder required an extension of time. Since the work was inadequately described it could not be known at the time the Printed Contract was signed how long it would take to build or what would constitute completion.

Retentions

44. There is no provision in the Printed Contract entitling the Owners to make any retention from the amounts claimed. In general, where an owner is entitled to any retention, a percentage of each progress payment is withheld from the builder for a time specified in the contract. In the present case, despite there being no provision for retention, the Owners retained 5% against each of the subcontractors. This was not kept from the Builder but from the individual subcontractors themselves. What has become of these retentions does not appear from the evidence but it was contemplated that when they were eventually paid they would be paid by the Owners directly to the supplier concerned and not to the Builder. There was no retention made in regard to the payment of the Builder's Fee.

Ownership of materials

45. Another inconsistency between what the parties had agreed upon and the Printed Contract lies in the ownership of materials. Although the Owners paid for all work and materials directly to the suppliers, clause 31 of the Printed Contract provides that any unfixed goods and materials on the building site are the property of the Builder. This is quite inconsistent with the arrangement the parties intended to have yet it is what the Contract Document provides.

No builder's margin on labour or materials

46. The Builder's fee was for its work in supervising the construction. There was no margin to be allowed to the Builder on any of the trades or materials used on site which seems inconsistent with the notion that it was accepting responsibility for them.

Uncertainty

47. Mr Carr submitted that the Printed Contract was void for uncertainty. He referred me to the following well known quotation from the judgement of Lord Wright in *G. Scammell and Nephew v Ouston* [1941] AC 251:

> "The object of course is to do justice between the parties, and the Court will do its best, if satisfied there is an ascertainable and determinative intention to the contract, to give effect to that intention, looking at the substance and not the mere form. It will not be deterred by mere difficulties if interpretation. Difficulty is not synonymous with ambiguity as long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically, and with due regard to all such implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there is no contract. Such a position is not often found."

48. Apart from the Printed Contract it is clear from the evidence that what the parties intended was that the Respondent would supervise the construction of the building for a fixed fee and that the Owners would pay all the trades and suppliers directly. The choice of a "cost plus" form of contract was made by Mr Martin Vella. He says that he was advised that he could not enter into a "supervision" contract with his insurance and that he would have to enter into a "costs plus" contract.

49. Certainly if his insurance was to be relied upon by the Owners the Builder would have to be undertaking the work as builder and not merely as a supervisor. It could only be relied upon by the Owners if the Builder were liable in the first instance for any defects in the work or materials. However in determining whether a person is liable for defective building work one does not start by asking whether it was contemplated that the owner would rely upon his domestic building insurance. The ultimate question must be whether the defective work was done pursuant to a contract whereby the person contracted to do the defective work as the builder.

50. The examination of the Printed Contract and the six sheets of plans above demonstrates that, on their own, those documents could not constitute the whole of an agreement between the parties. Further, its terms are inconsistent, not only with each other, but also with what the parties had expressly agreed. It is impossible to give effect to the whole of the Printed Contract and equally impossible to give any effect to any part of it because one would have to choose which part should be relied upon and which part should be ignored. There is no definite and ascertainable definite meaning to be derived from the document upon which I can safely act so I have no choice but to say that it is no contract. Such a position may not be often found but it is found in this case.

51. It seems likely that the parties signed this document assuming that it recorded what they had agreed upon but it clearly does not. If they had

understood what they were signing I doubt they would have signed it, at least in this form.

What was the agreement

52. It is clear that the parties considered that they had entered into a binding agreement. Domestic building insurance was obtained and paid for by the Owners and the parties then set about constructing the building in accordance with the plans and other documents supplied by the Owners' architects and engineers using trades and suppliers supervised by the Builder and paid by the Owners. The building is now complete at a cost in excess of Five Million dollars.

53. In this case therefore I am satisfied that there was an ascertainable and determinative intention of the parties to contract and so if it can be ascertained what they agreed upon I should give effect to that intention. The problem is, what was the agreement?

54. The parties contemplated that the architects would prepare working drawings, the engineers would prepare engineering drawings, a proper specification would be prepared, setting out the materials to be used, and that all of these would be supplied by the Owners to the Builder. The building would then be constructed in accordance with these documents and it would be done under the supervision of the Builder except for the landscaping and paving which the parties agreed the Builder would not supervise..

55. The Builder was to obtain quotations from the various subcontractors and suppliers and these were to be submitted to the Owners who would then direct the Builder which subcontractors or suppliers were to be engaged.

56. Payment of the suppliers and subcontractors was to be made by the Owners and they were to assume primary liability to those individuals for the amounts due. Hence:

    (a) the retentions made unilaterally by the Owners against the subcontractors and suppliers but not the Builder;

    (b) the non-involvement of the Builder in any of the payments, part from recommending payment in some cases; and

    (c) the direct engagement by the Owners of some of the trades and suppliers.

Was the Printed Contract part of the agreement?

57. Although the parties have signed the Printed Contract its terms are so contradictory both internally and with what the parties had agreed that it cannot be given any effect, even to supplement what the parties had agreed upon orally. That is a serious conclusion because the Printed Contract is the repository of the warranties given by the Builder with respect to the work and materials but that is consistent with what the parties had agreed.

58. The Builder's task was to supervise the work of other people and oversee the construction of the building. It had to do that with all reasonable care and skill but it was not the builder in the sense that it was undertaking responsibility for the work.

59. Mr Carr submitted that it cannot reasonably be presumed that the parties agreed that the Builder was to provide ongoing warranties for the work for 10 years in circumstances where it did not have authority to select the tradesmen and had no financial control over them in order to get them back to rectify any defective work. That may be so, but in any case, there is no evidence that the parties ever discussed that the Builder would guarantee the work.

60. In case I am wrong in my interpretation of the agreement, I proceed to deal with the other issues raised.

Form of engagement of sub-contractors and suppliers

61. In practice, some of the trades and all of the materials were contracted directly by the Owners themselves. Many of the suppliers and subcontractors were engaged by the Builder using a printed form entitled PROJECT TRADE CONTRACT published by the Housing Industry Association. The form contains provision for the insertion of the person engaging the supplier or subcontractor who is identified by the words "Principal Contractor". In regard to most of these, the Principal Contractor is identified as "Harry & Leon Mrocki". The form is signed on their behalf by Mr Vella.

62. The Owners deny that they ever authorised the Builder to engage the suppliers and sub-contractors in this way. Mr Vella said that the Owners knew the form was used and that he showed Mr Leon Mrocki the form in the underground garage early during the course of construction. His evidence was supported by Mr Adam Vella. Mr Leon Mrocki denied that they were ever shown to him but I prefer the Builder's evidence. That establishes that the Owners knew about the use of the form and so acquiesced in it from the time they had that knowledge. It was also these forms that contained the provision for retentions that the Owners relied upon when it came to payment of the trades concerned.

63. The effect of the form in each case was to record a contract between the Owners on the one hand and the particular supplier or sub-contractor on the other. The engagement was not by the Builder.

64. In addition there was substantial involvement by the Owners in the trades to be engaged. At the Owners' instruction cheaper trades were used for the electrical work, plastering, glazing and floor honing rather than the more expensive tradesmen recommended by Mr Vella. According to Mr Leon Mrocki, there were some carpenters that Mr Vella insisted he wanted to work with. He said that he complained to Mr Vella that the carpenters were very expensive whereupon Mr Vella asked him to get cheaper ones. As a

result, the Owners engaged other carpenters directly to work on the site with the Builder's carpenters and paid them directly.

65. It was agreed that the foreman to be engaged on the site would be Mr Vella's brother, Mr Adam Vella, and he would be paid directly by the Owners. Payment for Mr Adam Vella's services was made by the Owners to a company, Southern Building Pty Ltd that he controlled. Again, Adam Vella although paid by the Owners was working under the overall supervision of Mr Martin Vella.

The Owners' claims

66. If there was a contract for the Builder to carry out the work and if it gave the warranties set out in the Printed Contract or in s.8 of the *Domestic Building Contracts Act 1995*, the Owners claim damages for breach of those warranties.

67. In order to prove that claim they must satisfy me on the balance of probabilities that the work done or the materials supplied for which the Builder undertook responsibility was not in accordance with the contract. That is a three stage process and involves establishing first, what work and materials the Builder undertook responsibility for, secondly, what work is defective and in what respects and thirdly, what loss or damage flows from that.

41. For a Builder to be undertaking responsibility for work done by persons engaged directly by the Owners would be such an odd arrangement that the Builder's liability should be strictly confined to the work identified in the contract. It would be liable for what it had specifically undertaken and no more. So what would be included?

Was the swimming pool within the scope of works?

42. Each of the two units in the building has a swimming pool. The six sheets of plans show the area to be occupied by each of these pools but provide no other details in regard to them. At the time the parties entered into their agreement and signed the Printed Contract, no design or engineering plans or computations had been prepared for either of the two swimming pools. They were subsequently designed and built by a swimming pool company, Red Tag Pty Ltd, which had been introduced to the Architects by Mr Vella. A major issue in the case was whether the swimming pools were within the scope of works for which the Builder had undertaken responsibility.

43. Mr Vella's evidence was that it is the usual practice in developments that incorporate a swimming pool for the pool to be the subject of a separate design and construct contract between the owner and the pool supplier. There is no contrary evidence and I accept that to be the usual practice. Moreover:

    (a) neither of the two building permits that the Builder applied for included the swimming pools; and

(a) the domestic building insurance obtained was inadequate even for the buildings, without the swimming pools.

44. As to the insurance, notwithstanding that the certificates for domestic building insurance supplied by the Builder were for only $900,000.00 for one unit and $880,000.00 for the other unit and notwithstanding that he must have been aware from the scope of works that the value of the work to be done was at least $3,500.000, the Building Surveyor nonetheless issued the building permits for the project. According to the evidence of Mr Martin Vella this was because Mr Romanovski considered the basement area was "commercial" and not domestic building work. It is clearly domestic building work within the meaning of the *Domestic Building Contracts Act* 1995 and Mr Romanovski must have been aware of that. Curiously, the part of the building permit application that contained the value of the building work has been altered by removing the figure that had been inserted. There is no explanation for that in Mr Romanovski's witness statement nor has the original of this document been produced.

45. As to the permits, the Stage 1 permit puts the value of the basement and ground floor at $400,000 although it must have been considerably more than that. The Stage 2 permit valued the work to finish the building beyond the basement and ground floor at $1,400,000 when all parties including the Building Surveyor must have known that it was much more than that. Mr Leon Mrocki said that the cost of construction exceeded $5,000,000.

46. Neither Building Permit refers to the swimming pools because the documents referred to in them do not include the design for the swimming pools. Mr Romanovski said in evidence that his fee was based upon a construction cost of $2.7 million which is not reflected in the permits or the value of the domestic building insurance. He denied that he considered the basement to be commercial work. I am unable to reconcile this part of his evidence with the documents but it is not directly relevant.

47. As the above chronology shows, at the time the building permit was issued for Stage 1 (basement and ground floor) no engineering drawings or architectural designs for the swimming pools had been prepared. They had been prepared by the time the Stage 2 permit was issued but that permit makes no reference to the swimming pools nor to the drawings prepared by the Swimming Pool Engineer.

48. Further, the Certificate of Compliance by the Swimming Pool Engineer is dated 19 September 2007. By Regulation 301 of the *Building Regulations 2006*, an application for a building permit must contain sufficient information to show that the building work will comply with the Act and the Regulations and the relevant provisions. In the case of *Moorabool Shire Council & Anor v. Taitapanui & Ors* [2006] VSCA 30 (24 February 2006) the Court of Appeal said, of the Building Surveyor's duty in this regard:

> "A permit, when granted under the hand of the surveyor, is a written certification which both authorizes building work and declares that the building

work as described in the application will comply with the Act and the Regulations."

49. It must follow that Mr Romanovski could only issue a permit for those parts of the structure for which he had plans and computations. Neither building permit included the swimming pools and neither refers to the swimming pool plans. I asked Mr Romanovski how he could have issued a building permit incorporating swimming pools without having those plans and he said that the swimming pools could be added later by amending the permit, and that is what he did.

50. On 9 October 2007 a "Variation Building Permit" was issued by Mr Romanovski. This document is identical to the Stage 2 permit except that it identifies the Swimming Pool Engineer and identifies the variation as being:

> "Variation to include the swimming pool engineering as prepared by V.C. Gallagher Pty Ltd received from Mountview Prestige Homes."

51. Mr Vella denies ever having applied for such a permit. A document has been produced by Mr Romanovski purporting to be a photocopy of an application signed by Mr Vella to amend the building permit so as to include the swimming pools. The original of this document was never produced.

52. This purported application came to light after Mr Leon Mrocki had raised with Mr Romanovski whether either of the original building permits included the swimming pools. In that communication Mr Mrocki threatened legal action against Mr Romanovski if they did not. Mr Romanovski then informed Mr Mrocki that they were included and that allegation was conveyed to Mr Vella.

53. Mr Vella then faxed copies of his two applications for building permits to Mr Romanovski that excluded the pools and attempted to contact him several times but his messages were not answered.

54. On 4 February 2009 Mr Vella wrote to Mr Romanovski stating that he had been made aware that the permit for the swimming pools had been made "under his licence" without his knowledge and that he had given no consent to Mr Romanovski to do that. He pointed out in his letter that the drawings for the pools identified Red Tag Corporation and not him as the builder of the pools. He said that he had tried several times to contact Mr Romanovski and had left messages without any response. He required the Building Permit to be amended within 7 days. There was no response to this letter.

55. There were then requests put to Mr Romanovski by Mr Vella for the production of his file but it was not until an order was made by this tribunal that it was eventually produced to the Registrar. The purported photocopy application was in the file.

56. I am satisfied that the purported application has been fabricated from three documents which were produced at the hearing. All three documents were

on the Building Surveyor's file. The first is the original application for a building permit that Mr Vella had signed. This has been copied, in altered form, by deleting the text and inserting in its place the words "Swimming pool details". The heading in the middle of the document has been taken from a standard form which, according to Mr Romanovski's evidence, was used by his office at the time for an application to vary a building permit. The rest of the document came from an application by Mr Vella for a Certificate of Occupancy that is dated 16 July 2008.

57. Mr Romanovski said that the purported application had been received by his office on the date the copy bears, which is 5 October 2007. When I asked him how that was possible when the application for the Certificate of Occupancy had been prepared by Mr Vella and dated 9 months later he said that he had given the form of application for this Certificate of Occupancy to Mr Vella earlier for him to use at the conclusion of the project. It is an unlikely story and one that Mr Vella denies. I do not believe Mr Romanovski's evidence. I am satisfied that either he or someone with access to his file has created this document. That is a matter of great concern.

58. I should add that it was put to Mr Romanovski quite bluntly in cross-examination that he had forged the document and he denied having done so.

59. The fact that there was no building permit applied for by the Builder for the swimming pools does not of course mean that they were not therefore within the scope of works. However, I am not satisfied that the swimming pools ever formed part of the contemplated scope of works by the Builder.

60. According to the evidence of Mr Vella the pools were not part of the scope of works he was to supervise. He added that it is not the usual practice for a builder to construct a swimming pool. It is generally done as a separate contract with a specialist pool company. The Owners, being experienced developers, would have known that. There was no contrary evidence given to the effect that this is not the trade practice. Indeed, Mr Vella's evidence is reinforced by the conduct of the architect who contacted him on 11 December and asked him if he knew of a pool company. Mr Vella then recommended Red Tag Pty Ltd ("Red Tag") as being a company with which he had dealt before and which, he considered, had a reputation for constructing swimming pools in high quality developments.

61. This was further supported by the fact that, although the engineers for the building designed it to support the anticipated weight of the swimming pool, they did not include in their engineering design any design of the swimming pool itself. It was known that the swimming pools would be built in the locations indicating on the town planning drawings and that is clearly shown in those drawings but the swimming pools were designed and engineered by Red Tag.

62. The pools were constructed by Red Tag under the supervision of Mr Dugina of that company and in consultation with the Owners who appear to

have had considerable input. Neither Mr Adam Vella nor Mr Martin Vella gave any instructions or were involved in their construction.

63. Mr Vella's evidence is further supported by Mr Leon Mrocki's correspondence with Red Tag in which he threatened to sue that company when problems arose with the swimming pools. He also demanded that Red Tag provide warranty insurance for the pools.

64. The invoices for the construction of the pools were addressed to Jenner Pty Ltd, a development company controlled by the Owners. Mr Leon Mrocki could not say how Red Tag would have known to invoice this company except to suggest that perhaps they had taken it from one of his business cards.

65. Finally, a letter of demand dated 23 December 2008 was sent to Red Tag by Mr Leon Mrocki's solicitors which asserted in the first operative paragraph that Red Tag had been "commissioned by our client to design and construct" the roof top pool.

66. I am satisfied that the contract to construct the pools was directly between the Owners and Red Tag and did not involve the Builder although it obviously had to work around and with Red Tag because they were on site at the same time. They were not part of the work which the Builder had undertaken to supervise.

Landscaping and paving

66. It is claimed by the Owners that the Builder also supervised other aspects of the work, including the landscaping and paving and so was responsible for it. Mr Leon Mrocki also said that the landscaping contractor was engaged by Mr Vella and that he was shocked to find that he had accepted a quote for $55,000.00. Mr Vella said that he was asked by the Owners to do so because they were going overseas. There is no issue raised as to the amount charged by the landscaping contractor. The issue is as to defects and who is responsible for them.

67. I do not accept that because Mr Vella engaged the landscaping contractor at the request of the Owners, or because he or his brother supervised some or even all of the landscaper's work, the Builder is therefore responsible for any defects in the landscaping. There is confusion here between supervision and assumption of responsibility. The direct day to day supervision of all aspects of the work was by Mr Adam Vella who was the on-site foreman engaged and paid directly by the Owners. Insofar as he was supervising work for which the Builder had assumed responsibility the Builder would be responsible for any defects in materials or workmanship in that work. Insofar as he was supervising other aspects of the work for which the Builder had not assumed responsibility, the Builder would not be responsible and the Owners would have to look for redress to the contractors and suppliers that they engaged.

68. As to the landscaping and paving, those items were expressly excluded from the contract and I am not satisfied that there was any agreement to vary the contract in that respect.

Evidence

69. Expert evidence as to the defects was given by the experts referred to. Mr Lees' first report responded to Mr Tanner's report and he has prepared a Scott Schedule that I found helpful.

The External tiling and paving - South

70. In regard to the paving, the Contract Document (if it were not void) specifically excluded this from the scope of works and so any defects are not the responsibility of the Builder. However the paving is linked in the reports to water penetration issues in the southern wall and near the entrance to Unit 1 so the problem requires some examination for that reason.

71. There are a number of complaints about the paving but those impacting on the building are as follows:

    (a) Ponding

    It is common ground that there is very little fall on the paving on the northern side where one enters the building and that water ponds on it. The drawings show the area to be drained at several points, necessitating the creation of numerous falls instead of one. I accept Mr Lees' evidence that this is a design issue.

    (b) Waterproofing below the paving slabs

    It is suggested that this has caused the efflorescence that I was shown on inspection inside the door to the front Unit. It is also blamed for efflorescence of the rendered wall which abuts the path. There is no evidence that the waterproofing under the paving slabs has failed and there is insufficient evidence to find where that moisture has come from.

    (c) Wall finishes on the southern areas

    There is a breakdown of the render near ground level due to the absorption of water. Mr Tanner suggests that the water comes from one of the sources above. Insofar as it arises from the paving, the Builder is not responsible. Mr Lees suggests that the rebate designed at the bottom of the walls (50 mm) is too small causing the render to be too close to the splash zone of the paving. He says that this prevents a suitable break being constructed between the top of the paving slab and the top of the rebate. There is no evidence that the wall was constructed otherwise than in accordance with the design. Mr Adam Vella said that he asked that a gap be left at the bottom of the wall to avoid the possibility of water wicking its way up into the render and that a row of tiles be installed but that the architect instructed that it was to be built it in this way.

72. Mr Cheong considers that the efflorescence in the external wall is caused by water leaks from above, accumulating in voids around the perimeter of the paving in this area. The accumulation is evidenced, he says by the discolouration of the paving material. In the absence of some evidence that voids have been left under the paving at or near the site where the spalling has occurred I cannot find that this is a cause but in any case, the paving would not be the Builder's responsibility. If the problem arises from leaks coming from above then, insofar as they arise from faulty work or materials of the Builder that would be the Builder's responsibility.

Planter boxes

73. These are said to be leaking but since this forms part of the landscaping it is excluded from the work for which the Builder assumed responsibility.

The shower bases

74. Mr Tanner said that water was ponding in the shower bases. The showers recesses are large and have a very wide strip drain against the wall for almost their full width. Mr Cheong and Mr Tanner said that there is insufficient gradient in the shower recesses causing ponding to occur on the floor of the shower recess. Mr Lees disagreed and said that there was no ponding, only a degree of beading. Mr Lees said that water in the recesses does drain to waste. At the on site inspection water was placed on the floor of one of the recesses and I observed that it does bead on the shower floor but it certainly does not pond. As to the cause of the beading, the tiles have been treated with a sealant.

75. Mr Lees said that the beading is caused by surface tension within the droplets, combined with the surface of the shower base. He notes in his report that the primary consideration for falls in floor finishes is to ensure that water does not remain on the finished floor in a manner that can adversely affect the health or amenity of the occupants or deteriorate building elements. Falls in floor finishes should ensure that water exits at the designed exit point and not pond on the floor, with the exception of residual water remaining due to surface tension. He acknowledged that a fall of 15mm would drain faster but said that the fall, as constructed, of 8 to 10 mm was sufficient.

76. There is a fall to the drain, which is the designed exit point, and the disagreement between the experts was as to its sufficiency. If the water were ponding then I could find that the fall was insufficient. However it is not ponding but beading. It is not apparent that if the fall were to be increased the water would not bead. I am not satisfied that any defect is proven.

Musty smell in the bathrooms and elsewhere

77. There is a musty smell in the bathrooms but no evidence establishing the cause. Mr Tanner suggested that perhaps water is trapped behind the wall sheeting in the cavity wall or that the plumbing has been inadequately

ventilated. He suggested destructive testing to find the cause. Mr Cheong also said that destructive investigation is required.

78. Mr Cheong produced a number of photographs showing some growth of mould on the undersides of the edges of some of the tiles where they overhang the drain trays in the shower recesses. They also show some gaps in the grouting and some silicone that had been used to glue the rubber blocks that were supporting the drain trays for the shower recesses. I accept that these problems need to be addressed and that the Builder is responsible for them but the smell was not more evident near these areas and so I accept Mr Lees' evidence that these are insufficient to cause the smell

79. Mr Vella acknowledged that his system for supporting the stainless steel covers for the drain trays of the shower recesses had failed. Adequate support must be provided for the covers and the silicone and rubber supports from failed system must be removed. The gaps in the grouting and the gaps under the metal drain trays in the shower recesses must be made sealed and made good and any mould cleaned off.

80. Mr Lees pointed out that the air in the building is particularly still and that the apartments are particularly well sealed at the doors and windows. He suggested investigating the sewer ventilation and ensuring that the floor wastes have maintained their water seals. He said the source of the smell was a mystery.

81. Mr Lees' evidence would suggest that if there is no water in the floor wastes that might explain the smell because gas from the sewerage system would then be venting directly into the bathrooms. Otherwise, the smell is a symptom of a likely defect somewhere. Until I know what the defect is I cannot find that it is one for which the Builder would be responsible. The building is a highly unusual design and I cannot simply assume that the cause is not a design problem.

Water Ingress

82. There are a number of instances of water penetration evident, some suspected to be related to the swimming pools and some not. Mr Lees suggested that these appear to have been fixed.

83. It is apparent from Mr Cheong's photographs 3734 to 3738 that water is entering around a window frame on the west of the building. This has caused efflorescence and some spalling of a stone tile. Photograph 3737 shows silicone at the corner of the window which seems to be an attempt to contain the problem but the task of establishing where the water came from or how it got in does not appear to have been addressed. The source of the water entry needs to be identified but it would seem to be the Builder's responsibility because water should not penetrate a window. I note that the tops of the window openings have no drip lines, which would seem to be a design issue, but it is not established that that has contributed to the presence of water around the window.

84. Photo 3776 shows what appears to be a water stain extending down a construction joint between two wall panels near the door of Unit 1. There are also water trails over the render in photograph 3780 and the succeeding photographs. In each instance, it is a water trail commencing from under a roof and that should not occur. Although it has not been established where the water came from it is likely to be related to work for which the Builder would be responsible. However, the source must be identified.

85. There is efflorescence on the skirting at the foot of the stairs, indicating that water has come inside to the bottom of that wall (see photograph 3890). Again, there is no evidence where that water has come from. Insofar as it is related to the external paving or a design defect then it is not the Builder's responsibility.

86. There is water penetrating below the stairs (see photographs 3952 et seq) and the wall of the basement below the entrance to Unit 1. This would suggest a failure of the tanking in this area. There is also water penetrating the ceiling. Mr Cheong says that comes from the courtyard above and that seems a reasonable conclusion given that the leak appears to be below the courtyard. There is worse seepage through the Northern basement wall.

87. Mr Cheong considers that this is caused by water leaks from above accumulating in the voids around the perimeter of the paving in this area but there is no evidence that there are any such voids. The accumulation is evidenced, he says by the discolouration of the paving material. Mr Lees disagrees. He says that the render material is absorbing water and breaking down at the base of the wall due to it being applied down to the paving and within the splash zone.

88. In the absence of some evidence that voids have been left under the paving I cannot find any specific defect in the paving work or materials at the site where the spalling has occurred. If the problem arises from leaks coming from above then, insofar as they arise from faulty work or materials of the Builder that would be the Builder's responsibility.

89. Photo 3776 shows what appears to be a water stain extending down a construction joint between two wall panels near the door. There are also water trails over the render in photograph 3780 and the succeeding photographs. In each instance, it is a water trail commencing from under a roof and that should not occur. What needs to be addressed in each case is, where is the water coming from but water coming from under a roof is prima facie a defect.

90. Mr Lees says that the leaks above the basement have been repaired but the plaster linings need to be repaired and painted. The repair certainly seems to have been in progress but they must be completed. This is a defect for which the Builder is responsible to the extent only that the water penetration does not arise from the pools or the paving or landscaping. In this regard, Mr Adam Vella suggested that the membrane might have been

perforated by the landscaping work above. There is no evidence as to that one way or the other.

91. The leaks above the family room area under the pool area appear to be related to the pool and so would not be the Builder's responsibility. The pools might represent a major source of the leaking problem. According to Mr Tanner, the pool, scum gutter and spa areas are all leaking, most evidently at penetrations.

92. A number of photographs show the stainless steel roofing material "holding water" but the depth of this water is not apparent and it is not suggested that this is the source of any leak. An unpenetrated stainless steel sheet cannot leak water. However, in photograph 3797 there is a flat sheet of stainless steel roofing material held down with screws which pass through the steel. Mr Cheong says the surface is "potentially leaking" so that may well be at least part of the problem but there is no evidence that it is leaking.

93. The same comment could be made about much of the capping material which is penetrated by a fastener of some kind but there is no evidence that any of these is admitting water. As part of investigating the leaking problem all of these should be checked but that has not been done. The corners of this capping material are covered and the mitred corners are covered by another capping Mr Cheong suggests that perhaps water is entering underneath this secondary capping but this has not been demonstrated.

94. Mr Cheong criticises part of the capping (see photograph 3799) as "not extending to the outer face of the wall" but the inner part of the concrete panel shown in this photograph extends up under the capping and Mr Vella's evidence was that it was built according to the design. There is no evidence that this is the source of a leak and I find no defect.

95. The tops of the panels are rebated and Mr Cheong criticises that fact that a number of them are not rendered on the top He raises this criticism in other photographs (for example, photograph 3815). He suggests that water might pass through the render and down under the over-flashings to enter the house. This possibility is disputed by Mr Lees and I prefer his evidence. The water appears to be travelling down the outside of the wall and not through it. Further, if the render were so permeable as to permit water to travel through it, it is not apparent that it would be effective to waterproof the tops of the panels if it were put there. Finally, the rendering was taken over by the Owners part of the way through.

96. There is no over-flashing shown at the end of the capping in photograph 3806 and M Cheong's evidence that this is a defect was not disputed. An even worse problem is depicted in photograph 3884 where there has been a clumsy attempt at rectification. I accept that this should be fixed and flashed properly by the Builder if it is responsible.

97. Mr Cheong criticises the capping for the fact that water runs down the face of the building and not onto the roof. However the capping is flat and also

does not extend out to the outer face of the wall. According to Mr Vella's evidence, that is the way it was designed. I find no defect in that.

98. Photograph 3801 shows an entrance to a down pipe at the bottom of a shallow sump that has been covered with chicken wire. Mr Vella says that was put in at the request of the Owners. The Owners deny that. Whoever is to be believed, there is no evidence that this has caused any leak. The photograph does not show any leaf or other material caught by the mesh that might have restricted water flow.

99. Mr Cheong says in his report that the sump shown in photograph 3819 "appears inadequate" but he was to check whether or not that was so. He was unable to say whether there was any gap between the upturn of the sump and the roofing material that runs into it. It was not disputed that any such gap would need to be sealed. That problem exists in the gutter shown in photographs 3826 and 3827 and I accept that that is a defect.

100. There are many other instances where Mr Cheong suspects that water may be entering but no defect is proven (see for example photograph 3886).

101. Photograph 3803 shows a collar around a pipe penetrating the roof. Mr Cheong says that the vent sealant is slightly cracked. It is not known whether any water is getting in there but it should be a simple matter to repair the crack. Another suspect penetration is shown in photograph 3868. Mr Cheong describes it as "unsatisfactory" in his report but does not say why nor point to any specific defect. There is no evidence of any defect or that the penetration is leaking.

The malthoid roof

102. There is a major problem with the malthoid. The malthoid roofing material is very heavily patched, resulting in a build up of material where the patches join. Mr Lees accepts that it is understandable if the Owners are not confident that the roof will perform over an extended period of time. It is a flat roof and so any hole is likely to admit water. How it came to be in that patched condition is another issue since there were many people other than the tradesmen for whom the Builder is responsible moving about on the roof and carrying out work. Whether and to what extent these patches are effective or leaking is unknown (see for example photograph 3845) although Mr Cheong says that some of the patching "appears defective" (photograph 3849).

103. Some of the penetrations were done by the Owners' contractors. These relate to the swimming pool works and the construction of the living area around the swimming pool. Some of these penetrations are significant and have not been sealed (see photograph 3855-3859).

104. There appears to be agreement that the membrane needs to be replaced, at least in part. It is impossible for me to find on this evidence how much requires replacement beyond saying that it must be replaced wherever it is heavily patched and the cost would be be borne by the Owners or the

Builder, depending upon who was responsible for the present state of that part of the roof. In addition, there is considerable work required to address the problems of the roof top pool and that might lead to the necessity to replace the malthoid roof in some areas but that would not be the Builder's responsibility. To the extent that the condition f the roof is defective workmanship it is the Builder's responsibility.

105. There appears to be no flashing over where the material is turned up at the walls (see photographs 3811 – 3813, 3824, 3838). In some places it appears to have been flashed over originally and then a later repair by someone was not pushed under the flashing (see photograph 3825). Even if it had been pushed up under the capping that was not what was required. The design required compressed fibro cement sheet to be installed over the membrane and under the capping and that was not done. Where there is no flashing over the malthoid I accept that that is a defect and would be the responsibility of the Builder.

106. The malthoid roof is drained at various points and there was criticism as to how this was done. Mr Cheong suspects that some of these may be leaking (see photographs 3840 and 3850). Mr Lees acknowledges that although the drawings do not detail how these drain points are to be constructed it is good practice to install grates over down pipes in a roof such as this.

Air conditioner

107. There is a photograph (3898) showing the discharge of a condensation pipe behind the face of tiles adhered to the external wall. It was suggested that perhaps that had caused the tiles to come off but the original position of the tiles appears to have been behind the outlet pipe. The tiling is related to the outdoor paving work for which the Builder is not responsible but the tiles appear to have been pulled off by the Builder's contractor mounting the air conditioner on it. The Air conditioner has been inadequately mounted and has come away (photograph 3900) taking the tiles with it. I find mounting the Air conditioner in this way to be defective workmanship for which the Builder would be responsible.

External tiling and paving - North

108. The external tiling on the northern side has been laid too high so that the extruded aluminium frames hold water below the tiles' finished level. I find that to be a defect but the paving was not within the scope of works. This defect may well account for the water penetration problems seen in the following photograph and for the exploded skirting I saw inside the Unit (photograph 3918). A similar problem is shown in photographs 3907 and 3911. I accept Mr Cheong's opinion in regard to this and find that all of this tiling needs to be re-laid at a lower level to permit the sub-sills of the windows to drain outside the building. Since this is due to the external paving it is not work for which the Builder is responsible.

Metal cladding

109. Where some of the vertical cladding panels meet the roofing material there are substantial gaps (see photographs 3929 and 3930) exposing the timber beneath. This is a surprising defect. The work here appears to be quite rough and although the precise method of construction is not apparent there does not appear to have been any attempt to attach one plane to another. Mr Cheong says that there might also be condensation problems with this material but that would seem to be a design issue. The gaps need to be fixed and that would be the responsibility of the Builder.

The other roof pool works

110. A wall has been built around the roof top pool and the vertical surface tiled. I accept that this was done by the Owners and not workmen supervised by the Builder. The tiles were laid by a tiler engaged directly by Mr Mrocki. The black granite tiles have lost adhesion and a number have fallen off. On site it was suggested by the experts that a possible cause was the northerly orientation and the fact that the tiles would expand when heated by the sun. Whatever the cause, this is not something for which the Builder is responsible.

The honing of the stone floors

111. The floors are made from stone tiles and the object of honing them was to produce a smooth finish. According to the expert, Mr Elliott, the honing process should be done first with a coarse stone to level the floor. That is the first cut. Thereafter the floor is re-cut using progressively finer stones until the final finish is achieved.

112. In regard to the honing of the stone floors, the complaint is that circular honing marks are visible on the surface and have not been polished out.

113. Mr Vella had obtained a quotation to hone the floors from two contractors, including "All Stone Restorations" for $50,160 but Mr Leon Mrocki opted for a much cheaper quotation per square metre which was obtained from Mr Blogoev. Calculated on the floor area, this was for $26,000.00.

114. Generally, where defects are claimed, it is no answer for a builder to say that the owner paid a cheap price. Whatever price the owner pays, he is entitled to have the work done in a proper and workmanlike manner using good and sufficient materials. However, within that description there are different standards of finish and where it is a question of the standard of finish to be achieved, the price paid is certainly an important matter to be taken into account.

115. In an email to Mr Vella dated 30 July 2008 Mr Leon Mrocki complains to Mr Vella that, despite attempts at rectification by Mr Blogoev, the floor is "still far from perfect". What is required is a reasonable standard of finish, not perfection. In the email Mr Mrocki says that the floors are "barely acceptable".

116. There are two areas in question.. The first is in the basement and it is not disputed that this needs to be rectified. The other area is in the upper floor where there is a dispute as to whether the standard of finish is acceptable.

117. Mr Elliott inspected the floors several times. He said that when he inspected the floors he found that Mr Blagoev had not picked up the scratches from the first cut properly and they were still in the floor He initially quoted $31,680 to regrind the whole floor but that was not accepted by the Owners. Instead they opted for a cheaper job costing "$7,000 or $8,000". Mr Elliott said in evidence that this improved the floor but there are still scratch marks which are highlighted by the polish. He said that he has not been required to do anything further.

118. Mr Clarke said that, in view of the cost of the development and the assertion on the part of the Owners that the rear unit was worth ten million dollars(there was no expert evidence in this regard), I should find that the standard of polishing achieved was insufficient and that therefore the work was defective. As against that I must take into account that Mr Mrocki opted for the quotation what was virtually half the price of that proffered by Mr Vella.

119. Mr Cheong said that all floors need to be re-honed and that to do so, the cabinets in the lower level will need to be removed. Mr Lees says that the standard now achieved for the other floors is acceptable but that the work in the basement needs to be rectified. He says that those floors need to be re-honed and repolished but says that the cabinets do not need to be removed..

120. Having inspected the floors, I prefer the evidence of Mr Lees. The upper floor requires rectification but the basement floor is acceptable. The floors were within the scope of works and so this is something for which the Builder would be liable.

Conclusion as to defects

121. Mr Cheong concludes on page 14 of his report:

> "…many of the apparent defects are highly likely to be the result of builder omissions and/or lack of adequate care or supervision. I should advise that, as other evidence becomes apparent this early conclusion may change but it would appear unlikely at this time. In very simple terms it would appear the defects are the Builder's responsibility."

122. Unfortunately, Mr Cheong's report, although raising many questions that require further (usually destructive) investigation, do not establish present liability against the Builder. There are many indications of things that are wrong but no clear evidence of what is wrong and because of the limited scope of work and the possibility of design problems, I cannot assume that any fault would necessarily be that of the Builder.

123. In Mr Tanner's report, which he described as "preliminary", he sets out a scope of works under the heading "Remedial Action". Most of these relate to items outside the Builder's scope of works. The relaying of the tiles in

the bathrooms is not proven to be necessary. The destructive testing is not something that I could order the Builder to do. Certainly, if it disclosed a defect for which the Builder were responsible I could order rectification or damages but it is for the Owners to prove liability first.

124. Mr Lees likewise recommends further investigation.

125. Following further investigation it might be found that there are more faults that could be blamed upon the Builder but on the evidence before me the following faults are proven which would be the responsibility of the Builder if it were a builder and not a mere supervisor.

    (a) The honing of the basement stone floor;

    (b) The replacement of the malthoid roof, except to the extent that this was caused by the Owners' tradesmen in constructing the upper swimming pool and the structure around it. It is impossible to quantify this apportionment on the evidence before me.

    (c) The water penetration in the basement;

    (d) The patent defects in the roofing material as detailed in these reasons;

    (e) The supports to the waste covers in the shower recesses and the gaps and faults in those areas identified in these reasons;

    (f) The supports to the air conditioner in the northern courtyard.

    Although I am satisfied that these are defects, I am not satisfied that they arise by reason of the failure of the Builder to supervise the work with reasonable care and skill.

Orders to be made

126. Because of the findings that I have made the claim against the Builder is dismissed. In D72 of 2009 I will further direct that the assessment of damages against the Second Respondent be fixed for hearing before any member of the Domestic Building List. I so order because I indicated that I would not make any orders for damages at this stage without giving the parties the opportunity to lead further evidence and that needs to be done in regard to that assessment.

SENIOR MEMBER R. WALKER