

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D642/2009

**CATCHWORDS**

Domestic Building – defective workmanship – proof of quantum of claim - domestic building insurance – claim by insurer for indemnity from Builders - evidence

<b>APPLICANT</b>	Owners Corporation PS511749
<b>FIRST RESPONDENT</b>	Vero Insurance Limited (ACN: 005 297 807)
<b>SECOND RESPONDENT</b>	E Farag Pty Ltd
<b>THIRD RESPONDENT</b>	E & M Farag
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25 October 2010
<b>DATE OF ORDER</b>	24 December 2010
<b>CITATION</b>	Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the First Respondent to pay to the Applicant the sum of \$43,731.06.
2. Declare that the First Respondent is liable to pay to the Applicant the reasonable cost of enforcing the claim. Liberty to the Applicant and the First Respondent to apply for a further hearing in order to establish the amount of such cost if not agreed.
3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant

Ms S. Kirton of Counsel

For the First Respondent

Mr Laird of Counsel

For the Second and Third Respondents: Mr E. Farag in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D643/2009

<b>APPLICANTS</b>	D. and N. Baird
<b>FIRST RESPONDENT</b>	Vero Insurance Limited (ACN: 005 297 807)
<b>SECOND RESPONDENT</b>	E Farag Pty Ltd
<b>THIRD RESPONDENT</b>	E & M Farag
<b>WHERE HELD</b>	Melbourne
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<b>CITATION</b>	Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the First Respondent to pay to the Applicants the sum of \$42,566.01.
2. Declare that the First Respondent is liable to pay to the Applicants the reasonable cost of enforcing the claim. Liberty to the Applicant and the First Respondent to apply for a further hearing in order to establish the amount of such cost if not agreed.
3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant Ms S. Kirton of Counsel  
For the First Respondent Mr Laird of Counsel  
For the Second and Third Respondents: Mr E. Farag in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION  
DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D644/2009

**APPLICANT** Terry Broadbent  
**FIRST RESPONDENT** Vero Insurance Limited (ACN: 005 297 807)  
**SECOND RESPONDENT** E Farag Pty Ltd  
**THIRD RESPONDENT** E & M Farag  
**WHERE HELD** Melbourne  
**BEFORE** Senior Member R. Walker  
**HEARING TYPE** Hearing  
**DATE OF HEARING** 25 October 2010  
**DATE OF ORDER** 24 December 2010  
**CITATION** Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the First Respondent to pay to the Applicant the sum of \$62,637.04.
2. Declare that the First Respondent is liable to pay to the Applicant the reasonable cost of enforcing the claim. Liberty to the Applicant and the First Respondent to apply for a further hearing in order to establish the amount of such cost if not agreed.
3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Ms S. Kirton of Counsel
For the First Respondent	Mr Laird of Counsel
For the Second and Third Respondents:	Mr E. Farag in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D646/2009

<b>APPLICANTS</b>	Ronald Wilson and Louise Wilson
<b>FIRST RESPONDENT</b>	Vero Insurance Limited (ACN: 005 297 807)
<b>SECOND RESPONDENT</b>	E Farag Pty Ltd
<b>THIRD RESPONDENT</b>	E & M Farag
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25 October 2010
<b>DATE OF ORDER</b>	24 December 2010
<b>CITATION</b>	Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the First Respondent to pay to the Applicants the sum of \$55,483.52.
2. Declare that the First Respondent is liable to pay to the Applicants the reasonable cost of enforcing the claim. Liberty to the Applicant and the First Respondent to apply for a further hearing in order to establish the amount of such cost if not agreed.
3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Ms S. Kirton of Counsel
For the First Respondent	Mr Laird of Counsel
For the Second and Third Respondents:	Mr E. Farag in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D647/2009

<b>APPLICANTS</b>	Peter Drummond and Joanne Clark
<b>FIRST RESPONDENT</b>	Vero Insurance Limited (ACN: 005 297 807)
<b>SECOND RESPONDENT</b>	E Farag Pty Ltd
<b>THIRD RESPONDENT</b>	E & M Farag
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25 October 2010
<b>DATE OF ORDER</b>	24 December 2010
<b>CITATION</b>	Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the First Respondent to pay to the Applicants the sum of \$55,288.77
2. Declare that the First Respondent is liable to pay to the Applicants the reasonable cost of enforcing the claim. Liberty to the Applicant and the First Respondent to apply for a further hearing in order to establish the amount of such cost if not agreed.

3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Ms S. Kirton of Counsel
For the First Respondent	Mr Laird of Counsel
For the Second and Third Respondents:	Mr E. Farag in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION  
DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D222/2010

<b>APPLICANT</b>	Vero Insurance Limited (ACN: 005 297 807)
<b>FIRST RESPONDENT</b>	E & M Farag
<b>SECOND RESPONDENT</b>	4S Constructions Pty Ltd
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25 October 2010
<b>DATE OF ORDER</b>	24 December 2010
<b>CITATION</b>	Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the Respondents to pay to the Applicant the sum of \$43,731.06.
2. Declare that the Respondent are liable to indemnify the Applicant with respect to the reasonable cost of enforcing the claim incurred by Owners Corporation PS511749 in proceeding D642/2009.
3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant

Mr Laird of Counsel

For the Respondents

Mr E. Farag, Director and in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D224/2010

<b>APPLICANT</b>	Vero Insurance Limited (ACN: 005 297 807)
<b>FIRST RESPONDENT</b>	E & M Farag
<b>SECOND RESPONDENT</b>	4S Constructions Pty Ltd
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25 October 2010
<b>DATE OF ORDER</b>	24 December 2010
<b>CITATION</b>	Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the Respondents to pay to the Applicant the sum of \$42,566.01.
2. Declare that the Respondent are liable to indemnify the Applicant with respect to the reasonable cost of enforcing the claim incurred by D.and N. Baird in proceeding D643/2009.
3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant Mr Laird of Counsel  
For the Respondents Mr E. Farag, Director and in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION  
DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D226/2010

**APPLICANT** Vero Insurance Limited (ACN: 005 297 807)  
**FIRST RESPONDENT** E & M Farag  
**SECOND RESPONDENT** 4S Constructions Pty Ltd  
**WHERE HELD** Melbourne  
**BEFORE** Senior Member R. Walker  
**HEARING TYPE** Hearing  
**DATE OF HEARING** 25 October 2010  
**DATE OF ORDER** 24 December 2010  
**CITATION** Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the Respondents to pay to the Applicant the sum of \$62,637.04.
2. Declare that the Respondent are liable to indemnify the Applicant with respect to the reasonable cost of enforcing the claim incurred by Terry Broadbent in proceeding D644/2009.
3. Costs are otherwise reserved.

**SENIOR MEMBER R. WALKER**



**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant                      Mr Laird of Counsel  
For the Respondents                  Mr E. Farag, Director and in person

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D229/2010

<b>APPLICANT</b>	Vero Insurance Limited (ACN: 005 297 807)
<b>FIRST RESPONDENT</b>	E & M Farag
<b>SECOND RESPONDENT</b>	4S Constructions Pty Ltd
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25 October 2010
<b>DATE OF ORDER</b>	24 December 2010
<b>CITATION</b>	Owners Corporation PS511749 v Vero Insurance and Ors (Domestic Building) [2010] VCAT 2082

**ORDER**

1. Order the Respondents to pay to the Applicant the sum of \$55,288.77.
2. Declare that the Respondent are liable to indemnify the Applicant with respect to the reasonable cost of enforcing the claim incurred by Peter Drummond and Joanne Clark in proceeding D647/2009.
3. Costs are otherwise reserved.

## SENIOR MEMBER R. WALKER

### APPEARANCES:

For the Applicant	Mr Laird of Counsel
For the Respondents	Mr E. Farag, Director and in person

### REASONS

#### Background

1. At all material times E & M Farag (“the Builders”) carried on business as registered domestic builders. E Farag Pty Ltd (“the Developer”) is a company controlled by one of the Builders’ partners, Mr Emad Farag (“Mr Farag”). The Developer formerly owned the land at 347 Nepean Highway Chelsea..
2. Between March 2002 and early 2003, the Builders constructed four residential units (“the Units”), a shop (“the Shop”) and a car park and on the said land for the Developer. The land was subdivided by Plan of Subdivision 511749P, producing separate titles for each of the Units and the Shop. By reason of the registration of the Plan of Subdivision, Owners Corporation PS511749 (“the Body Corporate”) came into existence and it is the owner of the common property in the subdivision, including the car park.
3. Vero Insurance Limited (ACN: 005 297 807) (“the Insurer”) issued domestic building warranty insurance in respect of the said building work in relation to each of the Units, the Shop and the common property to be constructed by the Builders. Before these policies were issued, the Builders and a company controlled by Mr Farag called 4S Constructions Pty Ltd (“the Guarantor”) had given a Deed of Indemnity (“the Indemnity”) to the Insurer indemnifying (*inter alia*) the Insurer against all claims payments, costs and any other expenses, losses, damages and costs that may be sustained by it or that it might incur resulting from entering into any home owner’s warranty policy with the Builders.

#### The various proceedings

4. There are ten applications before me. The first five (“the Owners’ Appeals”) relate to Owners’ claims and are as follows:
  - (a) The Body Corporate is the Applicant in proceeding D642/2009 and is the owner of the common property.
  - (b) The Applicants in proceeding D643/2009, D. and N. Baird, are the current owners of Unit 1.

- (c) The Applicant in proceeding D644/2009, Terry Broadbent, is the current owner of Unit 2.
- (d) The Applicants in proceeding D646/2009 Ronald and Louise Wilson are the current owners of Unit 3.
- (e) The Applicants in proceeding D647/2009, Peter Drummond and Joanne Clark are the current owners of Unit 4.

Each of the current owners of Units 1, 2, 3 and 4 (“the Owners”) purchased their respective Units from the Developer.

- 5. The next five applications (“the Indemnity Proceedings”) are claims by the Insurer against the Builders and the Guarantor seeking to recover from them any monies that might be awarded by this Tribunal against the Insurer in each of the Owners’ Appeals. They are D222/2010 in regard to any sums awarded in regard to the claim by the Body Corporate, D224/2010 in regard to any sums awarded in regard to the claim by the Owner of Unit 1, D226/2010 in regard to any sums awarded in regard to the claim by the Owner of Unit 2, D227/2010 in regard to any sums awarded in regard to the claim by the Owner of Unit 3 and D229/2010 in regard to the Owner of Unit 4.

#### **The claims by the Owners and the Body Corporate**

- 6. There were numerous defects in the work and the Body Corporate and each of the Owners submitted claims to the Insurer seeking indemnity under the relevant policy with respect to those defects.
- 7. The Insurer made a decision with respect to each of the claims by the Owners on 29 July 2009 and a decision was made in regard to the claim by Owners Corporation PS511749 on 30 July 2009. In regard to each claim the Insurer accepted the majority of the items and rejected others. As to the accepted items the Insurer directed the Builder to rectify the defects.
- 8. Five further applications were then brought by Mr Farag against the Insurer, the Body Corporate and each of the Owners, seeking the review of the decision of the Insurer in regard to each of the claims made by the Body Corporate and the Owners. Those proceedings (“the Farag Appeals”) were:
  - (a) In regard to the claim by the Body Corporate, D654/2009;
  - (b) In regard to the claim by the Owner of Unit 1, D655/2009;
  - (c) In regard to the claim by the Owner of Unit 2, D653/2009;
  - (d) In regard to the claim by the Owner of Unit 3, D652/2009;
  - (e) In regard to the claim by the Owner of Unit 4, D656/2009.
- 9. On 24 February 2010, in each of the Farag Appeals, a self executing order was made that, unless by 17 March 2010 Mr Farag filed and served Points of Claim in compliance with an earlier order of the Tribunal, the proceeding would stand dismissed with costs. Mr Farag did not comply with the orders and so each of the Farag Appeals stands dismissed. No application has been

brought by Mr Farag to reinstate any of the Farag Appeals. The effect of that is that there is no appeal by the Builders against the decision of the Insurer in regard to liability for the items that the Insurer admitted and so the Builders are bound by the decision in regard to those items.

### **The Owners' Appeals**

10. The subject of each of the Owners' Appeals is an appeal against the decision of the Insurer in regard to:
  - (a) those parts of the claim the Insurer rejected; and
  - (b) the direction to the Builders to return and rectify the defective work..

The relief sought in each case is the reversal of the Insurer's decision and damages being the reasonable cost to rectify the defective work. Although both the Developer and the Builders are parties to each of the Owners' Appeals, no relief is sought against them.

11. Each of the Owners' Appeals was defended by the Insurer. In each case, in its defence it added that, to the extent that rectification of the defects should not be permitted by the Builders it was entitled to seek indemnity from the Builders and the Developer pursuant to the Deed of Indemnity. By their defence the Builders and the Developer deny that the work was defective and say that the matters complained of in the claim is due to a failure to maintain the property.

### **The hearing**

12. All ten matters came before me for hearing on 25 October 2010 with 5 days allocated. Ms Kirton of Counsel appeared for the Body Corporate and each of the Owners. In each case, Mr Laird of Counsel appeared for the Insurer and the VBuilder and the Developer were represented by Mr. Farag.
13. At the start of the proceeding I was handed an extensive statement of agreed facts which included the matters referred to above. I was informed by Ms Kirton and Mr Laird that the Body Corporate, the Owners and the Insurer agreed with the contents of the document and that they had provided a copy to Mr Farag. I explained in detail to Mr Farag the nature of the document and suggested that he read it carefully and seek advice before determining whether he would agree to the facts set out in it.
14. The hearing was then adjourned to an on-site inspection with all parties present. I was shown the Units, the Common Property including the car park and also the Shop. The alleged defects were pointed out and discussed on site with the parties.
15. On the second day of the hearing I asked Mr Farag whether he was prepared to agree to the statement of facts on behalf of the Builders and the Developer and he said that he was. In the light of that concession the need for any further evidence was avoided apart from the expert evidence in regard to the existence or otherwise of the defective or incomplete work and some general evidence from one of the Owners on the issue of whether the

Builders should be given an opportunity to come back and attend to the defects.

### **Expert evidence**

16. Evidence on behalf of the Owners was given by an engineer, Mr Tom Casamento, and by a building expert, Mr Raymond Martin. Evidence was given on behalf of the Insurer by Mr Bruce Dobell. The evidence of these experts was given concurrently.
17. The Builder had obtained and filed a report from a well known expert, Dr Eilenberg but I was informed by Mr Farag that Dr Eilenberg was not being called and that his report was not relied upon. In addition, the Builder had filed two quotations from builders to carry out work referred to in the direction by the Insurer. Neither builder was called to give any evidence and the quotations are very short on detail. They are of no assistance at all in quantifying the rectification costs in regard to the claims that have been admitted or that I find established.
18. The three experts who appeared had had extensive discussions between themselves and co-operated in producing a Scott Schedule setting out all of the admitted and disputed items. A great deal of agreement was reached between them although there were some items in dispute. The hearing concluded during the second day and I informed the parties I would provide a written decision.

### **The defects**

19. In most cases, the existence of a defect was obvious when pointed out at the inspection. A few of the items originally claimed had been abandoned by the time of the hearing. As to the remaining items, I generally accept the evidence of Mr Martin and Mr Casamento that the work is defective and I accept the costing as to each of these items prepared by Mr Dobell. I also accept Mr Casamento's comment in his report that the building as a whole has been poorly constructed. I do not accept Mr Farag's assertion that the problems have largely arisen due to a lack of maintenance. I did see untidiness in some of the Units and some objects and debris in some of the light wells but that did not appear to be related to the defects complained of. He was not supported in that view by any of the experts.
20. I will deal with the items in the order in which they were set out in the Scott Schedule.

### **Common property**

#### **21. Item 1 – Timber deck on the roof**

This was rejected by the Insurer but I find it to be defective. The timber deck is sitting upon the metal roof. The experts agreed that there was insufficient information in the plans and specifications to show how the deck was to be constructed and supported but in those circumstances the Builders ought to have sought instructions. I accept the evidence of Mr

Casamento that the metal roofing is inadequate to carry the dead and live loads to which it would be subjected by the presence of the decking. He said that the roofing material was only designed to carry 1.8 kn of load for maintenance whereas the deck would need to be able to support 150 kg per square metre. To overcome that problem it was agreed that shaped timber blocking needs to be installed in order to transfer the load of the deck from the metal roof and onto the supporting timber trusses. It was also agreed that the deck joists which have deteriorated will need to be replaced and certain other work as detailed in the schedule needs to be done. I accept that evidence and the estimate of \$12,834.30 as being a fair and reasonable price for the carrying out of the necessary work.

**22. Item 2 – Caulking to the articulation joints**

This was also rejected by the Insurer. There were two types of material used in the articulation joints, one hard and one soft. Mr Dobell said that the specification required silicon or mastic and the soft material was mastic which could be penetrated with a car key. The other material was quite different. It was suggested that there was no evidence as to who had installed the hard material. Mr Farag said that he had a contractor do it and he had no personal knowledge of how it had been done or what materials had been used. In the absence of any evidence to suggest that it has been done at a later date I think I must find that it was part of the building works. The majority of the caulking material is plastic which would extrude under compression and so work effectively. However in the areas where the articulation joints have been filled with a non-flexible filler I accept that that would prevent the articulation joint from performing as it should. The Builder has been back to the site since completion in response to complaints from the Owners and done work although precisely what was done is unknown. I think that it is fanciful to speculate that some third party might have put this hard material into the articulation joints. There is no evidence that that occurred. I find this work to be defective. I accept the estimate of the cost of \$640.02 for rectifying the problem..

**23. Item 3 – Soffit lining of the car park roof is detaching and peeling due to water seepage and ingress.**

These defects were readily apparent on site. The item was accepted by the Insurer and the experts have agreed on the quantum of \$11,246.49. I accept the presence of the defect and also the costing.

**24. Item 4 – Wall cladding and moulding detaching due to water infiltration and poor connection detail.**

This was also readily apparent on site. It is a common defect throughout the building, particularly along the north and west walls. It was accepted by the Insurer and the experts have agreed upon a rectification costs of \$5,501.68. I accept the presence of the defect and also the costing.

25. **Item 5 – Wall cladding is spalled and cracked around the stormwater pipe penetration.**

Mr Farag suggested that this was caused by a lack of maintenance but I do not accept that as an explanation for what I saw. The item was accepted by the Insurer and the experts have agreed upon the quantum of \$1,011.88. I accept the presence of the defect and also the costing.

26. **Item 6 – The steel lintel over the car park entrance has moved out of alignment and is only partially supported by the brick wall at the north end.**

The lintel has moved and is now supported on acrow props. Mr Farag suggested that this might have been damaged after construction but there is nothing to indicate that. This was accepted by the Insurer and a scope of works has been discussed and agreed upon. The agreed cost is \$2,539.68. I accept the presence of the defect and also the costing.

27. **Item 7 – The block work along the north wall is cracked due to foundation movement and lack of articulation joints.**

This was denied by the Insurer on the basis that although there was some cracking in the masonry wall there was no evidence to suggest that it was caused as a result of inadequate articulation in the wall or that the existing articulation was not in accordance with the relevant standard. In this regard I prefer the evidence of Mr Martin and Mr Casamento that this is a defect. Should that finding be made a scope of works was agreed upon at an agreed cost of \$473.29.

28. **Item 8 – The wall cladding around the south wall is cracked.**

This was also rejected by the Insurer on the ground that the cracks were less than 1 mm and so were within tolerance. Mr Casamento said that the cracking arose through inadequate articulation and foundation movement. Having seen the extent of the problem on site I accept the evidence of Mr Martin and Mr Casamento that this is a defect. It was agreed between the experts that the cracks can be sealed at a cost of \$870.20.

29. **Item 9 – No articulation joints to external walls.**

This was also rejected by the Insurer. It is linked to the preceding item and so the same comment can be made in regard to this item. I accept the evidence of Mr Casamento and Mr Dobell that articulation joints need to be added to the light weight cladding. I accept that there is a defect and the agreed cost of \$3,156.56.

30. **Item 10 – Ponding in gutters**

This item was withdrawn.

31. **Item 11 – Rainheads require overflows of the same capacity as the downpipes**

This item was accepted by the Insurer. The rectification cost was agreed at \$1,054.08.

32. **Item 12 – Rainheads not sealed with birdwire.**

This was sensibly withdrawn. I agree with the Insurer that there was no requirement for the Builders to do this.

33. **Item 13 – No sumps on internal gutters and no overflows.**

The Insurer quite properly admitted the necessity to put overflow facilities on the three box gutters on the south side of the roof. The price agreed between the experts for the overflows is \$3,352.92. However the Insurer denied that the Builders were responsible to put sumps in the gutters. Although I accept the evidence of Mr Martin that this would have been good practice I cannot find that there is a breach in that regard and so the claim for \$3,110.88 for providing sumps is not allowed.

34. **Items 14 and 15**

These items were denied by the Insurer and were withdrawn.

35. **Item 16 - Pop rivets rusting and/or not sealed**

A number of pop rivets on the roof and flashings are rusting and they all need to be sealed. It was accepted by the Insurer and I accept that this is a defect. The experts agreed upon the quantum of \$756.72 for that which I accept.

36. **Item 17 – Metal flashing lining the parapet on the north east end of the roof requires additional fixing.**

This was denied by the Insurer on the basis that there was no evidence of defective flashing or rattling of the flashings and that they met the appropriate Australian Standard. The Owners' experts said that the flashings needed to be fixed and capped and I agree that that is the case. In that event the agreed price is \$293.26.

**Unit 1**

37. **Item 18 - The decks and light wells have been constructed higher than the floor levels inside the building.**

That was apparent upon inspection. It was admitted by the Insurer. It was agreed by the experts that it is bad building practice because, unless particular attention is paid to the detail required to prevent ingress of water into the adjacent rooms, water will enter the building which is what has occurred. It is apparent that whatever waterproofing system the Builders used, if there was one, it has failed, causing damage to timber skirtings, boards, carpets, architraves and flooring. A similar problem was observed in the decks and light wells throughout the building. Mr Farag argued that it was not proven that the water ingress into the adjacent rooms was as a result of any failure of the waterproofing of the decks and light wells. He

pointed to evidence in several light wells of small amounts of litter and moss partially obstructing the outflow. There were also objects stored in some of them. He was not supported in his opinion by the evidence of the Insurer's expert and none of those factors appear to me to be a likely explanation for the damage that I observed. I find this item proven. The Owners' experts and the Insurer's expert agreed upon a scope of works in order to rectify the leakage. That involves removing all tiles, repairing or replacing any damaged substrate and reconstructing the decks and light wells in a proper way. The agreed cost in regard to the deck and light well in Unit 1 was \$43,566.01. Since I have no other figure from Mr Farag I accept that this is a reasonable cost.

38. **Item 21 - Differential movement and cracking**

This is dealt with and taken into consideration in Item 9. It was denied by the Insurer but I find a defect for the reasons given in regard to that Item.

39. **Item 22 – Lack of articulation joints.**

This is also taken up in Item 9. It was denied by the Insurer but I find a defect for the reasons given in regard to that Item.

40. **Item 23 – the drainage points for the light wells and enclosed balconies are too narrow and block easily.**

This is part of Item 18 and is included in the rectification costs of that item. It was admitted by the Insurer.

41. **Item 24 – The light wells and enclosed balconies have no provision for overflow of blocked drains.**

This is also taken up in Item 18. It was admitted by the Insurer.

**Unit 2**

42. **Item 25 - The timber deck**

This relates to the timber deck and is dealt with and costed as part of Item 1. It was denied by the Insurer but I find a defect for the reasons given in regard to that Item.

43. **Item 27 – Internal decks and light wells**

The same comments can be made here as were made about Item 18. The rectification with respect to Unit 2 is agreed by the experts at \$63,637.04. Since I have no alternate costing from Mr Farag I accept that assessment.

44. **Item 28 – Water leakage has caused loss and deterioration of internal finishes.**

This was admitted by the Insurer and is taken up in Item 27.

45. **Item 29 – the deck tiles have cracked due to floor movement.**

This was admitted by the Insurer and is taken up in Item 27.

46. **Item 30 – Part of the ceiling in some walls have been damaged due to water ingress.**

This was admitted by the Insurer. The damage was pointed out to me. The cost of this work was included in Item 27.

47. **Item 32 – Differential movement and cracking in external render.**

This was denied by the Insurer but I find a defect for the reasons given in regard to Item 9. Rectification cost is taken up in the cost of that item.

48. **Item 33 – The downpipe is not connected to any stormwater drain allowing water to flood the deck and light well.**

This was admitted by the Insurer. Rectification cost is taken up in the cost of Item 27.

49. **Item 34 – Lack of articulation joints at the required distance.**

This was denied by the Insurer but I find a defect for the reasons given in regard to Item 9. Rectification cost is taken up in the cost of that item.

50. **Items 35 and 36 – Drainage points to the light wells in enclosed balconies are too narrow and block easily and there is no provision for overflow.**

These items were admitted by the Insurer and the rectification cost taken up in Item 27. Mr Farag's suggestion that the blockages are due to lack of maintenance does not address the construction issues and in particular, running downpipes into light wells, the inadequate size of the drains and the lack of any provision for overflow. All of these are defects.

### **Unit 3**

51. **Item 37 - The timber deck**

This is dealt with and costed as part of Item 1. It was denied by the Insurer but I find a defect for the reasons given in regard to that Item.

52. **Item 39 – Internal decks and light wells**

The same comments can be made here as were made about Item 18. The rectification with respect to Unit 3 is agreed by the experts at \$56,089.93. Since I have no alternate costing from Mr Farag I accept that assessment.

53. **Items 40 and 41– water leakage has caused deterioration in internal finishes.**

This is caused by the defects in Item 39 and the rectification cost is included in that figure..

54. **Item 42 – There is a gap between the deck tiles and the upstand.**

This is also admitted by the Insurer and since it relates to the construction of the balcony it is taken up in the rectification cost for Item 39.

55. **Items 43 and 44 – Gaps and damage to the timber floors water ingress**

This was admitted by the Insurer. It relates to Item 39 and is taken up in the rectification cost of that Item.

56. **Item 45 – The sliding door to the rear deck is out of alignment.**

This was denied by the Insurer on the basis that it was said to be a maintenance issue. Having inspected the door I agree with the Owners' experts that this is a defect. The door when fully closed does not meet at both top and bottom. The amount allowed is to realign the door and I accept that will be needed. In the event of such a finding the agreed sum for that is \$393.59.

57. **Item 47 – Different movement to cracking to exterior render.**

This was denied by the Insurer but I find a defect for the reasons given in regard to Item 9. Rectification cost is taken up in the cost of that item.

58. **Item 48 – Downpipe is not connected to any stormwater drain.**

This was admitted by the Insurer and the rectification cost is taken up in Item 39.

59. **Item 49 – Lack of articulation joints in external walls.**

This was denied by the Insurer but I find a defect for the reasons given in regard to Item 9. Rectification cost is taken up in the cost of that item.

60. **Items 50 and 51 – Drainage points to the light wells in enclosed balconies are too narrow and block easily and there is no provision for overflow.**

These items were admitted by the Insurer and the rectification cost taken up in Item 39. Mr Farag's suggestion that the blockages are due to lack of maintenance does not address the construction issues and in particular, running downpipes into light wells, the inadequate size of the drains and the lack of any provision for overflow. All of these are defects.

#### **Unit 4**

61. **Item 52 - The timber deck**

This is dealt with and costed as part of Item 1. It was denied by the Insurer but I find a defect for the reasons given in regard to that Item.

62. **Item 54 – Internal decks and light wells**

The same comments can be made here as were made about Item 18. The rectification with respect to Unit 4 is agreed by the experts at \$56,288.77. Since I have no alternate costing from Mr Farag I accept that assessment.

63. **Items 55 and 56 – water leakage has caused deterioration in internal finishes.**

This is caused by the defects in Item 54 and the rectification cost is included in that figure..

64. **Items 57-60 – Crack in Living Room wall, damage to floor by water penetration and gap between the tiles and upstand of the light well**

These items were all admitted by the Insurer. They all relate to consequential damage following the failure of the enclosed light well and deck. The cost of rectifying them is taken up in Item 54.

65. **Item 61 – Different movement to cracking to exterior render.**

This was denied by the Insurer but I find a defect for the reasons given in regard to Item 9. Rectification cost is taken up in the cost of that item.

66. **Item 62 – Downpipe is not connected to any stormwater drain.**

This was admitted by the Insurer and the rectification cost is taken up in Item 54.

67. **Item 63 – Lack of articulation joints in external walls.**

This was denied by the Insurer but I find a defect for the reasons given in regard to Item 9. Rectification cost is taken up in the cost of that item.

68. **Items 64 and 65 – Drainage points to the light wells in enclosed balconies are too narrow and block easily and there is no provision for overflow.**

These items were admitted by the Insurer and the rectification cost taken up in Item 54. Mr Farag's suggestion that the blockages are due to lack of maintenance does not address the construction issues and in particular, running downpipes into light wells, the inadequate size of the drains and the lack of any provision for overflow. All of these are defects.

**Should the Builders be allowed to rectify the defects?**

69. Mr Baird gave evidence as to the purchase by himself and his wife of Unit 1 in about mid 2003. He said that the other Owners purchased their Units at about the same time. The purchases were "off the plan". Each of the Units is rented to tenants. Defects appeared in the Units shortly after settlement. He said that he and the other Owners contacted the Builders on a number of occasions asking them to come back and fix the defects. A list of defects was sent to them on 26 July 2003, a further list was sent in August 2003 and he wrote to the Builders many times. He said that the Builders returned on numerous occasions but failed to properly rectify the defects with the result that they reappeared.

70. In cross-examination by Mr Farag, Mr Baird agreed that he first complained about water penetration and not drainage from the courtyards. He said that people came out to look at it but nothing much was done. Some drainage from downpipes was relocated and some cracks were sealed but no substantial rectification work was undertaken. He said that the timber roof deck had to be locked up because it was unsafe and had remained locked up for two to three years.

71. Where Mr Farag's evidence related to individual items it is referred to above. In general, he said that the work was done according to the plans and that the problems were due to a lack of maintenance of the Units by the tenants. He tendered a number of photographs which certainly showed untidiness in the courtyards, uncollected mail for the Body Corporate and items stored in the light courts. He also suggested that the attachment of a sign to the balcony over the shop had resulted in water penetration, although this was not supported by the Insurer's expert and seems an unlikely cause for any of the problems that I saw.
72. It is apparent from the evidence of Mr Baird that he made numerous requests to the Builders, submitting lists of required work between 2003 and the issue of these proceedings. He said that despite the Builders returning on numerous occasions they have failed to rectify or properly rectify the defective works so they continued to be in a defective state as described above. They were in that condition at the time of the hearing when they were inspected by me.
73. I do not agree with Mr Farag that the present condition of the units is due to a lack of maintenance. I accept the evidence of the experts that it is due to defective workmanship for which the Builders are responsible. To the extent to which the Builders' responsibility is insured under the respective contracts of insurance, the Insurer is also responsible.
74. Mr Farag indicated a willingness to return and carry out rectification work but this was resisted on behalf of the Owners and in all the circumstances their objection to the Builders returning is quite reasonable. I am not satisfied, that if I made an order that the Builders carry out the scopes of work the experts have agreed upon, it would be done satisfactorily or at all. The only satisfactory solution is to make a monetary award in each case.

#### **The extent of the Insurer's liability**

75. In regard to the Owners' claims, the maximum claimable under each policy is \$100,000.00, less an excess of \$1,000.00. There is no excess in regard to the claim by the Body Corporate but the amount awarded to the Body Corporate must come off the maximum claimable by each of the individual Owners.

#### **Orders to be made**

76. The claim for the Body Corporate is allowed at \$43,731.06, being the total of the sums assessed for the rectification of the Items that I have allowed as above. There being no excess there will be an order made in D642/2009 for that amount. The effect of that is that the maximum claimable by each of the Owners is reduced by one quarter of that sum, which is \$10,932.75. the maximum claimable by any of the four Owners is therefore reduced to \$89,067.25, less the excess of \$1,000 plus the reasonable cost of enforcing the claim. There will be a corresponding order made in proceeding

D222/2010 that the Builders and the Guarantor pay these amounts to the Insurer.

77. The claim with respect to Unit 1 is assessed at \$43,566.01, being the rectification cost that I have allowed as above. As with all of the Units, this is less than the maximum amount claimable and so the whole sum will be allowed, less the excess of \$1,000, making \$42,566.01 and an order made in D643/2009 for that amount plus reasonable costs as aforesaid. There will be a corresponding order made in proceeding D224/2010 that the Builders and the Guarantor pay these amounts to the Insurer.
78. The claim with respect to Unit 2 is assessed at \$63,637.04, being the rectification cost that I have allowed as above. The whole sum will be allowed, less the excess of \$1,000, making \$62,637.04 and an order made in D644/2009 for that amount plus reasonable costs as aforesaid. There will be a corresponding order made in proceeding D226/2010 that the Builders and the Guarantor pay these amounts to the Insurer.
79. The claim with respect to Unit 3 is assessed at \$56,483.52, being the rectification cost that I have allowed as above. The whole sum will be allowed, less the excess of \$1,000, making \$55,483.52 and an order made in D646/2009 for that amount plus reasonable costs as aforesaid. There will be a corresponding order made in proceeding D227/2010 that the Builders and the Guarantor pay these amounts to the Insurer.
80. The claim with respect to Unit 4 is assessed at \$56,288.77, being the rectification cost that I have allowed as above. The whole sum will be allowed, less the excess of \$1,000, making \$55,288.77 and an order made in D647/2009 for that amount plus reasonable costs as aforesaid. There will be a corresponding order made in proceeding D229/2010 that the Builders and the Guarantor pay these amounts to the Insurer.

**SENIOR MEMBER R. WALKER**