

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D178/2007

CATCHWORDS

Domestic Building, defects, access to the Builder to rectify, alleged plaster defect, light conditions under which plaster should be viewed, brickwork, articulation joint, expansion joint, flashing, damp-proof course, contingency and builder's margin

APPLICANT	Hanna Yarak
FIRST RESPONDENT	Clarendon Homes (VIC) Pty Ltd (ACN: 090 713 732)
SECOND RESPONDENT	Rob Grant
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	10-12 December 2007 and 25-26 February 2008
DATE OF ORDER	7 May 2008
CITATION	Yarak v Clarendon Homes (VIC) Pty Ltd (Domestic Building) [2008] VCAT 852

ORDER

1. The First Respondent must pay the Applicant \$92,129.48.
2. Costs are reserved and there is liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr Beck-Godoy of Counsel
For the First Respondent	Mr Xafis, Construction Manager of the First Respondent
For the Second Respondent	Ms S Leonard of the First Respondent's Legal Department

REASONS

- 1 Mr Hanna Yarak owns a two storey brick veneer home at 27 Delacombe Drive Mill Park where he lives with his wife and five children. In late 2004 Mr Yarak entered a contract with the First Respondent, Clarendon Homes who agreed to build the home for him. Clarendon Homes was previously called Domain Homes (Vic) Pty Ltd and the contract documents are in that name.
- 2 Mr Rob Grant, the Second Respondent, is a registered builder. Somewhat surprisingly, the Respondents have admitted paragraph 4 of the Applicant's Points of Claim which state:

By agreement being a Building Contract, the Respondents agreed to carry out domestic building work at the property in accordance with the terms and conditions of the contract and in accordance with the plans and specifications for a total contract price of \$234,474.00. (emphasis added)

Although no application was made on Mr Grant's behalf to dismiss the claim against him, and neither Mr Xafis nor Ms Leonard sought to distinguish between the Respondents, Mr Beck-Godoy said in answer to my question that Mr Yarak seeks to be compensated by Clarendon Homes, which I take to mean that no claim is pursued against him. I will therefore make orders for payment against Clarendon Homes alone.

- 3 The parties agree that the whole sum due under the building contract was paid. However, Mr Yarak and his family have complaints about the quality of the work. The aspect of the work that seemed to concern them most initially was the quality of the internal plasterwork and it remains a major part of Mr Yarak's claim. Their discontent with the plaster led to the home being inspected by their expert, Mr Cross, who found a number of other matters of which they now complain.
- 4 Mr Yarak's claim, as updated on the last hearing day, is for \$132,800.67, being:

1. Rectification of Plasterboard and Site drainage reclamation	\$20,275.50
2. Rectification of First Floor Level defect	\$34,880.00
3. Repair and Rendering of Brickwork	\$17,017.75
4. Repair to 3 additional articulation joints	<u>\$804.45</u>
Total	<u>\$72,977.70</u>
x1.495 margin	\$109,101.67
Add GST	<u>\$10,910.00</u>
Sub total	\$120,011.67
Add accommodation required during repair works 45 days @\$220.00	\$9,900.00
Cleaning of Residence after works	\$700.00
De and reinstallation of blinds	\$689.00
Storage of household items	<u>\$1,500.00</u>
TOTAL CLAIMED BY APPLICANT	\$132,800.67

THE CONDUCT OF THE PROCEEDING

- 5 The Respondents have expressed concern regarding Mr Yarak's conduct of the proceeding. His claim has changed over time. Further, the Respondents complied with the directions of 10 December 2007 to file and serve the expert report of Dr Eilenberg by 25 January 2008, but Mr Yarak did not comply with the order to file and serve any expert report in reply by 8 February 2008.
- 6 Mr Cross's 20 page report was not filed until 20 February 2008 and an addendum to the report was filed on the 22nd, the Friday before the Monday on which the hearing re-commenced. Ms Leonard of Clarendon Homes said she did not receive it until the morning of the hearing.
- 7 To put this in context, Mr Cross's first report was dated July 2007 and his "supplementary report" was filed on 20 November 2007. Perhaps most importantly, photographs upon which the Applicant relied on the second-last day of the hearing were not part of any of Mr Cross's reports but were handed up on that day. His explanation was that coloured photographs that are photocopied end up black and indecipherable. Given parties' obligations in accordance with paragraph 18 of Practice Note PNDB1 (2007) to file and serve reports copied in colour where the original contains coloured photographs, his reasoning is hard to follow. Failing to annex relevant photographs can be unfair to the other party.
- 8 The Applicant's conduct of the case was unreasonable. Nevertheless, the Respondents did not seek a further adjournment and the hearing proceeded.

HAS MR YARAK UNREASONABLY REFUSED ACCESS TO THE BUILDER TO RECTIFY?

- 9 It is Clarendon Homes' contention that it offered to undertake rectification work on 31 July 2006 and Mr Yarak unreasonably refused to allow it to do so. At that date, the only claim by Mr Yarak was for rectification of plaster. The work described in the offer was estimated by Mr Warren Toogood, Clarendon Homes' building manager, as taking 14 hours to undertake. Mr and Mrs Yarak had some concerns for the health of their second son, who is asthmatic. However as Mrs Yarak admitted, the real issue was that they considered the scope of works insufficient.
- 10 As admitted by Mr Xafis of Clarendon Homes, considering the plastering alone, the necessary work will take significantly longer than 14 hours, which supports Mr and Mrs Yarak's view that the work proposed was insufficient. I therefore find Mr Yarak's refusal to allow the builder to return was reasonable in the circumstances.
- 11 Because Mr Yarak's refusal to allow Clarendon Homes to return to site to attempt rectification was reasonable, he is entitled to the reasonable cost to him of having the work done by another builder.

ALLEGED DEFECTS

- 12 In accordance with the contract and with the warranties contained in s8 of the *Domestic Building Contracts Act 1995* ("DBC Act"), Mr Yarak is entitled to a home which is built in a proper and workmanlike manner.

13 The following are the defects Mr Yarak alleges:

Plaster

14 Mr Yarak alleged many defects in the walls and ceilings. The Respondents replied that some were only visible in conditions under which it is unfair to judge the quality of the plaster.

Light conditions under which plaster should be viewed

15 The parties agree that the finish to be achieved is a level four finish. This is described in the standard AS/NZS 2589.1:1997 *Gypsum linings in residential and light commercial construction - Application and finishing*. It states:-

This is generally the accepted level of finish for domestic construction. It is used where light textures or wall coverings and smooth textured finishes are illuminated by critical lighting and where smoother textured finishes and satin/flat/low sheen paints are illuminated by non-critical lighting.

In critical lighting areas, flat paints applied over light textures tend to conceal joints. Gloss and semi-gloss paints are not generally suitable over this level of finish.

The weight, texture and sheen level of wall coverings applied over this level of finish should be carefully evaluated. Joints and fasteners must be adequately concealed if the wall covering material is lightweight, contains limited pattern, has a gloss finish, or has any combination of these features.

All joints and interior angles shall have tape embedded in joint compound and a minimum of two separate coats of joint compound applied over all joints, angles, fastener heads and access leads. All joint compound shall be finished smooth and free of tool marks and ridges.

16 A site inspection was conducted on the first afternoon of the hearing - 10 December 2007 - and the day was fine and sunny. The general impression of the plaster in Mr Yarak's home is that it is quite smooth, although it is possible to see some fasteners and some ridges. This was particularly apparent in the lighting conditions where the blinds were closed and the lights, consisting of bare bulbs on batons, were turned on. Both the standard and the 2002 Guide to Standards and Tolerances ("2002 Guide") - which was current when Mr Yarak's home was built - make reference to the CSIRO Report No. L8 of 1960 *Illumination and decoration of flat surfaces*. The 2002 Guide is not prescriptive, but is what its title suggest - a useful guide.

17 Paragraph 18.2 of the 2002 Guide also states: "If plaster peaking or jointing is obvious in normal daylight conditions, it will be considered a defect". The CSIRO document states "The worst effects are produced when a single unshaded lamp is placed close to a wall or ceiling in an otherwise darkened room."

18 Mr Cross and Mr Pimm, plaster expert for the Respondents, gave concurrent evidence about the quality of the plaster. I note with concern that Mr Pimm's report was not in accordance with VCAT Practice Note 2: Expert Evidence.

- 19 I am not convinced that Mr Pimm is correct when he said that surfaces should be viewed under the same conditions that the trades work under, which is usually natural light. However I am also concerned that Mr Yarak's claim for allegedly defective plaster-work, and the undoubted unhappiness of himself and his family, is based on an unreasonably high standard. It is hard to imagine a less flattering light than the shadows cast by a bare bulb when the blinds are closed. It is also impossible to believe that Mr Yarak and his family will not shade their lights in some manner, because at present their appearance is inconsistent with the pleasing appearance of the rest of the home. The building contract called for cowl light shades, and no explanation was given about why they were not in place.

Display home

- 20 Mr and Mrs Yarak visited a display home of the First Respondent and said that the quality of plaster in their home is not as good as that in the display home. Although they appeared to me to be truthful witnesses, I am not satisfied that they were in a position to judge and remember the plaster conditions in the display home. Mrs Yarak admitted there were down-lights in the ground floor ceilings in the display home and was not sure what the light fittings were on the first floor. Down lights provide diffuse light on plaster and tend not to show defects as bare bulbs do. They have failed to prove the plaster in their home differs substantially from the plaster in the display home.

Ceilings

- 21 Mr Cross identified 38 locations where he stated that the recessed and butt joints were unreasonably visible; 19 on the ground floor and 19 on the first floor. Mr Pimm admitted that there are three butt joints in the ceilings that are obvious and need to be rectified.
- 22 Mr Cross identified over 200 instances of screw popping with the exception of the first floor rumpus room where he said there were "too many to count". Mr Cross and Mr Yarak agreed that the standard of finish of the garage ceiling is unacceptable. Mr Pimm conceded that it needs some re-surfacing.
- 23 My own observation on site tended to support Mr Pimm's view. Three butt joints need to be rectified. The ground floor ceiling otherwise appears acceptable, although there are some visible trowel marks and under normal daylight there is a fastener pop which is just visible near the stairs.
- 24 Under normal daylight conditions, two plaster joins in the living room and two in the dining room are just visible. There is a plaster defect beside the column in the dining room which needs to be filled, sanded and touched up.
- 25 In the ground floor rumpus room Mr Cross drew my attention to a plaster join to the west of the central light. I prefer Mr Pimm's view that it is not visible under normal daylight conditions at a distance of 1.5 meters. I accept Mr Pimm's evidence that it is reasonable to view surfaces such as walls and ceilings from 1.5 meters or further.

- 26 The first floor ceilings were generally acceptable under normal light, although the first floor rumpus ceiling appears a little out of level and the area around the manhole needs refinishing.
- 27 Mr Cross's report of July 2007 stated that a number of ceilings are significantly out of level. He identified them as the ground floor meals room, kitchen, entry near stair, living room, dining room and study. On the first floor he identified the rumpus room, master bedroom and retreat. Whilst I found this defect was only obvious in the meals area, neither expert for the Respondents challenged Mr Cross's view. Mr Pimm said that the ceilings were tight to the bottom chord of the truss, but did not comment on whether they were level and agreed under cross-examination that he had not looked at structural levelness. I therefore accept Mr Cross's evidence on this point.

Walls

The parties agree that there a number of walls which are out of plumb or bowed. The experts disagree about the extent of these wall defects and as to the method of rectification.

- 28 On site, I observed some minor paint runs to the south of the stairs that need a light sand and retouch. The internal wall to the east of the front door does not appear to be defective, but Mr Cross demonstrated there is a horizontal bow in it of approximately 6 mm. The northern wall of the study is slightly bowed horizontally and needs to be straightened. I was not assisted by Mr Pimm's comment in his report of 14 October 2007 regarding this wall that he "Could not locate a horizontal wall". There is a significant horizontal bow in the wall to the east of the stairwell. It requires straightening.
- 29 The first floor rumpus room has two walls that are unacceptable. The south wall is out of horizontal by approximately 20 mm and the south end of the eastern wall is out by approximately 12 mm.
- 30 Other walls requiring attention on the first floor are the west wall in bedroom 4, a bump beside the window (west wall) in bedroom 3, a deviation of approximately 9 mm in the bathroom wall and in bedroom 2 the north wall is out by approximately 10 mm and requires straightening.

Cost of rectification of plaster

- 31 The Respondents have not provided a written estimate of costs to rectify plaster-work although Mr Pimm did a rough calculation on 12 December 2007 and estimated approximately \$7,000.00, inclusive of margins, including the garage. He did not include re-levelling the ceilings, bins or any allowance for an electrician.
- 32 Mr Cross has provided costings, but they are somewhat difficult to follow. On page 21 of his report of July 2007 he listed locations upon which work was to be undertaken, calculated the areas of plasterboard and multiplied it by a rate, but gave no indication of how that rate was arrived at, for example, how much for materials and how much for labour. The sum he reached for walls, ceiling repair, ceiling

suspension work, ceiling replacement work, demolition, reinstatement and repainting, was \$18,991.82 before a contingency and builder's margin were added.

- 33 He has not changed this calculation in later reports, so it is assumed that it is incorporated in the sum of \$20,275.50 referred to in paragraph 4 above. It therefore follows that the amount allowed for "site drainage reclamation" is \$1,283.68.
- 34 I deduct \$2,500.00 from the sum allowed by Mr Cross for plaster because I have allowed less rectification and while the garage ceiling does need to be refinished, it does not need to be replaced. \$1,000.00 of the sum deducted is for protective covering on contents, cupboards and floors as Mr Yarak claimed \$2,189.00 for removal of blinds and household effects in the "Updated particulars of loss and damage", and this sum will be allowed. Mr Yarak is entitled to \$16,491.82 for plaster before contingency and builder's margin are taken into account.

Site drainage

- 35 There is some question about whether the builder installed the agricultural drains. They were shown on drawing 1/13 at the bottom of a slight site cut to the north side of the home and extend a little down both the east and west sides. Evidence was given by Mr Gibney, expert for the Respondents, that the area to the north of the meals area might have been damp and that this might have caused heave. He drew the conclusion that there might not be a cut off drain, but admitted under cross-examination that he did not check to see if it was in place. There is no evidence either way as to whether there is a drain in this position.
- 36 The onus of proving the drain has not been installed is on Mr Yarak and he has failed to prove it.

First Floor out of level

- 37 At the site inspection on 10 December 2007 it was demonstrated to me that the floor of the parents' retreat sloped from north down to the south by 12mm over the length of a 1.8m spirit level. Mr Cross gave evidence that the overall difference in level of the first floor is 31mm and his evidence was uncontradicted. Mr Xafis of the Respondent agreed that if the difference in level of the floor were 31mm, it would not be in accordance with a reasonable standard of workmanship.
- 38 Mr Cross gave evidence that the cost of rectifying the floor would be \$21,788.38. This evidence was first provided to the Tribunal on 12 December 2007 on the third day of the hearing. The proceeding was adjourned for further hearing on 25 February 2008 to enable the Respondents to inspect the property, particularly the brickwork, and provide any reports about the brickwork and a costing for the first floor. The Respondents engaged Mr Tim Gibney to provide a "costing for first floor levels" which was provided to me on 25 February 2008. The total sum estimated by Mr Gibney was \$3,888.50 inclusive of GST. Mr Cross apparently had access to this costing earlier, and he revised his estimate for first floor levelling to \$34,880.00 further revised by an additional "\$1,500.00 to \$2,000.00" during the hearing on 25 February 2008 when he was told by Mr Gibney that the floor joists could not be shaved as they are not solid wood, but "I" joists. I treat his additional sum as

\$1,750.00, therefore his total for the first floor is \$36,630.00 excluding margins and GST.

- 39 I am not satisfied that the method of rectification costed by Mr Gibney is adequate, as he admitted under cross examination that his solution only levels the master bedroom and retreat, leaves a step into the “rumpus” area, and at best the result will be that the floor will be 7mm out of level. I do not accept that a step at the bedroom door is a reasonable solution.
- 40 Mr Cross was not cross-examined on either of his costings and I accept the first one as reasonable, with the addition of \$1,750.00 to take into account the inability to shave the “I” joists. Clarendon must pay Mr Yarak \$23,538.38 for this item.

Brickwork and articulation joints

- 41 I was assisted in considering the brickwork by evidence given concurrently by Dr Eilenberg for the Respondents and Mr Cross for Mr Yarak. Mr Yarak complained about a number of matters concerning the brickwork. They are:
- Articulation joints; insufficient, misplaced and incorrectly built,
 - Damp-proof course; incorrectly installed and missing below windows,
 - Flashings below windows missing,
 - Aesthetic appearance of the brickwork.

Articulation joints

- 42 I accept the evidence of Mr Cross that the articulation joints were to be placed at the locations marked with an arrow on Auswide Engineering’s concrete slab plan. This document was annexed to Mr Cross’s report filed 20 February 2008 and shows 11 locations. However, I am concerned that Mr Cross’s second report filed 20 November 2007 mentions only the failure to install articulation joints in straight vertical lines. His “estimated cost schedule for rectification of new defects” handed to the Tribunal on 10 December 2007 mentioned a further two articulation joints and allowed \$1,072.75 in total for articulation joints. However, it was not until 20 February, three working days before the last hearing days, that the other complaints about the articulation joints were raised. Repeated corrections of reports, particularly when the sums claimed keep rising, tend to detract from their credibility.
- 43 I note the expressions “articulation joint” and “expansion joint” were used interchangeably in some of the evidence before me. Although they fulfil different purposes, a single joint can fulfil both functions.

Insufficient

- 44 Mr Cross’s evidence on this point was confusing. Early on 25 February 2008 he said that all eleven articulation joints had been installed, but later, when locating them on the drawing, he said there were only nine. Only two articulation joints were pointed out to me on site and I cannot be sure how many there are. I am not satisfied that there were insufficient articulation joints.

Misplaced

- 45 Mr Cross said the articulation joints were not installed in the positions called for by the engineering design. Dr Eilenberg agreed while giving concurrent evidence that many of the articulation joints do not match the engineering drawings, but said he assumed there would be an engineer's sign off on the project as the home has an occupancy permit. Dr Eilenberg agreed with my view that only an engineer should approve a change to an engineering design and the Respondents did not produce any such document. I accept Mr Cross's evidence that the articulation joints were misplaced, which justifies installation of two additional joints.

Incorrectly built

- 46 Two of the articulation joints do not run vertically from the top to the bottom of the brickwork. The two-storey articulation joint on the west side of the home has been fitted in to accommodate the fact that the windows on the ground floor and the first floor do not line up. The articulation joint runs from the ground to the bottom of the north side of the window then from the top of that window to a point beneath the sill of the first floor window. It dog-legs through the sill and commences again, a brick or so further north on the top north side of the first floor window where it is vertical to the top of the brickwork.
- 47 The articulation joint on the east side is similar except that where it is out of vertical by half a brick, it runs up both sides of the half brick. It therefore is in two discontinuous sections. Nevertheless, there is no appearance of distress in the brickwork, with the possible exception of a very small sill crack on the ground floor to the west and Mr Gibney and Mr Cross agreed at the site inspection that the brick walls appear to be performing properly.
- 48 Exhibit R2 is Sheet four of the architectural drawings with the "Domain Homes (Vic) Pty Ltd" title block, showing Domain Homes as the designer. Surprisingly, the west elevation shows a dog-legged articulation joint, but the Respondents failed to prove this was a contractual drawing or that the unusual nature of the design was drawn to the attention of Mr Yarak.
- 49 I accept Mr Cross's evidence that an articulation joint which is not vertical - or at least straight - is not in accordance with reasonably competent building practice and I find that both joints complained of require rectification. Further, although there is as yet no evidence of significant damage caused by the failure to provide adequate articulation joints in this two and a half year old home, the Respondents failed to convince me that Mr Yarak and his family can now be reasonably sure that the brickwork on their home will not crack within the expected life of the building. See *Lawley v Terrace Designs* [2006]VCAT 1363 at paragraph 261.

Rectification of articulation joints

- 50 Clarendon Homes must pay Mr Yarak \$1,072.75 for reinstatement of the two discontinuous articulation joints and installation of a further two articulation joints in accordance with Mr Cross's cost schedule of 10 December 2007.

Damp-proof course

51 There was some confusion in Dr Eilenberg's report about whether the item under discussion was a damp-proof course or a flashing, although I acknowledge that a flashing at base brickwork level can fulfil both functions.

Incorrectly installed

52 Mr Cross gave evidence that a correctly installed damp-proof course should be laid so that it extends beyond the brick and mortar line, and then trimmed back. While I have no reason to doubt the accuracy of his interpretation of the relevant standard, I also accept Dr Eilenberg's evidence that in practice, bricklayers do not do it that way.

53 I accept Mr Cross's evidence that there were a number of examples of the damp-proof course being 20 or 30 mm back from the front face of the mortar. My own observation on site was that it was visible in weep holes, but in one I observed it was approximately 15 mm back from the face of the mortar and in another it was 25 mm back.

54 Dr Eilenberg agreed that this is not competent building practice. Although Mr Yarak has not given any evidence of dampness within his home, where a damp proof course is "bridged" by mortar, it allows water to travel up the bricks and mortar by capillary action. Mr Yarak is entitled to a home that does not contain this fault.

Missing below windows

55 Mr Cross concluded that there is no damp-proof course beneath the windows because there are no weep-holes in the course above. As the course above is the window sills, the absence of weep holes is not surprising. Mr Yarak has failed to prove there is no damp-proof course beneath the windows.

Rectification of damp-proof course

56 The Respondents did not offer any solution to deficiencies in the damp-proof course. I accept Mr Cross's evidence in his cost schedule of 10 December 2007 that the cost of grinding out the mortar and re-laminating the damp proof course is \$2,265.00. Clarendon Homes must pay that amount.

Flashings below windows missing

57 Mr Cross drew the conclusion that there is no flashing beneath ground floor or first floor windows because there are no weep-holes where flashing would be expected, consistent with good practice.

58 For the first floor windows, the experts agreed that if flashed, there should be weep-holes. Dr Eilenberg said that as the windows are aluminium and have an incorporated rubber apron that extends out onto the sill about 10 mm, flashing is unnecessary. I have regard to figure 3.3.4.5 of the Building Code of Australia which was annexed to Mr Cross's report. That diagram calls for sub-window flashing and does not distinguish between timber and aluminium framed windows. There are aluminium extrusion frames that incorporate flashing, but there was no

evidence that these windows were of that description and at least one of the windows had been installed so that the apron was partly caught beneath the window and did not provide a continuous seal along the sill.

- 59 Further, the sills in the home are almost horizontal and it cannot be expected that rain will glance off them as it does from a vertical brick face.
- 60 Mr Yarak is entitled to have his home properly flashed, or to have another means of rectification that produces the same result. Dr Eilenberg did not recommend a means of rectifying this problem. Mr Cross recommended that the home be rendered, which would rectify both the absence of flashings below the windows and would ameliorate issues with the appearance of the brickwork.

Aesthetic appearance of the brickwork

- 61 The general impression of Mr Yarak's home from the street is that it is well built. A home of which he can be justly proud. Nevertheless, there are some areas that have not been properly cleaned after bricklaying and there are discrepancies in the finished product. In particular the corner to the immediate west of the front door is rather rough with some quite wide perpends. The corbells around the brick columns have been achieved by the insertion of small sections of brick and the lower corbell to the column to the south east side of the front door has an uneven perpend on the north side.
- 62 As suggested by the 2002 Guide, perpends should generally be around 10 mm wide, plus or minus 5 mm. There are a number of places around the home where the perpends exceed this standard and in particular where perpends of significantly different widths are in close proximity. At the site inspection, one of the perpends visible on the west side of the home was 23 mm wide. There is a narrow path down this side of the home and it is not readily visible. There are also a number of mortar blow-outs, some bricks are out of level and some have been poorly cut.

Rectifying the brickwork

- 63 As stated above, I have allowed \$1,072.75 for rectification of articulation joints and \$2,265.00 for rectification of the damp proof course.
- 64 Although the blemishes to the brick-work as it is now would be insufficient to justify rendering the walls, the combination of those blemishes, the risk of water ingress from a lack of flashings below first floor windows and the difficulty of obtaining a good finish once the articulation joints have been rectified and moved justifies rendering. In accordance with the schedule of 10 December 2007, I allow \$13,650.00.
- 65 Clarendon Homes must pay Mr Yarak \$16,987.75 for rectification of brickwork.

BOX GUTTER OMISSION

- 66 Mr Cross gave evidence that the gutter on the garage roof adjacent to the main house has not been flashed so that it is checked into the wall, but has been glued on and sealed with silicon along the top. I note the objection of Ms Leonard for the Respondents that the box gutter was raised first in the report provided to the

Tribunal on 22 February 2008 and to her on the morning of the hearing. I accept Mr Cross's evidence that if the building is rendered with water-proof render, it will pick up all the flashing problems including this one.

DROPPER DOWNPIPE AND FALL TO BALCONY FLOOR

67 Mr Cross mentioned these items for the first time in his report filed 20 February 2008, but they was not included in the Updated Particulars of Loss and Damage of the Applicant of 22 February 2008, nor mentioned during the course of the hearing. I make no allowance for them.

CONTINGENCY AND BUILDER'S MARGIN

68 Mr Cross allowed 15% for the builder's margin, which is reasonable. He also allowed 30% for contingency. It is well known that rectifying builders tend to charge more than a builder undertaking work where there is no history of technical or personal difficulties. Some types of work can justify significant contingencies. For example, replacing windows when it is uncertain whether the support for the windows has rotted out, can justify a charge for unknown conditions. Not all work is in this class. None of the work to be undertaken at Mr Yarak's home is of a class that is particularly fraught with unknown risks, therefore a contingency of 10% is allowed, to be applied before the margin of 15%.

CLEANING

69 Mr Yarak has claimed \$700.00 for cleaning as a separate item after the works are complete. This amount is reasonable, but no additional amount for cleaning is allowed in the claim for levelling the first floor. The First Respondent must pay Mr Yarak \$700.00 for cleaning.

ACCOMMODATION AND STORAGE OF POSSESSIONS

70 I accept Mr Cross's evidence that a reasonable allowance for the interior work is 45 days and that the work is inconsistent with the home being occupied by a family of seven, particularly when one of the children is a chronic asthmatic. \$220.00 per night is very modest for a family of seven. Clarendon Homes must pay Mr Yarak \$9,900.00 for accommodation.

71 Mr Cross gave evidence that the reasonable cost of de-installing and re-installing the blinds is \$689.00 and storage of household items is \$1,500.00. His evidence is accepted. Clarendon Homes must pay Mr Yarak \$2,189.00 for these items.

AMOUNTS DUE TO MR YARAK

Plaster rectification	\$16,491.82
First floor rectification	\$23,538.38
Brickwork rectification	<u>\$16,987.75</u>
	\$57,017.95
Contingency of 10%	<u>\$5701.80</u>
	\$62,719.75
Builder's Margin of 15%	<u>\$9,407.96</u>

GST	\$72,127.71
	<u>\$7,212.77</u>
	\$79,340.48
Cleaning	\$700.00
Accommodation	\$9,900.00
Blinds and storage of possessions	<u>\$2,189.00</u>
	\$92,129.48

Clarendon Homes must pay Mr Yarak \$92,129.48 forthwith.

COSTS

72 Costs are reserved and there is liberty to apply, but the parties' attention is drawn to the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

SENIOR MEMBER M. LOTHIAN