VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D63/2003**

CATCHWORDS

Defective works, extent of design and build obligation for defective work, expert evidence, claim against insurer for breach of the domestic building insurance contract, clam under Section 59A of the *Domestic Building Contracts Act* 1995.
[2005] VCAT 821

APPLICANTS:	John Stiff, Dulcie Stiff
FIRST RESPONDENT:	Christopher Phillip Barton T/as Freeform Builders
SECOND RESPONDENT:	Cassie F Barton T/as Freeform Builders
THIRD RESPONDENT:	Vero Insurance Ltd (formerly Royal Sun Alliance Insurance Australia Limited)
JOINED PARTY:	Dahlsens Building Centres Pty Ltd
WHERE HELD:	Melbourne
BEFORE:	Senior Member R J Young
HEARING TYPE:	Hearing
DATE OF HEARING:	18-21, 25-28 October; 3-5, 8, 9, 11, 12, 15, 16 and 19 November 2004
DATE OF ORDER:	4 May 2005

ORDERS

1. The first and second respondents will, jointly and severally, pay the applicants the sum of $99,648.00 such sum to be paid within 60 days of the date of these orders.

2. The applicants' claim against the third respondent is dismissed.

3. **The proceeding is set down for a further hearing of one half (½) day's duration at 2.15 pm on 24 June 2005 at 55 King Street, Melbourne.**

SENIOR MEMBER R. YOUNG

APPEARANCES:

For the Applicants:	Mr S Smith of Counsel
For the 1st & 2nd Respondents:	Mr S Stuckey of Counsel
For the 3rd Respondent:	Mr K Howden of Counsel
For the Joined Party:	No appearance

REASONS

1. INTRODUCTION

1.1 This is an application by the owners, John Stiff and Dulcie Stiff, ("the owners") of a dwelling house constructed on their property at 25 Balmoral Crescent, Wodonga by Christopher Barton and Cassie Barton (trading/as "Freeform Builders"), the first and second respondents, ("the builders") claiming damages for breach of contract in the construction of the subject dwelling. The owners allege there are a significant number of items of defective work and claim the costs of rectifying such work. The owners also claim against the third respondent, Vero Insurance Ltd, the provider of the domestic building insurance to the owners ("the insurer"). In its particulars of loss and damage of 19 October 2004 the owners sought costs of rectification of $284,853 for approximately 60 items of alleged defective work plus the costs of alternative accommodation during the period of any rectification works in the sum of $9,000.

1.2 The owners claim the same damage against the insurer as they claim against the builders on the basis that the insurer wrongly rejected the insurer's claim upon it; alternatively, the owners claim it is not reasonable for the insurer to compel the owners to:

a) accept an inferior or substandard rectification methodology; or

b) permit the builders or the insurer's nominee to carry out such rectification work.

1.3 The builders joined the designers and suppliers of the roof trusses, Dahlsens Building Centres Pty Ltd, as a joined party to this proceeding. Subsequently all matters in issue between the builders and the joined party were settled and by the orders of 18 September 2004 it became unnecessary for the joined party to attend.

1.4 A view was held in this proceeding, which took approximately 18 hearing days. The owners were called as lay witnesses and they called the following expert witnesses:

Mr Whitby – building consultant

Mr Dalziel – structural engineer

Mr Xeros – structural engineer

Mr Hester – builder, estimator

Mr Bailey – plumber

Mr Phillips – painter

Mr Eery – brick and mortar expert

The builders called the first and second respondents as lay witnesses, together with Mr M Styles, foreman, and a number of expert witnesses, being:

Mr Dennaoui – Senior State Engineer for MiTek

Mr O'Connell – building consultant

Mr O'Donoghue – roof tiles

Mr Hore – plaster expert

Mr Jackson – plumber

Mr Crowe – brick and mortar expert

Ms Taylor – painting expert

Mr McLinden – specified building surveyor

Mr Sharp – appointed structural engineer

The insurer called its claims offer, Mr Zervos together with the following expert witnesses:

Mr Nestic – structural engineer

Mr Campbell – building consultant

Mr McNees – building consultant

1.5 In this decision I will firstly set out the claims and parties' positions in some detail. Following that I set out the facts in chronological form, which will be followed by my findings on liability, after which will come my assessment of

the quantum of any damage and finally my findings firstly against the builders and secondly against the insurer.

2. CLAIMS

2.1 The Owners' allegations of defective work are set out in the report of Mr Whitby of 25 February 2004 where he identified 62 items of alleged defective work. These items fall into a number of categories. There are two main issues, the first is the adequacy of the roof structure, being the trusses and support structure to the concrete tiles, this issue involves approximately 21 of the individual items of alleged defective work. The second issue is the spalling of the brickwork below the damp proof course, involving approximately 2 items. On the third day of the hearing the owners filed particulars of loss and damage consisting of costings carried out by Mr J Hester which assessed their total claim for rectification works at $284,853.00.

2.2 The builders in their defence denied that there were any items of defective work with the exception of the rectification of the roof structure as set out in the joint structural engineers' report of 4 August 2004 signed by Mr Xeros, Mr Nestic and Mr Dennaoui. At the commencement of the hearing the builders submitted that they were ready willing and able to return to the site to rectify the roof structure in accordance with joint report of each party's structural engineer of 4 August 2003, (see Facts: Section 3), together with any other items of defective work upheld by the Tribunal. The builders submitted that they had made every attempt to satisfactorily rectify any of the owners' allegations of defective work and that they should be given the opportunity of returning to the site and carrying out the necessary rectification.

2.3 The insurer maintains that the owners' claim against in this proceeding it is misconceived on the following grounds:

a) an owner's claim against the insurer is normally to seek to review the insurer's decision under Section 61 of the *Domestic Building Contracts Act* ("the Act");

b) this is not such a claim as the owners have alleged breaches by the insurer of the domestic building insurance contract between them, therefore it must be a general claim under Section 59A of the Act;

c) the allegations the owners make against the insurer are for breach of the express terms of the insurance contract.

2.4 Further, the insurer claims that the owners' complaint to it cannot be regarded as a claim under the policy because:-

a) it does not contain sufficient information to enable the insurer to properly assess whether it is a valid claim and therefore the owners do not reach the threshold of being able to maintain an action against the insurer;

b) secondly, in breach of the express terms of the policy the owners refused to provide information to the insurer's experts when they were inspecting the subject property; and

c) thirdly, the only owners' claims against the insurer involving allegations of defective work could only be grounded on the terms of the domestic building insurance contract between them and any allegations of defective work in Mr Whitby's report of 24 February 2004, the subject of this proceeding, that were not covered in the owners' complaint to the insurer could not be found against the insurer as it had not considered these allegations in accordance with the terms of the policy.

Finally the insurer maintained that its decision, in any case, was correct.

2.5 Mr Smith, Counsel for the owners, in response to a question from the Tribunal, conceded that if there are items in the Whitby report that have not been claimed by the owners against the insurer then the insurer cannot be held liable for those

items, nor any rectification costs arising from those items. Mr Smith said that the owners deny that there were items of the Whitby report that could not fairly be said to be within the items complained of to the insurer in the complaint dated 18 June 2002.

2.6 The insurer says it is a term of the insurance contract between itself and the owners that the owners must permit the insurers' nominee to carry out the rectification works and can only refuse if the insurers' request is unreasonable. The owners in reply maintained that the builders were given sufficient opportunity to properly rectify the defective works and that a significant amount of the defective work, as evidenced by the rectification work within the roof structure, is itself substandard and defective and thereby it is not unreasonable for them to refuse to allow the builders to return.

3. FACTS

3.1 Set out here is a chronological summary to provide a factual framework to the matters in issue:

Date	Event
5 January 2000	The owners and builders sign a major domestic building contract in the "HIA New Homes Plain English Contract" together with plans and specifications prepared by the builders for a consideration of $187,506.00. Under the contract the builders' were responsible for the site cut but the owners was responsible for the construction of the retaining walls and drainage pertaining thereto at the rear of the property, together with the construction of the driveway pavement.
November 2000	The building works completed.
7 December 2000	The owners took possession of the premises and at a joint inspection the builders gave the owners a list of defects that the builders would rectify.

26 January 2001 (Australia Day)	Water penetrates into the kitchen during a storm and the owners contact the builders to attend to rectify. There is a dispute between the builders and the owners as to what was said during this telephone call; the alienation between the builders and owners seems to arise from approximately this time.
29 January 2001	The builders' employees attend to rectify the water damage and to rectify the leak; they find that adjacent to the heat exchanger on the roof a truss web has failed at a large knot near a joint and this truss is found to have a sag of approximately 20mm.
Early 2001	The living room ceiling at about the location of the broken web sags approximately 20mm. The trusses in the living area of the house span from the kitchen/dining area external wall on the south side of the house, over the external wall of the lounge section of the living area and bear on the large oregon beam on the external side of the verandah on the north side of the property. This beam nominally 400x100 shrinks substantially, thereby lowering the truss bearing height so that the trusses began to bear on the external wall of the living area at the lounge; at this location there were large windows and sliding doors with lintels over them. At the request of the builders the roof truss designer provided the builders with modifications to the trusses to allow the trusses to bear on the external lounge section wall and to cantilever out from the external lounge section wall so that the trusses did not, technically, bear on the verandah beam. However, in reality it appears that the trusses still did bear on the verandah beam to some extent. At the time of modifying the trusses to bear on the lounge room wall the builders jacked the roof trusses and put numerous levelling wedges under tile battens.
20 November 2001	The owners were not happy with the roof structure and the builders' rectification thereof and commissioned a report from Mr P Dixon, Senior Engineer of Central West Engineering Services Pty Ltd, who inspected the property on 30 November 2001 and concluded that the roof trusses as modified appeared in general to be structurally adequate and in his opinion the structure would be at least as strong as typical house roof framing and would not have an unusual risk of malfunction.

End 2001 – Start 2002	The owners provided the builders with lists of defects a number of which the builders set out to rectify and this included the repairs to the discharge drains of the ensuite floor wastes. There were many letters between the parties solicitors regarding the rectification of the alleged defects with most of the correspondence concentrating on the roof trusses and the ensuite floor wastes. The builders attempted to strengthen the roof truss system by the addition of further connections e.g. nails, plates, etc and additional pieces of wood to existing members e.g. webs, etc. I do not recall any specific evidence as to when these rectification works took place. From my observations at the view these works were not to any design and appear to have been carried out without effective supervision. Many of the additional nails, particularly in the girder trusses, are randomly located and not fully driven. The additions to the truss webs are with odd pieces of timber, often not the correct shape or length.
6 May 2002	The owners were not satisfied with Mr Dixon's report and commissioned Mr P Xeros of Xeros Kendall, Consulting Engineers, to inspect the roof. Mr Xeros, in his report of 6 May 2002, concluded that the roof structure had been extensively modified and repaired and was not certified by any qualified authority. He noted that the original computations were for a metal roof and may not be relevant to the existing tile roof. He concluded that the roof is required to sustain much higher loads during peak storm conditions, he regarded the roof structure as unsafe and not fit for occupation. He considered the entire roof structure including ceilings would need to be replaced.
June 2002	Owners lodge a complaint with the insurer in relation to seven items of alleged defective building work which under the "Claims Schedule" were wholly described as: 1 Roof and trusses 2 Retaining wall 3 Brickwork 4 Toilets 5 Windows 6 Stain 7 Garage floor;

	There was no further detail than this on the claim schedule. The claim comprised a substantial number of pages including the report of Mr Xeros of 6 May 2002, a number of photographs and, a copy of the contract. Buried in the middle of all of this documentation was a single sheet with a number of separate paragraphs with headings, the first being retaining wall and which contained the allegation "Insufficient drainage." The next paragraph was brickwork, which said "Too much acid and too much pressure used in brick cleaning, chemical reaction to acid caused yellowing/orange discolouration. Inconsistency of mortar colour." Next heading was toilets which was described as "Both toilets smell of raw sewage, modifications to one toilet but not rectified." Next is windows – "Do not wind out, lock or seal properly." Next is stain – "Stain streaking on architraves, cupboards, benches etc." Lastly is garage floor – "Cracked."
13 November 2002	The insurer sent a decision letter to owners accepting roof trusses and window winders as defective and denying the other items.
11 February 2003	The owners lodge an application with the Tribunal against the builders and the insurer seeking removal and replacement of the roof and trusses and rectification of the windows to be supervised by Mr Xeros. The application also seeks the rectification of the retaining wall, brickwork, toilets, staining of architraves, cupboard doors etc. and garage floor.
15 July 2003	The Tribunal orders the parties' structural engineers to meet on site with a view to reducing the number of items in dispute between the parties.
4 August 2003	The joint inspection results in a joint report drawn up by Mr Xeros and signed by himself for the owners, Mr A Dennaoui for the applicants and Mr Nestic for the insurer. This joint report requires modification of the roof trusses in accordance with a MiTek Australia Limited report for which Mr Dennaoui was the Senior State Engineer at the time of the preparation of the joint reports. The owners do not allow access to the builders to carry out the work in the joint report.

25 February 2004	Mr Whitby, building consultant, provides a report to the owners with a list of alleged defective items, being 60 in number. The owners commission a further structural engineering report on the roof, this time from Mr Dalziel, structural engineer.

4. ROOF STRUCTURE – EVIDENCE AND ANALYSIS

4.1 The adequacy of the roof structure and its performance is the genesis of this dispute and it has remained the focal point. There were a number of unfortunate mistakes in the building approval documentation that has allowed misunderstandings to arise between the parties. The roof as installed is a tiled roof, however, in the application for a building permit a roof truss design for a steel deck roof was submitted and there does not appear to be a truss design for a tiled roof in the building file at the responsible authority. When the owners found only a sheet metal roof cladding truss design at the responsible authority, Mr J Stiff (owner) became convinced that this was the explanation for the failure of the roof and the truss deflections. As he approached each structural engineer in turn for their opinions he provided them with a copy of the truss design for a sheet metal clad roof. Both Mr Xeros and Mr Dalziel opined directly that the roof structure appears to have been designed for a sheet metal deck. Mr Xeros comments in his report of 6 May 2002 at paragraph 3 "*the original computations were done by Dahlsens, however these were for a metal roof and may not be relevant to the existing tile roof.*" In Mr Dalziel's report of 27 January 2004 he comments in paragraph 1 "*another critical factor that has been investigated relates to the tile of roof cladding material that was specified on the approved architectural drawings. As shown on the documents list, the truss design submitted for permit approval clearly indicates that a sheet deck roof loading was to be applied to the truss system. The later investigations by MiTek have been based on a tile roof cladding system and the rectification details provided are required to justify the tile roof load.*" A copy of the truss design for a steel deck roof was attached to Mr Dalziel's report.

4.2 Under cross examination, Mr Stiff agreed that he considered that the trusses used in the roof were those appropriate to a steel deck design. He further said that even if he was incorrect, he considered that the trusses performed so badly that he was convinced he required a totally new roof structure.

4.3 In his evidence Mr Dalziel was still querying where there had been a specific truss design for a tile roof at the time of its construction, as opposed to a modification of a design for a sheet metal roof. Such concerns have probably been heightened by Mr Stiff's belief that the design was a sheet metal design. One of the reasons Mr Dalziel infers that a sheet metal design was used in the construction of the roof structure is that the trusses are centred at 900mm, which is the normal spacing for metal deck roof trusses; whereas, the normal truss spacing for a tiled roof is 600mm centred. However, this is not a rigid criteria and Type B trusses, appropriate for a tiled roof, can be installed at 900mm centres provided they are so designed.

4.4 However, it is obvious that the roof structure, as built, was not built to a truss design for a steel metal deck. The first and most obvious reason is that the metal deck design nominated A type trusses, that is a truss with five web members. What has been installed in the roof structure are Type B trusses, that is a truss with seven web members, which is the appropriate type for a masonry tiled roof. Secondly the Dahlsens' quote which the builders submit was the one they accepted for the roof was for a tiled roof. Thirdly, the building surveyor, in his evidence stated that although a metal deck roof was the truss design that accompanied the application for a building permit, it was not stamped approved or approved at that stage as the drawings and details that accompanied the application were schematic only and it was not until the frame stage inspection that the building inspector requested and was given the specific truss design for the roof which was a tiled roof that was then approved and used in the inspection of the frame. Finally, the structural engineers' joint report of 4 August 2003 notes at Section 2 that "*structural design documentation was produced by MiTek*

indicating that the roof trusses supplied and installed were designed for a tiled roof." Further, it is my understanding that the trusses being manufactured offsite could only be constructed to a specific design if they were to fit the dimensions of the dwelling. I find that there was a specific truss design for a tiled roof at the time of its construction, wherever that design may be.

4.5 Mr Xeros gave evidence that Mr Stiff was unhappy with him for agreeing to the findings in the structural engineers' joint report of 4 August 2003 and it was subsequent to this report that the owners engaged Mr Dalziel for structural engineering advice. Mr Stiff remains unconvinced that the roof design was for a tiled roof. The builders submit that Mr Stiff's intransigent attitude has led him to engage and discard structural engineers when their opinions do not suit his. To some extent this appears to be the case but I don't consider that it has any substantial effect on how I should assess the evidence.

4.6 Mr Xeros gave evidence that at the meeting to consider the preparation of the joint report he did not go into the roof to specifically check individual truss members and verify size and grade and in assessing the rectification works he gave evidence that he relied upon Mr Dennaoui. Mr Dennaoui was the State Engineer for MiTek and responsible for the truss design; therefore, one can understand Mr Stiff's unease at Mr Xeros ready acquiescence to Mr Dennaoui's opinion. In his evidence Mr Xeros said that on reflection he shouldn't have relied on Mr Dennaoui's opinion and signed the joint report. He said he realised this when he read Mr Dalziel's report with which he agreed and now relied upon for his opinion of the roof structure and its required rectification. In relation to the roof Mr Xeros has relied upon the opinions of other, he has not carried out any independent design checks. Mr Xeros' evidence is purely qualitative and of no independent value and I do not consider it has any weight as expert evidence.

4.7 However, no design was put before me that was stated to be the design to which the roof structure was built. What I found disturbing in all of the conflict in the

expert evidence over the roof structure was that apart from the meeting of Mr Dennaoui and Mr Nestic in the roof space to check a number of individual truss members, there had not been a concerted effort to assess what precisely had been built. This failure to directly assess the adequacy of the actual roof structure only became apparent to me during discussions with the structural engineers at the view. I find the argument between the engineers as to what was the original design to be of little assistance to me in adjudicating the claim and of no assistance to the parties in trying to resolve their differences.

4.8 The crux of solving or adjudicating this issue is not to try and establish a chain of designs or design amendments but to assess whether the existing structure making up the roof can satisfactorily carry the expected loads for the expected life of the structure as it presently stands and if not, how is it to be rectified.

4.9 The view was attended by all structural engineers except for Mr Dennaoui who was excused from attendance because of Ramadan. After looking at the roof at the view and voicing my concerns, I requested the structural engineers in attendance, Mr Dalziel and Mr Nestic, to jointly investigate the roof structure in detail and to prepare a joint report which answered the following questions:

1) what are the dimensions and stress grading of all of the timber elements existing in the roof;
2) from those elements, can they identify a truss design from amongst the truss designs they have been given which would satisfy the structural members used;
3) in their opinions, are the structural members used in the roof adequate to carry the expected loads for the design life of the structure, taking into account the rectification efforts already made by the builders;
4) if the members are not, what are they recommendations to satisfactorily rectify the roof;
5) are there any other problems with the roof.

The joint report of Mr Dalziel and Mr Nestic was presented to the Tribunal at a conclave of the structural experts on 3 November 2004. No truss design for the existing roof structure was identified.

4.10 Mr Dalziel gave evidence that together with Mr Nestic he had spent two days in the roof after the view inspecting the trusses and identifying the size and strength grading of individual members. Also in their investigations Mr Dalziel and Mr Nestic carried out a number of measurements of the deflections of the ceilings in the living area, such deflections could only arise from the deflections of the trusses in the roof structure. They measured a maximum deflection of 20mm at the point where the web member broke near the heat exchanger location. The next highest deflection measured was 12mm and there were a number of other measurements between the 8-12mm mark. They each carried out a check design. Mr Dalziel used a computer design programme and Mr Nestic carried out hand computations assisted by computer assessments. Mr Dalziel acknowledged that the design check of himself and Mr Nestic was slightly different to the MiTek design as they had assumed rigid (i.e. continuous) joints through the top and bottom chords where web members joined them, with the web members assumed to be pinned. The MiTek design, on the other hand, assumed fully pinned joints. On my questioning of Mr Dalziel he agreed that assuming rigid joints through the chord members would be a less conservative design resulting in smaller member sizes in the Dalziel and Nestic designs, compared to the MiTek. However, he did point out that the MiTek software package did allow for some continuity (i.e. rigidity) of chord members which would bring their joint assumptions closer together.

4.11 Both the design of Mr Dalziel and the design of Mr Nestic found that there were a significant number of truss members in place that were under strength according to their designs. Both Mr Dalziel and Mr Nestic checked the serviceability of their designs. "Serviceability" assesses whether the roof structure is capable of providing the level of performance required of it. In the case of roof structures this means that deflections are held to a degree to where they do not become visible and unsightly. Mr Dalziel and Mr Nestic's separate calculations as to the estimated deflections were roughly the same and

comparable to those calculated in the MiTek design. They both agreed that the measured deflections of the existing trusses were excessive with discrepancies in the top plate level measured up to 20mm. This did not agree with their calculations.

4.12 There were slight differences in their method of calculating the deflections as Mr Dalziel did not take into account any stiffness or rigidity from the metal clips which attached the facia at the end of the truss overhangs as there was no published strength values or degrees of fixity stated by the manufacturer. Mr Nestic did take a degree of fixity in that he assumed a pin joint at this location.

4.13 In relation to the existence of greater than estimated deflections, Mr Dalziel and Mr Nestic reached different conclusions which then influenced their final recommendations for the rectification work. Mr Dalziel considers that the greater than estimated deflections are a result of ungraded or incorrectly graded timber which is much weaker than the stress grade stated on the member. Alternatively, he submitted that the timber grading system used to grade the timber, now machine grading, was not operating properly. Mr Dalziel submitted that in his opinion the machine grading system of timber was not being operated and administered properly by timber manufacturers such that it was likely that timber was being misgraded. Further, he submitted that due to the recent building boom timber had been in short supply and there was talk of deliberate improper grading to obtain a product. All of this is hearsay. To substantiate such allegations Mr Dalziel needed to get a piece of suspect timber tested, this was never done.

4.14 Mr Dalziel said that as a result of the incorrect grading, it was his opinion that the Young's Modulus of many of the members used was much smaller than what would be expected for a structural grade of timber. At the lowest structural grade usually used he would have expected a Young's Modulus of 9,000; whereas working back from the deflections of up to 20mm that have been

observed, he assessed that the Young's modulus of the timber used in that member would be less than half of the expected figure. The Young's Modulus is a measure of the strain or elongation that a material will undergo for a measured stress; it is a measure of the ratio of stress over strain. This influences Mr Dalziel to conclude that the strength figures stated on the members used in the roof structure cannot be trusted and that the whole roof should be replaced.

4.15 Mr Nestic on the other hand accepts the stress gradings shown on the timber members, he considers that a large amount of the apparent deflection in the long span trusses over the kitchen and lounge areas is a result of the shrinkage of the large oregon verandah beam on which these trusses originally bore. This verandah beam was nominally 400mm by 100mm. It is accepted that this beam has shrunk approximately 20mm from the time it was installed; this led to the trusses bearing on the lounge room wall and the amendments of the trusses so that they would be strengthened to allow such bearing on the lounge room wall.

4.16 Mr Nestic maintains that the drop of 20mm in the bearing of the trusses gives a primary movement and that changing the bearing point to the lounge room wall, together with propping of the trusses on that wall at different points and wedging of the roof battens induces significant but incalculable stresses in the trusses that have resulted in the deflections as measured.

4.17 Mr Nestic disagreed with Mr Dalziel's proposition, submitting that if the Young's Modulus was as low as Mr Dalziel had assessed then the reduction in the timbers stiffness would be so great that it would be like "spaghetti", i.e. it would exhibit obvious deflection in other ways such as in the top chords with the roof loading, deflections out of the plane of the truss, etc., in other words the trusses would exhibit severe defects in serviceability. Further, Mr Nestic considered that if Mr Dalziel's hypothesis was correct as to the level of the Young's Modulus of some of the members used in the roof that he would have expected them to have broken under the load they are carrying. Mr Dennaoui in

his evidence agreed with Mr Nestic that if Mr Dalziel's hypothesis as to the level of the Young's Modulus in some members was correct their strength problems would have become evident and there would have been catastrophic failure of some members.

4.18 Mr Dennaoui in his evidence submitted that other than the recommendations in the MiTek report prepared for the structural engineers' joint report of 4 August 2003, he did not consider that any other rectification work was required. In the light of the Dalziel and Nestic report I do not accept Mr Dennaoui's evidence. I note that, similar to Mr Nestic, he submits that if the Young's Modulus of some members was lower than half of the expected he would have anticipated seeing greater serviceability problems in relation to more obvious examples of deflection in the trusses.

4.19 On balance I consider that the evidence of Mr Nestic is the most convincing. For Mr Dalziel's hypothesis to be correct it means that the whole timber grading system is unreliable or is being deliberately thwarted by manufacturers. There was no evidence of this other than his personal opinion. Further, I consider that the serviceability problems that should arise if Mr Dalziel's hypothesis was correct would be more obvious, as submitted by Mr Nestic and Mr Dennaoui. I consider Mr Nestic's explanation regarding the shrinkage of the beam and then the ad hoc loading of the trusses while bearing on the lounge room wall and wedging of the tile battens places large loads at points on the trusses that were not designed for, either as to load or position, and which could induce large stresses in the trusses, resulting in the greater than expected deflections

4.20 In relation to rectification Mr Dalziel with his concern about timber grading recommends that the whole of the house and part of the garage roof need to be replaced. Mr Nestic recommends that the eleven "T1" trusses be replaced as the larger than expected deflections of the overhangs, the visible curvature at large knots, and the unknown amount of stressing during ad hoc rectification means

that the trusses have been overstressed and may not perform up to the necessary serviceability limits. I accept Mr Nestic's proposal. The "T1" trusses are those over the central part of the building.

4.21 In relation to the truss overhangs, Mr Dalziel considered that they had all deflected more than the allowable and that they should be replaced. At the view I carefully looked at the truss overhangs and I could not see any visible deflection. Therefore, I do not consider the truss overhangs have to be replaced because they have exceeded serviceability limits. Mr Nestic does not consider that the overhangs generally need to be replaced, he considers that most deflections are not apparent or visible. Further, when he and Mr Dalziel removed tiles to examine the overhangs it became apparent that the overhangs had been braced back to give support for the eave lining and this provided a rigid brace to the end of the overhang; therefore the overhang's capacity to further deflect is prevented. I accept Mr Nestic's recommendation that the overhangs do not need to be replaced.

4.22 In relation to the garage, both Mr Dalziel and Mr Nestic considered the garage could be rectified. Mr Nestic considered that the garage roof structure was satisfactory except for two overhangs where the deflection was excessive. Mr Dalziel, based on his assessment of the house roof, was suspicious of the strength of the material and this led him to conclude that a higher amount of rectification of roof elements was required. For the reasons given previously regarding the cause of deflection, I accept Mr Nestic's analysis of the cause of the deflection within the garage roof structure and accept his proposed rectification.

4.23 Mr Dennaoui considers that the deflections shown by the trusses could be due to factors other than the weakness of the timber such as:

a) the trusses were installed out of plumb, which induced secondary stresses which resulted in the excessive deflections; or,

b) the trusses were exposed to the weather prior to being installed and absorbed excessive moisture which lowered the Young's Modulus at the time they were installed and loaded.

I do not need to consider take these two matters in detail because if either is correct the builders are responsible for the defective work and I do not accept Mr Dennaoui's conclusions as to the roof rectification required.

4.24 Mr Nestic considers that the existing trusses will not need to be removed but the replacement trusses should be married up to them. This would take place by removing the tiles over the area of the trusses to be removed, inserting the new trusses alongside the old trusses, cutting the top chords of the old trusses then loading the roof back up and allowing the primary deflection of the new trusses under load, allowing the initial creep to take place over a number of weeks to a month and then connecting the new and existing trusses along the bottom chords so that the new trusses can take over the ceiling load from the old trusses. Mr Nestic has allowed for further tiles to be removed where he wishes the corner overhangs to be checked and also the timber members used in the hips. Mr Nestic confirmed that in his re-design of the roof he had not allowed for marrying up the existing and replacement trusses, so that he had not allowed for the self weight of the existing trusses that will remain in the roof in his rectification calculations. He considered that leaving the existing trusses there would not overstress the new trusses; I have no calculations to substantiate this proposition.

4.25 Whilst I have agreed with the basic thrust of Mr Nestic's recommendations for the rectification of the roof I do not accept a number of details. Firstly, I consider that all of the tiles should be removed from the roof. This is so that all of the roof is unloaded, rather than partially some unloaded and some left loaded and then re-loaded. I would prefer it that all of the roof was unloaded so that all roof timbers could rebound or recover to some extent before all being loaded up again. I do not consider that the trusses should be married up; this will make the

roof space very tight. I am unsure, and Mr Nestic has not informed me, of the structural effect on the dead load of leaving the existing trusses there. Further, given that we have a deflection of 20mm in one position and up to 12mm over the rest of the ceiling in the roof space, I consider that the ceiling should be rectified. Therefore, I consider that the existing trusses that are going to be replaced should be removed together with the ceiling for the central area, comprising the kitchen, dining and family areas, and allowed to be replaced with new trusses. When all of the tiles are removed the overhangs can be checked to make sure they are properly braced and any other matters in relation to the roof members can be easily checked. Once the new trusses are in place the roof will be loaded up as in a normal roof installation and the central area ceiling replaced.

4.26 I consider the deficiencies in the roof construction show that the roof work carried out by the builders, commencing with the design and following on with the construction of the roof and then its purported rectification by the builders, to be unsatisfactory.

5. BRICKWORK

5.1 The owners allege that there is a serious deterioration in the brickwork, particularly beneath the damp proof course. There is evidence of fairly severe salt efforescence and spalling of brickwork on the southern wall of bedroom three, a lesser amount on the western wall of bedroom two, on the eastern wall approximately at the living area and on the southern side of the garage.

5.2 It is also evident that the damp proof course does not come through to the external wall, in fact it stops quite a way short of it, but what is in between the edge of the damp proof course and the outer edge of the mortar is the horizontal part of the plastic tee used in the "Granitgard" termite barrier. Although this was not designed as a termite barrier, as confirmed by the company in its letter to the applicants, I consider that the solid plastic angle and in particular the

horizontal part would act as a complete moisture barrier. However, even accepting this, the damp proof course does still not extend to the external surface of the mortar; it is approximately 15mm short. This means that it is possible for moisture to bridge the damp proof course and this is evident in a number of places, in particular where the brick spalling and salt efforescence is at its worst.

5.3 The experts generally agree that the salt movement is caused by moisture movement within the brickwork.

5.4 Relevant questions are where does the moisture come from and where is the source of the salt? Mr J Crowe, technical representative for PGH, the brick supplier, considers that the moisture is coming from ground water which contains significant amounts of salts and this is the source of the salt.

5.5 Mr O'Connell, building consultant, for the builders, considers that the moisture is not from groundwater but from bad surface drainage, where the fall immediately beside the house is towards the house, and that the salt is from the bricks themselves. He considers that the appropriate drainage around the perimeter of the house would prevent the moisture getting to the brickwork and thereby stop the problem of moisture movement and salt precipitation on the surface of the brick, leading to spalling. He considers that the bricks may continue to spall to some degree but they would perform their function. Mr McLinden, the building surveyor, agrees.

5.6 The applicants called a brick expert, Mr J Eerey, director of the Brick and Mortar Research Laboratory. Mr Eerey considered that the moisture was coming from ground water that is salty. He does not consider that the salt can be coming from the bricks themselves; he submitted that if this was the case then he would expect to see some degree of efforescence across all of the brickwork. I would concur. It is Mr Eerey's opinion that the bricks used below the damp proof course are unsuitable in an environment where there is salty groundwater.

The bricks used are "general purpose" bricks. Mr Eerey carried out tests in accordance with AS 4456.10 - 2003 to measure the resistance of the general purpose bricks used in the construction to resist salt attack. The test results show that the general purpose bricks failed badly. Mr Eerey considers that the subject bricks had the lowest ability to resist salt that he had experienced. He estimated that these bricks would fail completely in 15 to 20 years unless they were kept completely dry all of the time. It is Mr Eerey's opinion that what is required is exposure grade bricks and that the bricks below the damp proof course should be replaced with exposure grade bricks.

5.7 On considering all of the evidence of the experts, I do not consider that the salt comes from the bricks; I consider that the most likely source is the groundwater and that the moisture is coming from moisture in the soil profile, i.e. sub surface moisture, and some surface drainage. I accept Mr Eerey's evidence that these bricks have a very low ability to resist salt precipitation and the resultant spalling of their surface, and that they would fail well before the expected design life of the structure of 40 to 50 years. However, I acknowledge that to replace all of the subject bricks with exposure grade bricks, as recommended by Mr Eerey would most likely result in the loss of the Granitgard termite barrier and to properly remove all the bricks below the damp proof course and ensure that a Granitgard barrier is in place it would be necessary to replace all of the bricks. The exposure grade bricks would be a different colour to the general purpose grade bricks.

5.8 Mr Campbell, building consultant for the insurer, gave evidence that appropriate chemicals could be injected into the bricks to provide a chemical damp proof barrier, he submitted that chemical damp proof courses were well known to perform satisfactorily. I accept this evidence. Therefore, I do not consider it is necessary to remove all of the general purpose bricks below the damp proof course. I accept it is necessary that they be made moisture resistant by treating them with a chemical damp proofing liquid that is injected into the bricks, such

as “Techdry” or similar product. I consider that the bricks that have already spalled are defective and should be removed and replaced by general purpose grade bricks, followed by the treatment of the two courses of bricks below the damp proof course with a chemical damp proof coursing treatment. The application of the chemical damp proof coursing will change the colour of the bricks, but so would their replacement with exposure grade bricks. Given the amount of spalling bricks that need to be replaced on the south wall of bedroom three, I would consider that all of the bricks below the damp proof course at this location should be replaced and this would necessitate the re-building of this whole wall.

5.9 It is not necessary to rake out the mortar at the damp proof course joint as the chemical damp proof coursing of the two bricks will provide an adequate damp proof course, instead of the existing damp proof course.

5.10 These are my findings of fact in relation to this allegation and I now turn to the major issue in this allegation and that is, who is responsible for this damage? The builders submit that the spalling of the bricks is so unusual that they should not be held liable as they had done everything that could be expected as builders and therefore, they should not be held responsible.

5.11 I accept the evidence of the building surveyor, Mr McLinden, and Mr O’Connell, both of whom have worked in the Wodonga area for many years on numerous housing constructions projects and near to the particular location of the subject property that they had never encountered salty groundwater. I accept this evidence.

5.12 The question as to the builders’ liability for this allegation is a question of law. In addressing it I recognise that the builders’ prepared the plans, arranged for the engineering checks that were necessary, such as the design of the roof trusses, so that within the particular facts of this case the builders had the design obligation

as well as the obligation to build, and I address the consideration of the builders' liability from the viewpoint that they have both obligations to fulfil.

5.13 In their final submission the builders submitted that: "*the reasonable builder can only proceed on the information reasonably available to him. The general knowledge of local conditions available within the building industry in the area and the soil report are the principal sources of such information.*" I do not consider that this correctly framed the extent of the builders' duty to the owners.

5.14 There is a term that is implied into all building contracts, that the work will be competently done, *Hancock v Brazier (Anerley) Limited* [1966] 1WLR 1317.]. Secondly, there are the statutory warranties at Section 8 of the *Domestic Building Contracts Act* 1995. The builders have these obligations as builders, together with the design obligation. I consider the design obligation extends at least as far as the design being competently done.

5.15 The builders' submit that the extent of their obligation is to comply with the Building Code of Australia ("the Code"). The Code, at Volume 2, Part 3.3.1.5, specifies the situations in which the three classes of bricks, being "protected", "general purpose" and "exposure grades" should be used. The builders' submits that under the Code the use of exposure grade bricks is only required if there are reasons to expect attack by salt or aggressive soils. The builders say on the evidence of Mr McLinden and Mr O'Connell they couldn't expect salt attack in this location. Again, I do not consider that this line of analysis properly delineates the extent of the builders' obligation to the owners, both as builder and as designer.

5.16 I consider the extent of the obligation is to be found in the common law and within the statutory warranties. I consider the applicable warranties are those as to satisfactory workmanship and the warranty of fitness for purpose. The principles of these warranties, and their extent, have been developed in a long

line of common law authorities dealing with the sale of goods. These warranties have passed over and been adopted into the law regarding building cases via the English decision of *Young and Martin v McManus Childs* [1969] 1 AC 454, this decision has been adopted into Australian law by the decision of the High Court in *Helicopter Sales Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 CLR 1.

5.17 In relation to ground the warranty of fitness for purpose reliance must be shown, but it can be established by imputation: *Ashford v Dependable Motors* (1960) 101 CLR 265 at pages 27, 36 and 43. Such reliance may be established by the purchaser of the goods or service merely making the supplier aware of the particular purpose for the purchase. Thus in *Priest v Last* [1903] 2 KB 148 a person who went into a shop and asked for a 'hot water bottle' was held to rely on the seller's skill or judgement.

5.18 In this case I consider that Mr Stiff made the builders specifically aware he was relying on them when at an on-site discussion regarding the design of the house, prior to the contract being entered into, when he indicated to the house opposite and said he did not want a roof like that. In other words, I consider Mr Stiff was saying he wanted a properly constructed house and he was relying on the builders to produce that result. Therefore, I consider that a warranty of fitness for purpose applies in the circumstances of this case. I am reinforced in this view because of the fact that in this case the builders were also the designers of the house: *Basildon D C v J E Lesser (Property) Ltd* [1985] 1 ALL ER 20 and therefore have the design obligation as well as the builder's obligation.

5.19 What is the extent of the builders' warranty of fitness for purpose? *Dorter and Sharkey "Building and Construction Contracts in Australia" 1990 at page 615* submit:-

> *"In* Viking Green Storage v T H Wide Installations Limited *(1985) 33 BLR 103, the court rejected the contractor's argument that its obligations were limited to the provision of resource, skill and care only. The purposes for which the storage facility was required by the owners had been made known to the contractor, and the owners relied upon the contractor to provide a*

facility fit for the purposes. It was held that a term would be implied that the finished product must be reasonably fit for its intended purpose and that the contractor should be liable to the owners, irrespective of whether the defects were defects in materials or workmanship or design."

5.20 The extent of the duty of fitness for purpose, particularly where there is some design aspect, has been examined in detail in "*Hudsons Building and Engineering Contracts*", 11th Edition, 1995, at paragraph 4.065:

> *"Thus the workmanship obligation, as it is usually called, will in its primary sense mean care and skill in the physical execution of any specified or described work processes. But it may also mean design in one of the senses indicated above, as when a carpenter decides to use non-corrosive rather than ordinary steel nails or screws in an exposed position or where long life is required of his work, or a mortise and tenon rather than butt joint, of where a plasterer is left to decide the number of coats needed on a particular surface to give an even finish, or a tiler will lay tiles to unspecified falls to take storm water off a balcony or a bricklayer chooses the particular mix for his mortar, or the builder chooses the type or location of reinforcement in a reinforced concrete lintel not otherwise described in detail. Again, materials may be said to be of poor quality when what is really involved, on analysis, is that they have been chosen for the wrong purpose, as common bricks for facing bricks in an exposed situation, or iron cramps for zinc. All these are, on close analysis, cases of design, because they involve the element of freedom of choice as between different materials, but are frequently not so referred to because the finer details of construction, even in sophisticated contracts, and in less formal contracts a great deal of more important design, is in practice left to the "good building practice" of the tradesman or contractor concerned, for which the work "workmanship" is commonly used by lawyers and industry alike.*
>
> *So, too, the obligation in regard to supply "good" materials may in reality imply a design obligation, in the absence of express description, to choose suitable materials, as in some of the examples already given above, though the strict extent of the materials obligation will, in the absence of reliance on the contractor, be the lesser one to supply materials good of their described kind and without defects.*
>
> *In this Subsection the work "design" is used in the sense of the suitability for its intended purpose of the final permanent work, in so far as that may result from the choices of those conceiving and planning the work and its constituent parts, whoever they may be.*
>
> *Bearing in mind the possible overlapping areas of design responsibility already mentioned, a contractor undertaking to do work and supply materials impliedly undertakes:*
>
> *(a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;*
>
> *(b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind and free from defects. (In the case of goods not described, or not described in sufficient*

detail, there will be reliance on the contractor to that extent, and the warranty in (c) below will apply);

(c) that both the workmanship and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is additional to that in (a) and (b), and will only become relevant, for practical purposes in any dispute, if the contractor has fulfilled his obligations under 9a) and (b)).

The first two obligations (a) and (b) correspond to the warranty of merchantability, and that under (c) to the warranty of suitability, under section 14 of the Sale of Goods Act 1893. The obligation under (c) is here called the "design" obligation and extends, it is submitted, to all defects of planning or conception of the building or project in question including, as stated, the selection of all materials and work processes. The purpose for which the work or materials are required must, it is submitted, be considered in the light of the reasonable life of the building or project, or of the relevant part of it, if the part can reasonably be expected to have a shorter life than that of the main structure."

5.21 In relation to the warranty of merchantability and the warranty of fitness for purpose, the analysis in Hudson concludes, at paragraph 4.071, that:

"The obligation to use materials of merchantable quality is absolute and independent of fault: Hancock (supra), Young and Martin (supra). *Defects in a large number of materials used by contractors may in fact be due to the careless work of a subcontractor, but of one working off site rather than upon it, for example in the manufacturer of items such windows, doors and joinery, or of pre-cast concrete units, and even bricks; so that the extent of the contractor's implied obligation in this case is, on close analysis, only a warranty that someone's else's work, whether or not in contractual relations with him, has been carefully and skilfully done. But in the last resort, the warranty is indeed absolute in every sense, as in the case of a material that contains a latent defect which no-one could have detected or avoided before making use of it, whether for sub-manufacturing purposes or in the building itself. It follows also from what has been said that it will not avail the contractor that he obtain the material from a reputable source, that its production was outside his expertise, or that he took all reasonable steps to test and examine it:* Hancock (supra)."

"Until comparatively recently it was an open question whether the suitability liability, i.e. fitness for purpose, was absolute or qualified by a concept of care and skill, it is now clear, contrary to what was suggested in the Ninth edition of this work, that this obligation is, in the light of the reasoning of the House of Lords in Young and Martin (supra) *absolute also. This is of crucial importance in design and build or turnkey contracts."*

5.22 From the point of view of law and from the proper management and apportionment of responsibility in construction contracts I consider this analysis

is correct and via the decision in *Helicopter Sales (supra)* is directly applicable in this jurisdiction. Therefore, as noted in *Hudson* the obligation of the designer builder is absolute and the builders' claim that they only need to perform reasonably is not correct and I consider that the builders are liable for the spalling bricks and are responsible for their rectification.

5.23 I make this finding in this case only in respect of the builders because they have a design as well as the build obligation. The design obligation is very important in this case because I accept that the situation is highly unusual to find salty groundwater in this area; however, given the builders' obligation to investigate the site and prepare a competent design, the absolute warranty, means that the builders are responsible for any latent defect as is evidenced in this case by the presence of salty groundwater causing the bricks to spall. I might not make the same finding in this case if the builder was not also responsible for the design.

6. BALANCE OF ALLEGED DEFECTS

6.1 The parties' building experts agreed that the following items were items of defective work: 2, 3, 4, 5, 7, 8, 24, 25, 27, 30, 58 and 59 and I do not need to address liability for these items. I will deal with the other items of defective work in numerical order.

6.2 Item 1: The roof ridge tiles have not been provided with weep holes.

It was the uncontroverted evidence of Mr M J O'Donohue, Sales Manager of Monier Wunderlich, that all water entering behind the roof bedding can escape through the watercourse of the tile and no weep holes are required. Not defective work.

6.3 Item 6: The first three rows of tiles from the gutters are unacceptably pitching down out of plane.

At the view this was not apparent to me. If they are pitching down to some extent this will not become greater as the overhangs are now braced back to the

external wall by braces that support the eaves lining. I accept the evidence of Mr Campbell. Not defective work.

6.4 Item 10: The brickwork has an unacceptable yellow stain, particularly to the verandah walls.

The brickwork was of variable colour, one of which was a light yellow. I do not consider that the yellow complained of was a predominant colour, it was a yellowish tinge. I could not see any obvious sign that the yellowish tinge was due to acid clearing, for example: streaks in the yellowish tinge, some areas of higher yellow colour than others. The yellowish tinge could be a natural colour in the bricks, no evidence produced to me that established that the yellowish tinge was not a natural normal feature of these bricks. No unused bricks were produced to me. Even if it was due to staining I do not consider that it is necessary or reasonable to attempt to rectify this allegation: *Belgrove v Eldridge* (1954) 90 CLR 613. I find this for three reasons:-

(a) the yellowship tinge is very light;

(b) any proposed rectification by further acid washing may result in a deepening of the yellowship tinge or more obvious indications of brick washing that would give a greater contrast than present; and,

(c) part of Mr Whitby's proposed rectification is to replace 500 of the worst affected bricks which will almost certainly provide a greater colour contrast than present.

I do not consider this work defective.

6.5 Item 11: The brickwork mortar patching in what appears to have been two rectification operations as unacceptable, colour match problems and the darker mortar operation has been left uncleaned.

There was a slight difference in mortar colour on the rear wall, but I do not consider it sufficient to be described as defective work.

6.6 Item 12: The brickwork perpends are separated on one side.

I do not consider this has any structural significance and it was very difficult to see and I do not consider it a defect.

6.7 Item 14: A significant number of articulation joints in the brickwork have been left out.

I accept that this is a defect.

6.8 Item 15: The articulation joints installed are not right down to the footings as required.

I accept that this is a defect.

6.9 Item 19: The garage brick piers are inadequately bonded to the brick wall.

As a result of the destructive testing carried out in the garage, I accept that this is a defect and it should be rectified.

6.10 Item 20: The brickwork has no weep holes under window sills.

I accept that this is a defect and should be rectified.

6.11 Item 21: The wind flaps under the window sills are incorrectly built into the mortar and/or fall short.

I accept Mr Campbell's evidence that this will not result in any appreciable water penetration and cannot be considered a defect.

6.12 Item 22: The eaves lining is unacceptably taped, messy.

I do not consider that this is substandard work and I accept Mr Campbell's conclusion that it is not a defect.

6.13 Item 23: The down pipes are too far apart and/or too distant from large valleys.

I accept the evidence of the building surveyor, Mr McLinden, that he has carefully looked at this and measured it against the requirements of the Building

Code of Australia and he considers that there are sufficient downpipes. This is not a defect.

6.14 Item 26: There is a noticeable waviness in the timber beading at the front verandah.

If this is a defect it will be rectified with the roof trusses.

6.15 Item 28: The roof tiles are too tightly fitted to permit easy maintenance.

I do not accept that the roof tiles can be too tightly fitted as they have grooves which match up and accept Mr Campbell's evidence that this is not a defect.

6.16 Item 29: The tile fixing are under requirement.

This will be rectified with the roof trusses and the removal and replacement of all tiles.

6.17 Item 31: Roof battens are under strength for the 900mm spacing of the trusses.

Mr O'Connell does not consider that this is a defect as it is just shrinkage of the green hardwood from which the roof battens are normally manufactured. Mr Nestic, agreed with Mr O'Connell's reasons. I accept the evidence of Mr O'Connell and Mr Nestic and I do not consider this to be a defect.

6.18 Item 32: Roof trusses has been dealt with previously at Section 4 of these reasons and this also deals with Items 33, 34, 35, 36, 37, 38, 39, 40, 42, 44, 45, 55, 58.

6.19 Item 41: The load bearing entry study wall is not permitted to be load bearing. as the roof trusses in the rectification will bear on the verandah beam and not on the wall referred to in this item.

This item is no longer relevant as the replacement trusses will bear on the verandah beam, likewise, neither are Items 43 and 46.

6.20 Item 47: The walkways/verandah beams must be designed.

Mr Nestic considers the existing 400 v 100mm nominal Oregon verandah beams are adequate. Shrinkage of up to 10% is acceptable I accept that their shrinkage of approximately 20mm is acceptable and therefore I do not consider this to be a defect.

6.21 Items 48, 49 and 50 relate to allegations that window lintels, lintels of the house and garage and opening studs besides windows are suspected of being under strength by the applicants and should be justified.

Mr Sharp, Structural Engineer for the builders, gave evidence that he had carried out checks on each of these alleged items and I accept his evidence. Further, the building surveyor, Mr McLinden, gave evidence that his staff had done the inspection of the frame and all of the items had been checked and were passed. Not defective work.

6.22 Item 51: The finish at least to the timber veneered joinery, architraves are messy, non-uniform, rough.

I could not see any streaking, roughness or non-uniformity in the painting to the timber veneer of the cupboards and I do not accept this as a defect. I accept that some of the architraves are streaked and unsatisfactory and I will allow for that to be rectified. This will require re-painting of all of the architraves.

6.23 Item 52: The storm water drains are leaking at least near the garage and the rear of the house.

The installing plumber gave evidence that the item complained of beside the walkway between the garage and the house was not in fact a stormwater pipe but a sleeve into which a 90mm stormwater pipe had later been inserted. The sleeve was put in to get the stormwater pipe through the walkway footings. I accept the plumber's evidence and this is not a defect.

6.24 Item 53: The excavation for the west boundary retaining wall was inadequate, i.e. not to the boundary and the screenings have not been continued to the top as required.

The allegation in relation to screenings was not pursued. The first limb, as to the excavation to the west boundary retaining wall being inadequate, relates to the fact that the builders did the site cut. According to the approved plans the west boundary retaining wall was located immediately upon the common boundary with the allotment to the west. It was the owners' responsibility to construct the wall. The builders did not excavate the site cut to the common boundary but left the cut approximately 1-2m from the title boundary. The owners could not come in to construct this retaining wall until the builders had completed their work. After the owners took possession the builders would have no idea as to when the owners would be carrying out the construction of the west boundary retaining wall. It would have been irresponsible in the extreme for the builders to excavate up to and including the common boundary with the lot to the west and then leave it for months until the owners could or did get around to constructing the retaining wall at the site. Such work would have at least resulted in the loss of the fence, from which all support would have been withdrawn, and would more likely than not have resulted in a collapse of some of the adjoining allotment's ground into the subject allotment due to removal of support. This clearly would have left the owners open to an action for nuisance from the adjoining owners if such excavation had been carried out. Therefore, I find it was entirely proper for the builders to leave the excavation 1-2m from the common boundary. I consider what the builders did was adequate and this is not defective work. The owners, if they wanted the wall on the boundary, should have arranged for the builders to carry out the excavation to the boundary immediately prior to the building of the retaining wall, there is no evidence they or their wall builder made such a request.

6.25 Item 54: The hot water service piping doesn't connect directly to the kitchen sink as specifically requested.

I accept that the hot water service piping was connected as is normally done by a plumber and is directly connected to the sink as that is understood for normal plumbing work. I do not regard this as a defect.

6.26 Item 56: Wall tiles, floor tiles and/or tiling corners are unacceptably jointed in thickness and material and do not comply.

I accept that tile intersections should have a flexible sealant and this is a defect.

6.27 Item 57: The garage slab mesh is incorrectly positioned and the sand bed underneath is insufficiently thick.

This was only checked at one point. I don't consider that insufficiency in the sand bed has any real relevance to the performance of the slab. It was apparent that the slab mesh was near the bottom of the slab and was not centrally located as it was required on the footings plan; however, no structural engineer at the view considered that the garage slab would not perform satisfactorily over its design life; therefore, I do not consider this to be a defect or if it was that its rectification would be reasonable and necessary.

6.28 Item 60: There is faint unpleasant odour at the en suite floor waste.

This is for both en suites. The constructing plumber gave evidence that he had extensively rectified this work and it had been passed by inspectors from the Plumbing Industry Commission. He had carried out dye tests by inserting blue dye in the toilets and flushing them and he said that no blue dye appeared in the floor waste traps. The owners' investigating plumber produced a video which he said showed that water was coming back from the toilet flush and back washing into the trap of the en suite floor waste. I did not consider that the video showed drainage water running back to the floor waste, rather there appeared to be a small reflected wave that came up the pipe for a short distance but there is no evidence it reached the floor waste. Other than the owners, no-one has been able to detect the smell on any regular basis and I do not consider

that this is a defect sufficiently large to justify an expenditure of approximately $10,000 to rectify, *Belgrove v Eldridge(supra).*

7. QUANTUM GENERAL

7.1 Prior to addressing quantum in detail I should address the builders' request that they be allowed to return to the site to carry out any required rectification work. The builders submitted that I have the power to order them to return, Section 53 (2) of the Act. In support of this, the builders submit that the Ministerial Order setting out the requirements for domestic building insurance policies has an express term that the builders will return and carry out any works if so directed by the insurer. However, this express term is not an unfettered right as under the Ministerial Orders the owners can refuse access if such a refusal is 'reasonable' and the term in its concluding phrase gives an illustration in stating that 'loss of confidence in the builders is such a reasonable ground.' After an eighteen day hearing in which the longest and hardest evidentiary battles were in relation to issues of credit between the owners and builders, I consider it is safe to say that neither party has much confidence in the other. Therefore, under the policy it would be reasonable for the owners to refuse the builders access. Therefore, I consider it would be wrong of me and it would tend to undermine confidence of the parties in the Tribunal process if I made such an order in the face of the owners' refusal to allow the builders access.

7.2 The last sentence in the previous sub-paragraph leads me to the second and the most important reason for refusing to make such an order without the owners' express approval. Such an order without the parties' consent could easily bring the law into disrepute. There is a long and consistent line of authority that a builder's right of access is only a revocable licence to enter an owners' premises and carry out the works: *Chermar Productions Pty Ltd v Prestest Pty Ltd* (1989) 7 BCL 46. The owners can legally revoke the builders' licence at any time and refuse the builders' access to the site, notwithstanding that the owners may be in breach of the building contract with the builders and therefore liable to damages.

The breach of the building contract does not make the revocation illegal; it is still legal for an owner to bar the builder's access. Thus, if such an order was made it would deprive the owners of this important right for the reason that if they exercise their right to revoke the builders' licence, the law recognises that they would thereby be in contempt of the Tribunal. I am not saying that such an order should never be made; however, I cannot imagine the circumstances at this stage, and it is certainly not the circumstances of this case, which would justify the removal of the owners' proprietary rights and so give the builders irrevocable access to carry out works.

7.3 In the conclusion, I wish to say that I do not accept that the builders have conducted themselves well over the rectification phase of this contract. I consider that the builders have attempted, as many builder's do, to talk themselves out of difficult rectification work and when forced to do it, they do the work with little supervision so that it is obviously unsatisfactory. The roof rectification is an obvious example of this with many nails improperly driven into the girder trusses in some, I presume, attempt to strengthen such trusses. There have been ill fitting pieces of timber off cuts nailed in a haphazard fashion to truss web members in a presumed attempt to strengthen them. The rectification work in the roof looks incompetent and would destroy any owner's confidence in the builder to satisfactorily complete the work.

7.4 The builders' request for an order that it be ordered to return to the site and carry out the rectification work is denied. A concomitant of this decision is that I consider that the costs of rectification should be assessed as costs to the owners, and thereby include all necessary margins for profits, overhead and risk plus GST.

8. PARTICULARS OF QUANTUM

8.1 I have taken my costings largely from the discussions at the building consultant's conclave in relation to quantum on 5 November 2004. Where there

has been any missing figure I have used the costings of Mr Hester, so that for example when I am looking to relay a whole wall, as in the rear wall at bedroom three, I have taken all of the Hester cost for removing and relaying all brickwork, and dividing it by the total area of brickwork to come up with a rough area figure. To some extent this would be an overestimate of the costs to actually carry out this work but I have made no allowance for scale, that is Mr Hester's costing is based on relaying every brick in the external walls, whereas I am just going to relay one wall. All costs are to the nearest dollar.

8.2 In relation to margins, Mr Hester, the estimator for the owners, submitted that in his costings he had included a margin for overhead, profit and risk of 25%. Mr O'Connell, building consultant for the owners, submitted that this margin should be only 15%. Mr Campbell for the insurer submitted that where you had rectification work he considered that 30% was the appropriate figure. I accept Mr Hester's 25% as I consider Mr O'Connell's 15% is more appropriate to the margin for new home construction. In my costings I have allowed $30 for a labourer and $40 for any tradesmen. I will go through the defects list seriatum.

8.3 Item 1 - No defect.

8.4 Item 2 – Agreed defect and agreed rectification and no sum is awarded and costs to rectify are include in the cost for roof truss rectification.

8.5 Item 3 – Agreed defect and cost to rectify included in the rectification cost of the roof trusses.

8.6 Item 4 – Agreed defect and rectification cost in roof trusses rectification.

8.7 Item 5 – Agreed defect and rectification cost included in roof trusses.

8.8 Item 6 – No defect.

8.9 Item 7 – Withdrawn.

8.10 Item 8 – No defect.

8.11 Item 9 – Bricks below damp course are spalling: This is a defect and the rectification cost is assessed as follows:

(a)	Remove salt affected bricks:		
	(i)	replace rear wall at bedroom three, 11.1m^2 at $112 per m^2	$ 1,243.00
	(ii)	replace balance of salt affected bricks below damp proof course being very careful not to destroy the 'Granitgard' allow 1 man hour per brick to remove and replace, estimate 56 bricks at $40 per hour	$ 2,240.00
(b)	Tip		$ 150.00
(c)	Bin hire		$ 150.00
(d)	Materials Cost: mortar, etc.		$ 150.00
(e)	Chemical damp proof courses for two courses of brick below damp proof course (including garage):		
	120m for 2 bricks at $90 per metre		$21,600.00
(f)	Agricultural drains across the back and down the sides of the house, allowing to replace concrete footpath where necessary:		
	(i)	63m of 90mm diameter slotted agricultural drain and crushed rock backfill at $50 per metre	$ 3,150.00
	(ii)	remove and replace concrete paving on south and east sides of house: 27.5m at $40 per metre	$ 1,100.00
	Total for rectifying spalling brickwork		$29,783.00

8.12 Rectification of the spalling brickwork resolves the following items of alleged defective work 9, 13.

8.13 I consider that the Granitgard can be retained by the very careful removal of the defective bricks and their replacement. The Granitgard has been retained on the

two examples where spalling bricks have already been removed to show the location of the damp proof course and Granitgard barrier; therefore I have allowed one hour for the removal and replacement of each brick. This may seem excessive but it is so that it is done very slowly and very carefully to retain the Granitgard. In relation to the chemical damp proof course I have allowed the cost proposed by Mr Campbell and I have assumed the cost he gave was the supply and install cost and without margins. As bricks are spalling on the garage I have allowed the treatment to be carried out on the garage as well for the two bricks below the existing damp proof course.

8.14 The owners may claim that the installation of the chemical damp proof course will change the colour of the brick and thereby be less aesthetic than what is the current situation. As I understand it, the owners only seek the replacement of the general purpose bricks below the damp proof course with exposure grade bricks and as it is a fact that Granitgard would almost inevitably be lost in carrying out such a process right around the house, the owners seek the replacement of all of the brickwork. The exposure class bricks will be manufactured differently to general purpose bricks and will be a different colour. Therefore, I consider that if the owners are willing to accept some change in the brick colour beneath the damp proof course if exposure grade bricks were used they will not mind a similar slightly different and likely to be a darker shade of brick below the damp proof course when the chemical damp proof coursing is installed. Further, on the principle enunciated in *Belgrove (Supra)* I would consider it would be unreasonable and unnecessary to completely replace all of the brickwork for a slightly different shade of brick due to the damp proof course installation.

8.15 In regards to the bricks spalling I also consider it is important as put forward by Mr Eerey and Mr O'Connell that the moisture be kept away from the brickwork and the side of the slab and for this reason I have allowed agricultural drains to

be laid on the south, east and west sides of the house where the brickwork faces the boundary.

8.16 Item 10 - No defect.

8.17 Item 11 – No defect.

8.18 Item 12 – No defect.

8.19 Item 13 – A defect but it will be rectified by the works carried out to rectify Item 9: Brick Spalling.

8.20 Item 14 – Defect and I accept Mr Hester's figure of $876.00.

8.21 Item 15 – Defect and rectification in Item 14 above.

8.22 Item 16 – Defect and rectification cost included in Item 14 above.

8.23 Item 17 – No defect.

8.24 Item 18 – No defect.

8.25 Item 19 – Defect and I accept Mr Hester's costing of $400.00.

8.26 Item 20 – Defects and for the cost to rectify I accept Mr Hester's costing of $187.00.

8.27 Item 21 – No defect.

8.28 Item 22 – No defect.

8.29 Item 23 – No defect.

8.30 Item 24 – Agreed defect, rectification cost $36.00.

8.31 Item 25 – Agreed defect, rectification cost agreed $145.00.

8.32 Item 26 – Defect, will be rectified with Item 32.

8.33 Item 27 – Agreed defect and agreed rectification cost $145.00.

8.34 Item 28 – No defect.

8.35 Item 29 – If a defect, will be rectified with Item 32.

8.36 Item 30 – Agreed defect and agreed rectification cost $145.00.

8.37 Item 31 – No defect.

8.38 Item 32 – Roof trusses are defective and I have allowed for partial replacement of the roof trusses roughly as proposed by Mr Nestic in the joint report of the structural engineering experts, see Section 4.

8.39 The cost of the partial replacement of the roof trusses is as follows:

(a)	Hire and erect scaffold, accept Hester figure	$ 900.00
(b)	Tile elevator, accept Styles' figure	$ 250.00
(c)	To replace broken tiles, estimated at 10% of tile area 291m^2 at $15 per m^2	$ 450.00
(d)	Remove, stack and relay all roof tiles: 291m^2 at $22 per m^2	$ 6,402.00
(e)	Tarp hire: accept three weeks at $150 per week	$ 450.00
(f)	Purchase replacement trusses; accept Hester costing but for eleven trusses only	$ 4,000.00

(g)	Supply and lay tile battens: 300m at $4.50 per metre	$ 1,350.00
(h)	Labour for truss erection	$ 3,580.00
(i)	Carpenters to repair balance of roof as indicated in Mr Nestic's plan in the joint report for house and garage: allow two men for three days at $40 per hour	$ 1,920.00
(j)	Plasterer to relay ceilings and materials: materials $175 and labour 36 hours at $40 per hour	$ 1,615.00
(k)	Painting, two men by three days by $40 per hour plus materials $800	$ 2,720.00
(l)	Crane hire, 16 hours at $120 per hour	$ 1,920.00
(m)	Insulation: removal and reinstall	$ 280.00
(n)	Prop ceilings, remove and reinstall plumbing, electrics: average of Hester and Styles' quotes	$ 5,973.00
(o)	Ridge tiles: accept Hester quote of 50m at $12.85	$ 643.00
	Cost of roof truss rectification	$32,453.00

8.40 The roof truss rectification – rectifies Items 2, 3, 4, 5, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 44, 45, 55 and 58.

8.41 Items 41, 43 and 46 are no longer relevant due to the form of truss rectification.

8.42 Item 47 - Not a defect.

8.43 Item 48 – Not a defect.

8.44 Items 49 and 50 – Not defective work.

8.45 Item 51 – Partial defect: to repaint the architraves it will need to be done very carefully so as not to create further work and it will need a sand and at least two coats of stain, therefore I would allow a painter one week plus the cost of paint: materials $200, labour 40 hours at $40 hours per hour - $1,800.00

8.46 Item 52 – Not a defect.

8.47 Item 53 – Not a defect.

8.48 Item 54 – Not a defect.

8.49 Item 55 – Not a defect.

8.50 Item 56 – I accept this is defective work and I would allow $250.00

8.51 Item 57 – Not a defect.

8.52 Item 58 – Agreed a defect and the sum allowed is $218.00

8.53 Item 59 – Agreed defect and the sum allowed is $73.00

8.54 Item 60 – No defect.

8.55	The estimated cost of the rectification works is	$66,511.00
	Allow 25% overhead, profit and risk margin	$16,628.00
		$83,139.00
	GST 10%	$ 8,299.00
	Total Rectification Cost of Defective Items	$91,438.00

8.56 In relation to preliminaries, the owners have claimed for:

(a) building permit $1,400.00, whereas the builders' estimates it should cost $800.00; I consider that this sum should allow for the redrawing of all of the proposed rectification work accurately so that an accurate building permit can be issued and I would allow for this sum $1,600.00.

(b) all risk insurance, Mr Hester for the owners has estimated $1,800.00 for this sum, whereas Mr Styles for the builders' estimates $500.00. I do not

consider that all risk insurance for this particular work should be as high as $1,800.00 and I would allow $700.00.

(c) warranty insurance: this will be the domestic building insurance to cover the rectification works. The owners claim $1,800.00 and I consider this a fair and reasonable sum given that this is a considerable amount of rectification work.

(d) all contractual details/project scheduling: Mr Hester for the owners claims $4,700.00 to prepare the engineering computations and plans for the rectification works, for alternative accommodation and for project management; the builders consider that the project management should be in the overhead, profit and risk margin and I agree. I would prefer to do a specific calculation for alternative accommodation, and the amount for engineering computations and plans I have allowed in the costs for the building permit; therefore, I do not allow any of this sum.

(e) in relation to alternative accommodation, I consider the works will take approximately six weeks at which stage the owners will be out of the house as it will be necessary to store all effects, furniture etc. in the garage, the roof of which will not be removed. Therefore, for alternative accommodation I am allowing 42 days at $75 per day for both Mr and Mrs Stiff, being $3,150.00.

(f) allow storage of the effects at home and in the garage, and I will allow one day for two men to store all the material, and one day for the men to bring it back into the house, so that's two men by two days at $30 per hour being $960.00.

(g) therefore, the total rectification cost, including all incidentals, for which the builders will be liable to the owners is $99,648.00

9. OWNERS' CLAIM AGAINST THE RESPONDENT INSURER

9.1 As described above in Section 2 the owners' claim against the insurer is not the common application under Section 60 of the Act seeking a review of an

insurer's decision. Instead of their points of claim of 27 February 2004, the owners' claim that the insurer wrongly rejected the claim by failing:-

(a) to accept liability for the claim

(b) recognize defective works;

(c) assess the scope and cost of the rectification work.

The owners also claimed as a cause of action that the insurer was not reasonable in compelling the owners to accept:-

(a) a substandard rectification methodology; and

(b) the insurer's nominee, in this case the builders, to carry out the rectification.

9.2 As set out in Section 2 the insurer considers the owners causes of action against it are misconceived on a number of grounds.

9.3 As a first observation I would say that I do not see that a cause of action can be grounded in a failure of the insurer to be reasonable: such failure would only ground an action if it amounted to a breach of contract or it was equivalent and amounted to misleading and deceptive conduct under the *Fair Trading Act.* The latter cause of action requires a number of other elements to be made out and none of these are pleaded therefore I will assess the allegation of unreasonableness as to whether it amounts to a breach of contract. That contract being the domestic building insurance contract between the owners and the insurer.

9.4 The owners in seeking an order for damages against insurer in the same terms as the relief sought from the builders, have, I accept, sought an order that cannot be granted in those terms. The relationship between the owners and the insurer are governed by the terms of the domestic insurance contract between them. The owners cannot require the insurer to do more than it is bound to do under the terms of the insurance contract between themselves. Therefore, the insurer

submits that before the owners can establish a claim against the insurer they must establish a breach of the insurance contract.

9.5 The insurer submits that the Tribunal only has jurisdiction over these disputes due to Section 59A of the Act.

9.6 Further, the insurer submitted that the owners' claim against them should not be upheld on the basis that:-

a) the owners had not submitted a proper claim to the insurer in that the claim to the insurer as detailed earlier in these reasons merely referred to areas of work and did not provide sufficient particulars as to the alleged deficiencies in those areas of work such that the insurers could properly determine if these complaints were made out. Therefore, owners were in breach of clause 24 of the domestic building insurance policy that requires that "*you (that is the claimant owners) must give us or the agent any reasonable assistance or information required*"; and,

b) similarly, the insurer claims the owners refused to provide assistance to the insurer's agents, being firstly Mr McNees and secondly on a different occasion Mr Campbell, thereby, being again in breach of clause 24 of the domestic building insurance contract. The insurer alleges that when Mr McNees requested to be advised by the owners as to what veneer staining they considered unsatisfactory the owners indicated the kitchen cupboards about which they actually had no complaint. In relation to Mr Campbell he asked the owners if hot water had been available on the day of his inspection and the owners informed him that he should work it out.

9.7 Notwithstanding that these submissions may indicate a breach of the terms of the contract by the owners I do not consider that they would totally bar the claim of the owners against the insurer; firstly, because the insurer dealt with the claim as put forward by the owners after receiving reports from their experts. Notwithstanding that the complaint may have been bad as to form or that not all

reasonable assistance had been provided; nevertheless, the insurer reached a decision in relation to the claim and is bound by its decision on that claim and cannot now say that because of deficiencies in the form of the claim or of the owners assistance the owners should in effect be barred from the claim. However, my decision in regard to refusing to bar the owners' total claim is not applicable to any detriment to the insurer that resulted from the misleading comments of the owners to the insurer's experts.

9.8 Secondly, the insurer's submission is undercut by clause 26 of the domestic building insurance contract which requires that "*if you (that is the owners) fail to comply with clause 23, 24 or 25, we (that is the insurer) can refuse to pay the claim to the extent we are prejudice by that failure*."

9.9 Citing the authority of *L'Union Fire Accident and General Insurance Co Ltd v Klinker Knitting Mills Pty Ltd et al*. (1938) 59 CLR 709 at 718, the insurer further submitted that to the extent that the owners failed to provide reasonable assistance or proper information in relation to the claim then such co-operation was a condition precedent to Vero being liable under the policy and therefore the owners' claim was not maintainable,. However, I am not sure that this case is applicable to the domestic building insurance contract under consideration in this proceeding. In the *L'Union* case the terms of the insurance contract were specific as to the form of the claim, in that paragraph 8(b) of the insurance contract required:-

> "*Within 7 days of the date of such notice (unless the Company has in writing agreed to extend such period) deliver to the Company a detailed statement in writing of the loss or damage, with an estimate of the market value of each article lost, and the amount of damage sustained, excluding profit in any kind.";*

which conditions the claimants in the case failed to provide in the body of their claims.

9.10 In my reading of the domestic building insurance contract the subject of this litigation the only term relating to the form of the claim is at clause 30 which maintains that:-

"Claims are to be made in writing and are to be delivered to the agent."

This the owners have done. Therefore, I do not consider the *L'Union* case assists the insurer. If the owners have provided so little information, or misleading information to the insurer's agent, then I do not consider that it means that the owners don't have a claim, what it does mean is that the owners are limited to the claim as made and as presented to the insurer and this includes information given to the insurer's experts at the view.

9.11 I will deal now with each of the allegations of complaint in the owners' complaint to the insurer. I proceed this way because during the parties openings at the start of the hearing the owners, in a clarification of the owners' case sought by the insurer, conceded that they were not seeking a review of the insurer's decision under Section 60 of the Act. However, they maintained that all of the complaints made by the owners in this proceeding as set out in the defects list of Mr Whitby, building consultant, and Mr Xeros, civil engineer and other experts' reports attached as Document 'A' to the owners' points of claim had been put to the insurer as part of the complaint of 18 June 2002 and to the extent that I find any allegations in Document 'A' to the points of claim were not claims made on the insurer in the complaint of 18 June 2002 then the owners cannot pursue those claims against the insurer in these proceedings. This concession by the owners means that I will deal with the headings set out in the complaint and as described further in the documentation attached to the claim and decide whether the complaints as made to the insurer are claims as put to this Tribunal as described in the expert reports of the owners and their points of claim.

9.12 The owners submitted that all allegations in the Whitby report had been properly and sufficiently raised with the insurer in the complaint of 18 June 2002. They did so on the ground that it was sufficient for an owner to demonstrate that it had raised a particular type of work as defective. The owners' Counsel submitted the justification for this ground was the relevant ministerial order which contained a provision that specifies "where the insured notifies the insurer of a defect, that insurer is taken to have been notified of any defect that is directly or indirectly related to that specific defect." Counsel did not give me that clause number of the relevant provision and the only similar provision I could find was Clause 8.6 which specified "*Where a person gives notice of a defect, that person is taken for the purposes of the policy to have given notice of every defect to which the defect notified is directly or indirectly related, …*" This provision binds the owners to notice not the insurer.

9.13 Be that as it may, even if the insurer was bound by the provision I do not consider the interpretation put on by the owners is valid. The provision talks of "defect" not work, and I do not consider "indirectly related" extends to cover a type of work but to a relationship with the "defect", for example, consequential damage. On a commonsense basis the defect and any related defect must have sufficient nexus that the insurer is aware that in considering the "defect" it must be considering the related defect, if the nexus is not there, there cannot be any notice. I do not consider that giving notice of brick discolouration due to alleged defective cleaning includes notice of a defect in the quality of the bricks and the presence of ground moisture leading to brick spalling. I do not accept this submission of the owners. To have me consider that the insurer considered such a defect as brick spalling it must have been squarely raised with the insurer or be an obvious concomitant of the allegation of brick discoloration.

9.14 <u>Roof and Trusses</u>

I accept the primary thrust of the insurer's submission that in relation to the allegations of a defective roof structure the insurer accepted the owners' claim

and by its letter of decision of 13 November 2002 required the builders to rectify the roof and trusses as per the contract requirements and in accordance with building regulations. The owners' complaints come down to the fact that the insurer was unreasonable in requiring the owners to accept an inferior or substandard rectification methodology which the insurer directing was to be carried out by the builders. The problem with the owners' allegations at paragraph 10 of their points of claim is that the allegation of substandard rectification or direction is not shown to be a breach by the insurer of the domestic building insurance contract.

9.15 It is a term of the contract at clause 27 that once an owner knows there is a claim they:-

> *"must comply with a reasonable direction regarding the completing or rectifying the home building work;*
> *…you must give us or our nominees, including a nominated builder (except for a builder to whom you object on reasonable grounds), reasonable access to inspect, rectify or complete the home building work."*

Therefore, under the terms of the domestic building insurance contract it is normal for the insurer not to specify the rectification work and to nominate and require that the original builders' return to rectify the defective building work; these actions are allowed under the domestic building contract.

9.16 Secondly, the insurer's obligation to the owners is not to rectify the work to a standard or quality required by the owners but to a standard implied by the warranties at Section 8 of the Act or as specified in the contract documents: see clauses 5.1.1 and 5.1.2 of the Ministerial Order. The insurer says that it has done this by requiring the builders to rectify the roof structure to the required standard.

9.17 Counsel for the owners submitted in his opening that the owners regarded what was intended to be done to rectify the roof by the builders as a bandaid rather than a proper solution and that as a result of that consideration they did not

accept that the insurer had properly made a determination that allowed the roof defects to be rectified properly. It was owners' opinion that the roof needed to be replaced and it was the owners' understanding that the insurer did not consider at any stage that the roof needed to be totally replaced. Therefore, submit the owners, this is what brings them into dispute before the Tribunal which is to decide what other defects in the roof and what properly required to rectify them. The insurer conceded that this dispute should be heard by the Tribunal and did not take any jurisdictional point over this distinction by the owners. As this allegation was put to the Tribunal the insurer maintained that its position was that as a matter of fact it was unnecessary to replace the whole of the roof to properly rectify the damage.

9.18 Mr Stiff in his cross-examination, attested that he was convinced that the roof needed to be wholly replaced on the basis that the design of the roof was for a metal sheet roof and not concrete tiles. During cross-examination Mr Stiff conceded that he commissioned further structural engineers when he did not consider a specific engineer's advice was in line with his opinions as to the structural adequacy of the roof. As I have found earlier I consider Mr Stiff's conviction arose because he was certain that the roof trusses had been designed for a metal deck and not a tiled roof; as I found earlier in these reasons I consider that the original truss design could not have been for a metal deck roof.

9.19 Dealing with this allegation on a purely factual basis the findings I have made in relation to the rectification of the roof trusses do not require the total replacement of the roof. I basically accepted the opinion of Mr Nestic, the structural expert for the insurer, as to the rectification required to ensure that the roof structure was of a standard that met the implied warranties under the Act and the terms of the contract between the domestic building contract between the owners and builders.

9.20 Secondly, the owners engineer Mr Xeros, drew up and signed the joint engineers' report at to roof rectification, as did Mr Nestic, the insurer's engineer; the owner refused to allow this work to be carried out, convinced the roof needed replacing. Given the owners' engineer's conduct, it is not tenable for the owners to claim the insurer breached the insurance contract in relation to the method of roof rectification.

9.21 Retaining Wall: The sketchy particulars that accompanied the insurance claim in relation to this item was:-

> *"Insufficient drainage, why weren't we informed that we may need more drainage? And there would be more costs for drainage, but nothing was ever said to us."*

9.22 The allegation in this proceeding was that the west retaining wall was incorrectly sited due to the builders improperly and defectively carrying out of the site excavation. From the language used in the complaint I do not consider that there was any original allegation put to the insurer prior to it making its decision that the west retaining wall or any part of a retaining wall was in the incorrect position. The complaint referred only to an allegation of "insufficient drainage." Therefore, I find that the owners claim that the retaining wall was located in the incorrect position is not a claim that can be made against the insurer. Notwithstanding this, even if it was a claim that could be made against the insurer, my finding is that this was not defective work.

9.23 Brickwork: The particulars of this allegation as set out within the body of claim are:

> *"Too much acid and too much pressure used when bricks were cleaned, by another person. Mortar wash from the brickworks. Chemical reaction to acid in iron oxide, causing yellowing/orange discolouration on bricks. Inconsistency of mortar colour between bricks, as they were patched up by different people of several occasions, using different mortar colour."*

9.24 The owners submitted that this was sufficiently wide to include their claim for spalling of the brickwork below the damp proof course due to salt contamination from ground water.

9.25 In his evidence Mr Xeros, structural engineer for the owners, gave evidence that he attended at the inspection by an agent for the insurer, Mr McNees, in relation to the 18 June 2002 complaint to the insurer and that although most of the brickwork inspection related to discolouration and mortar colour he did mention the deterioration of the brickwork below the damp proof course. Later in cross-examination he said he could not specifically remember if he had referred to it. Mr McNees could not remember any examples of brickwork deterioration being inspected that day or of any conversations relating to brickwork deterioration. In cross-examination Mr McNees said that no such conversations took place. Therefore, I do not consider that Mr Whitby's allegations of deterioration in the brickwork due to spalling resulting from the deposition of salts and the presence of ground water was put to the insurer in relation to the owners' complaint of 18 June 2002.

9.26 The yellowing discoloration of the brickwork allegedly as a result of a defective acid wash was raised in this complaint to the insurer and in Schedule 'A' to the points of claim at Item 10 of the Whitby defects list. However, I found as a matter of fact that the allegation is not substantiated and brick discoloration was not a defect.

9.27 Toilets: This areas of defective work was submitted to the insurer in the claim of 18 June 2002 however, previously in this determination I have found that the toilets is not an area of defective work.

9.28 Windows: The insurer found that the windows were defective and required the builders to rectify the windows. The owners prevented the builders arranging for the window supplier Stegbar, to rectify for the reason that they considered there would need to be a complete rebuilding of the roof and this may require modifications of the windows and the lintels above the windows, therefore they had denied the builders' access to rectify the windows. From the method of

rectification that I have accepted for the roof, there is no need to change the lintel size or arrangement over any of the windows, and none of the windows need to be changed for any other reason, therefore this claim fails.

9.29 Stain: It was Mr McNees' evidence and not disputed by the owners in their evidence that when Mr McNees asked the owners to point out the areas of stain that they considered defective, they indicated the kitchen cupboards to him, and this was the only area of stain that they owners indicated to Mr McNees that they were unhappy about. The owners did not indicate that they were not satisfied with the stain to the architraves or the benches, only the kitchen cupboards. Thus, I consider that the owners are in breach of clause 24 of the policy in not providing Mr McNees with the information that they were dissatisfied with the staining of the architraves and benches and the insurer cannot be said to have had the claim for the architrave stain put before it. This means that the insurer never made a considered decision under the terms of the insurance contract with respect to the architrave stain and therefore the insurer cannot be held liable for not recognizing this defect and the owners' claim against the insurer under this head must fail.

9.30 Garage Floor: This was an area of defective works put before the insurer but I have found previously in this determination that I do not consider this work to be defective.

9.31 I accept that the owners' claim cannot be a review under Section 60 of the Act and must be under Section 59A, can such a claim be maintained? In a decision of Hollingworth J: *Vero Insurance Limited v Witherow* [2004] VSC 272 (9 August 2004) Her Honour held that Section 59A "*is a provision which grants VCAT jurisdiction, but it is not an avenue for or of review*." Her Honour in a footnote said that she accepted the comments of Deputy President Cremean (as he then was) in *Clifton Properties Corporation Pty Ltd v Litwaite Constructions*

Pty Ltd [1999] VCAT 49 (31 August 1999) where the Deputy President stated that:-

> "*I regard Section 59A as a* "jurisdictional provision*" as it was termed. It is foundational to the Tribunal's jurisdiction in insurance disputes but it is not, itself, an avenue for or of review. A sure indication that this is say lies in the circumstances that Section 59A sets no time limits. In contrast with Section 61(3). If parliament had intends Section 59A to be a further avenue for or of review it would have set a time limit as it did in Section 61(3) on a party referring a dispute to the Tribunal. But no time limit was set and it is the plainest of indications that Parliament did not intend that Section 59 should be a further review avenue."*

I am bound by Her Honour's decision and her acceptance of the Deputy President's comments: therefore, I consider that the owners' claim against the insurer was not maintainable in its present form.

10. CONCLUSIONS

10.1 On the basis of my findings above, I consider that the builders are liable to pay the owners $99,648.00 for the cost of rectifying defective works.

10.2 The owners' claim against the insurer fails.

10.3 I will set this matter down for a half day hearing in the near future so that the parties can make any further submissions to me in relation to this determination and then any other consequential matters.

10.4 I would like the parties to address me in relation to any orders I should make in relation to the insurer's liability, if any, to the owners in the event that the builders fail to comply with my orders for the payment of damages.

11. COMMENTS

11.1 I take the unusual step of making some comments about the quality of the expert evidence, I found much of the expert evidence as presented was unhelpful and in many instances irrelevant, so that rather than helping to clarify issues and

resolve factual disputes, it tendered to obscure the real issues and did not contribute in any way to their resolution

11.2 This arose because of a number of shortcomings in the experts' reports. Firstly many of them tendered to be qualitative rather than quantitative, they only described factual issues rather than materially assessing them: a simple but very pertinent example of this was testing the subsurface groundwater or moisture for total dissolved salts. There was a hypothesis put forward that the salt came from the bricks but the bricks were never tested for salt content. There was a hypothesis that the moisture in the bricks was caused by surface drainage running up against the wall of the house but no surface levels of sufficient detail were produced to enable this hypothesis to be tested.

11.3 There was a hypothesis that the moisture in the bricks came from subsurface seepage but no test bores were dug on the subject property or the surrounding properties and observations taken in an attempt to understand the near surface groundwater regime and the groundwater movement.

11.4 In relation to the trusses the owners' experts seem to have become diverted by Mr Stiff's conviction that the truss design built was for a metal deck roof. The confusion in the building approval documentation did not assist to clarify this issue but that was all the more reason that the experts should have gone back to square one and assessed whether what had been built in the roof was capable of performing its function for the expected design life of the structure.

11.5 Testing and reaching definite conclusions assists and strengthens the experts opinion which assist the adjudicator, relying on that expert's opinion, to more confidently reach a decision. If an expert's evidence is largely descriptive and qualitative then in my experience their opinions tend to be less certain and more general.

11.6 In some reports the experts' opinions become so general that the expert concludes a definitive opinion cannot be reached and it is for the other party to prove that the work in question has been carried out successfully. This is an unacceptable attempt to reverse the onus of proof. Such expert opinion can in normal circumstances of a case be ignored as wrongheaded and irrelevant.

11.7 So I make a plea to all experts for more testing. Hypothesis and opinion submitted to an adjudicator should be backed by fact not a range of possibilities. In this proceeding I consider the unacceptable susceptibility of the bricks to spalling was directly and effectively demonstrated by the testing carried out by Mr Eery which evidence was not refuted and his opinion of their deficiency a logical extension of the testing carried out. That concludes my comments.

SENIOR MEMBER R J YOUNG