

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1032/2013

### CATCHWORDS

Domestic Building, warranties under s137C of the *Building Act* 1993 given by an owner-builder to a subsequent owner, defects, awareness of defects at the time purchase

<b>APPLICANTS</b>	Mr Suhail Mir Mohamed, Ms Amela Mahmic
<b>RESPONDENT</b>	Ms Aurora Pollara
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	19 and 20 March and 15 July 2014
<b>DATE OF ORDER</b>	17 October 2014
<b>CITATION</b>	Mohamed v Pollara (Building and Proeprty) [2014] VCAT 1291

### ORDERS

- 1 The Respondent must pay the Applicants \$32,231.55 forthwith.
- 2 Costs are reserved with liberty to apply until 30 January 2015. Any application for costs should be accompanied by a brief outline of facts and contentions. **I direct the Principal Registrar to list any costs hearing before Senior Member Lothian with an estimated duration of 2 hours.**

### SENIOR MEMBER M. LOTHIAN

#### APPEARANCES:

For Applicants	Mr M Dean of Counsel
For Respondent	Mrs A.. Pollara in person and with her son, Mr J. Pollara.

## REASONS

- 1 The Applicant-Owners were the purchasers of a home in Strathmore, which was renovated permit by the Respondent, Mrs Pollara, under an owner-builder building. For the reasons given on 22 July 2014, I determined the proceeding in favour of the Applicants under s78 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”), with quantum to be determined.
- 2 The damages to which the Owners are entitled are for breaches of the warranties implied into the contract between them and Mrs Pollara as owner-builder under s137C of the *Building Act 1993*.
- 3 I reserved quantum because I had the benefit of hearing both parties on 19 and 20 March 2014, and conducting the hearing on site on the afternoon of 19 March 2014. Mrs Pollara was present both days, assisted by her son, Mr Pollara.
- 4 I have also read the expert reports of Mr Ryan for the Owners and Mr Simpson for Mrs Pollara. Mr Ryan gave evidence on 20 March 2014. Most unfortunately, Mr Simpson was unable to do so because of a family bereavement.
- 5 An attempt to arrange for another day upon which Mr Simpson could give evidence was unsuccessful and resulted eventually in the orders of 22 July 2014, arising out of the hearing of 15 July 2014.
- 6 Mrs Pollara was not present at the hearing and was not represented. She sought a review of the orders of 22 July 2014 under s120 of the VCAT Act. Senior Member Farrelly heard the review application on 4 August 2014 and he dismissed it with no order as to costs.
- 7 The solicitors for both parties wrote to the Tribunal on 5 August 2014 concerning Mrs Pollara’s request to adduce further evidence in relation to quantum. I heard submissions from both parties regarding this application on 28 August 2014 and ordered that the decision on quantum would be made without further evidence or submissions.

## HISTORY

- 8 The date of the building permit was 18 June 2007 and the “project estimated value” was given as \$10,000. A certificate of final inspection was issued on 20 August 2008. The contract of sale of real estate was signed by the Owners on 3 August 2009 and by Mrs Pollara on 4 August 2009. The building permit and certificate of final inspection were annexed to the building contract. There was no inspection report under s137B of the *Building Act 1993* and no certificate of warranty insurance<sup>1</sup>. The contract of

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<sup>1</sup> Mrs Pollara claimed that as the value of the works undertaken by her was less than \$12,000, no warranty insurance was necessary. The Owners claimed the true value of the works was significantly greater, but as no monetary or other claim turns on this issue, it is unnecessary to consider further.

sale was not subject to finance and there is no indication that it was conditional upon receipt by the Owners of a satisfactory inspection report.

- 9 The contract could be terminated within “3 clear business days” under s31 of the *Sale of Land Act 1962*, as stated on the first page of the contract of sale. 4 August 2009 was a Tuesday. Three clear business days would therefore expire on the following Monday 10 August 2009. The Owners received a “Residential Pre-purchase inspection report” from Melbourne Property Inspections Pty Ltd. The only date on it is: “Date of Inspection: Monday, 10 August 2009 03:30 PM”.
- 10 Mr Mohammed gave evidence that by the time he received the report he believed the Owners could no longer cool off from the contract, but it would be surprising for a report to be obtained in circumstances where it had no relevance to a contract to purchase which had only just been entered.

## **QUANTUM**

- 11 As I said at paragraph 45 of the reasons for decision of 22 July 2014, the Applicants’ claim is for “inconvenience and loss of quiet enjoyment” plus:
  - \$51,773.76 in accordance with the report of Mr Ryan,
  - \$300 for the AAMI excess for the household insurance claim of 2010,
  - \$2,046 for Findlay-Evans Waterproofing,
  - \$2,547.40 for temporary repairs [by] Vic Constructions Pty Ltd, and
  - \$866 being the cost claimed for rectification of drainage to the south side of the dwelling, leading from the portico.

## **Matters in Mr Ryan’s report**

- 12 Each item is discussed in the order it appeared in Mr Ryan's report of 26 July 2013 (“First Ryan report”). It is noted that in recommendations for work and costing, on each occasion Mr Ryan has allowed for any necessary protection works, disposal of rubbish and clean up.
- 13 Mr Ryan consistently referred to the “builder” as the person who had constructed the extension. I refer to that person as the owner-builder, having regard to Mrs Pollara’s responsibility for the work, regardless of whose hand actually constructed it.

## **Sub-floor ventilation**

- 14 This claim was withdrawn by the Owners after Mr Ryan acknowledged the accuracy of Mr Simpson’s view that the floor of timber boards supported ultimately by a suspended concrete floor slab does not call for any further sub-floor ventilation.

## Rear tiled landing and steps

- 15 In the First Ryan report, Mr Ryan said that the owner-builder appeared to have constructed the landing and steps of timber and installed tiles on the steps. He also reported that he saw:
- a. The timber frame work below the tiled treads had gaps and appeared to be falling apart.
  - b. The rear timber landing was level with the house extension internal floor, allowing for potential moisture ingress and rot.
  - c. The landing timber lining has a gap of approximately 10mm in the timber flooring between the flooring that runs north-south and the single piece of timber at the outer edge, which runs east-west.
  - d. The filling is falling out of the gap which could allow the timber to rot.
  - e. “The timber floor boards had a 5mm cross-fall to the rear”.
- 16 Mr Ryan also reported that there is no mention of the landing and steps on drawings A01, A02 or A03. The only mention is on A05 which shows steps on the three elevations and they are marked as “brick steps” on the west elevation. There is also a note: “Brick steps to future detail, timber steps to apply during construction.”
- 17 Mr Ryan’s recommendation to rectify the “weathered and non-compliant” landing and steps was to:
- a. Remove and later replace plants from the planters on either side of the steps.
  - b. Allow for Acrow adjustable props and install them to support the glazed porch roof.
  - c. Allow for an electrician to remove and disconnect the stair tread lights and later reinstall them.
  - d. Demolish the stairs and dispose of the materials.
  - e. Remove and store the columns for re-use.
  - f. Construct concrete stumps.
  - g. Supply pine bearers and joists.
  - h. Supply rubber bearer and joist protection strips.
  - i. Supply Merbau decking and side boards.
  - j. Supply Merbau treads.
  - k. Contractor to erect frame and install timber decking, treads, side and baseboards.
  - l. Painter to apply 3 coats of decking oil.
  - m. Supply 2 No planter box metal liners as required.
  - n. Install porch plants.

- 18 Mr Ryde estimated \$9,038.36 for this work.
- 19 Mr Simpson said that “no action [was] required”. He said that the steps and landing appeared compliant with the Building Code of Australia and nothing more than cyclic maintenance by the Owners was required. He continued:
- There was no evidence to suggest that the existing conditions of the steps and the landings are causing water ingress or deterioration of the internal building elements.
- There is a gap between the timber landing and the timber door sill that will allow the door sill to drain under the landing, which has been constructed over brickwork; and there is no evidence to suggest that there is structural or foundation movement in the steps or landing.
- 20 Mr Simpson also commented on deterioration of the door jamb. It is noted that Mr Ryan did not mention the door jamb in this section of his report, but under "external door and windows installation".
- 21 Mr Ryan wrote a report in reply dated 28 January 2014 (“Second Ryan report”). In that report he said he thought the landing and steps had deteriorated at an accelerated rate. He also said:
- My re-inspection revealed that there is a concrete structure under the tiled timber steps and landing. I observed that on each side of the porch, there is a gap from the concrete to the outside edge of the porch tiles of approximately 80 mm to 90 mm which is unsupported except for the rotting timber cladding.
- The unsupported porch tiles have the potential to crack due to not being fully supported as required. NB: Potential for safety hazard if tiles break.
- 22 At the inspection on site my attention was not drawn to any cracking or other failure of the tiles. I therefore conclude that the tiles have not failed or shown any sign of failing, although I note that the timber to the side of the steps does appear to be rotting as reported by Mr Ryan.
- 23 I am also concerned that the structure described by Mr Ryan in his first report is substantially different from the structure described in his second report. I note with concern that he did not change his recommendation for remedial work. For example, it is difficult to see why it is necessary for a rectifying builder to follow paragraph 8.25.8 of the First Ryan report "Supply new concrete stumps and rapid set bags concrete" as there is a concrete structure where stumps would otherwise be placed, as described in paragraph 14 above.
- 24 Mr Ryan said at paragraph 8.17 of the Second Ryan report that:
- ... the stone door sill has always been lower than the timber porch landing and had the potential for water to enter the dwelling prior to the aluminium door screen track being installed by the Owner.
- 25 The parties agree that Owners have installed the aluminium door screen track.

- 26 At paragraphs 8.32 to 8.34 of his second report Mr Ryan raised for the first time the possibility that the rear porch, landing and steps were built without a building permit and are therefore illegal. This was not pleaded by the Owners and is not taken into account.
- 27 Mr Mohamed stated in evidence in chief that he fitted a retractor fly screen to this doorway, and it was the only doorway to which a screen was fitted by the Owners. Mr Mohamed gave evidence that the steps have rotted and the parts most frequently trodden are lower on each step than the remainder, so that when there is rain, water pools in the depressions.
- 28 I attribute the deterioration of the landing and rear steps in part to lack of maintenance and in part to poor design and construction of the side timbers supporting the steps. In the absence of better evidence Mrs Pollara must pay the Owners \$1,000 for this item.
- 29 I note that there are two potential defects for which the Owners did not claim which were clearly visible on the day of site inspection. One is that the rear steps do not have even riser heights and the other is that there was some deterioration of the polystyrene surrounding the glazed porch roof, visible from the balcony above. I conclude that the Owners chose not to claim for these items.

#### Extension moisture ingress damage

- 30 The first Ryan report mentioned the following:
- a. Light weight rendered cladding with no movement joints installed in the external walls.
  - b. No metal flashing above door and window openings in external walls, contrary to both the drawings and the Building Code of Australia clause P2 .2 .2 Weather Proofing.
  - c. Drawing sheet A 05 specifies in the site notes "all FC walls to be WP with flashing between stud wall and outer skin".

#### External door and windows installation

- 31 The first Ryan report included matters concerning external door and window installation as a subparagraph to extension moisture ingress damage. In this respect it mentioned the following:
- a. Door and window frames were installed projecting beyond the rendered cladding. There is potential for moisture ingress which has caused the timber door frames to rot.
  - b. The west side external timber doorframe protrudes beyond the rendered cladding. There is the potential for moisture ingress which has the potential to rot the timber doorframe.
  - c. The owner-builder has installed a timber doorframe trim to cover the gap between the rendered Harditex cladding and the door frames.

- d. There is a grey coloured sealant installed above the external door trims, possibly not by the owner-builder.
- e. The owner-builder has not installed metal flashings above any of the window and door frames installed in the rear extension rendered external cladding<sup>2</sup>.
- f. Mr Ryan took readings with a “Protimeter Mini” moisture meter in the external timber door head at the top right side door unit and reported that the reading was 60% which was consistent with the timber being saturated.
- g. The timber door frame head was rotted and appeared to be beyond repair.
- h. The Owners had installed foam filler to the base of the timber door jamb to be right side where the timber had rotted out<sup>3</sup>. Mr Ryan said that he inserted a screwdriver into the doorframe and saw that it penetrated through the doorframe and the timber studs supporting the door opening. This is the defect reported upon by Mr Simpson in paragraph 19 above.
- i. Mr Ryan said that the damaged timber door frames and structural members would require replacement but the extent of damage to the structural wall and floor frame could not be fully determined until the external cladding and internal plaster is removed.
- j. The external glazed doors had a moisture reading at the top right side of the frame of 22% and the timber appeared soft and waterlogged.
- k. The external doors appeared not to have been painted on all six sides, that is, they appeared not to have been painted on the tops and bottoms.

32 Mr Ryan's recommendations for rectification of the extension moisture ingress to the south wall were to:

- a. Remove timber window trims, door and window frames to rear south wall.
- b. Remove rendered cladding as required to south wall and above west side door as required.
- c. Remove internal timber architraves, skirting and plaster wall sheets to south wall as required.
- d. Remove water damaged timber wall frame studs and bottom plates as required.
- e. Supply new timber door frames and glazed doors to match existing.

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<sup>2</sup> This appears to be the same item as in paragraph 29b above.

<sup>3</sup> as discussed below, this filling was installed by Mr Mahfouz.

- f. Supply new 90 mm x 45 mm MPG 10 Pine studs and wall plate material.
  - g. Supply metal wall bracing, window flashing and nails as required.
  - h. Supply Harditex cladding sheets and Hardie compressed door trims and window head flashing materials.
  - i. Install new timber wall framing as required including timber windows as required;
  - j. Install Harditex cladding, flashings and door trims.
  - k. Plasterer to supply and install plasterboard sheeting to south wall as required;
  - l. Supply new architraves, skirting and quads as required.
  - m. Carpenter to hang glazed doors and hardware as required.
  - n. Painter to repaint internal walls, doors and frames as required – three coats.
  - o. Renderer to render external walls as required to manufacturer's requirements to match existing render colour.
- 33 As can be seen from the number of items which include the expression "as required", the extent of work will not be able to be finally determined until it is undertaken. Nevertheless, Mr Ryan has estimated the cost of this work at \$20,735.30.
- 34 As mentioned above, Mr Simpson said:
- ... there has been some deterioration of the door jamb, which appears to be related to the blockage of the door sill by the fitting of a sliding screen across the door opening, which is preventing the full drainage of the door sill.
- 35 I am not satisfied of the accuracy of Mr Simpson's deduction and further, I note that the door jamb is defective at the top as well as at the bottom, so unless Mrs Pollara is not responsible for the remainder of the damage to the door jamb, this issue is irrelevant to whether she is liable for this item.
- 36 At item 3A of his report, Mr Simpson addressed the issue of whether it is necessary to install articulation joints. He came to the conclusion that it is not. Nevertheless, as Mr Ryan has based the extent of work on the area affected by water rather than the lack of articulation joints, the question of whether articulation joints are necessary does not determine the necessary scope of works.
- 37 At item 3B of his report, Mr Simpson commenced:
- There was no evidence of water ingress around or through the doors or windows, except for the door opening on to the landing and stairs, that has deteriorated at the top of the door jamb, possibly due to a metal sliding door guide that appears to be causing water retention above the door and premature deterioration of the timber.



- 38 I note that Mr Simpson has not reported moisture levels to challenge the accuracy of Mr Ryan's assessment in this area, although he did report moisture levels around the door opening to the first floor balcony. I therefore accept Mr Ryan's assessment.
- 39 Further, I accept the evidence of Mr Mohamed that in 2013 he and his wife noticed that there were fungi, ("mushrooms"), growing between the door and door frame of the western double doors on the south side of the rear living room. Mr Mohamed said that the Owners' insurer, AAMI, sent out an inspector from Johns Lyng to inspect. AAMI provided an air extraction unit to prevent fungi spores from causing ill-health to the Owners and their children.
- 40 I accept Mr Mohamed's evidence that AAMI declined to pay for other items because they concluded that the fungi growth was due to "gradual deterioration over a period of time". Mr McCann of Johns Lyng inspected on 11 May 2013. The conclusion to his report is:
- In my professional opinion, the cause of mould to the door and window frame is caused by the window and door frame being proud of the wall and not being sealed properly to the solid brick wall<sup>4</sup>. This is therefore allowing rain water ingress into the frames from where this water/moisture is causing the damage.
- 41 The doors leading out to the landing and steps are on the east side of the south wall.
- 42 Mr Wosam Mahfouz of Vic Constructions Pty Ltd gave evidence on 20 March 2014. He said he visited the site in 2013 and saw the mushrooms growing out of the architrave to the French doors to the west side of the south wall. He said the timber in the area was very wet – it was spongy. He said he took off the door jamb and the rear stud wall was also rotted. He said he cut the plasterboard back about 600 mm in the ceiling and took off the plasterboard from the southern wall. He said there was rotting in the joists and on the edge of the floorboards.
- 43 Mr Mahfouz said that the extent of moisture was severe; some of the studs had lost their structural integrity. He said he believes it is necessary to remove and replace the whole of the south wall but the work he undertook was just to stop the mushrooms from growing. In answer to my question, Mr Mahfouz said he removed about 70 to 80% of the plaster on the south wall to the left of the French doors but did not go around the corner to the West side of the room.
- 44 Mr Mahfouz said that he undertook a temporary repair of patching the eastern door jamb at the base. When asked in cross-examination by Mr Pollara whether he had inserted the screwdriver to a distance of approximately 400 mm to reach the blue board, he said he thought that was correct. He said in cross-examination, that he thought the reason for the rot was that the doors were not properly sealed. Mr Mahfouz said that the

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<sup>4</sup> This wall is not solid brick, but light weight cladding. Nevertheless, I am satisfied that Mr McCann has correctly identified the position of the door frame as being defective.

sealing undertaken by his company was a temporary measure using silicon rather than permanent repair.

- 45 Mr Pollara cross-examined Mr Mahfouz about whether the work undertaken by his company was adequate. Mr Mahfouz replied that the work was temporary and not adequate if it were to be regarded as permanent, although Mr Mahfouz did say that the work was inspected by a building surveyor.
- 46 Under cross-examination by Mr Pollara, Mr Ryan agreed that he was aware that the west door on the south wall had been replaced and poorly sealed. He agreed that it was possible that water could penetrate as there is still no flashing. Mr Ryan reiterated that the door frame is rotting and that he believes water is being sucked in at the top of the door frame by capillary action.
- 47 Mr Pollara asked Mr Ryan whether he believed the Owners have been maintaining their home. Mr Ryan's response was that he was not sure that they could, given the dispute.
- 48 I do not accept Mr Simpson's conclusion that:
- ... the main cause of the water damage and deterioration to the top of the door opening on to the landing and stairs is related to works undertaken by the existing owners with the fitting of a metal guide that would restrict discharge of water from the top of the door.
- 49 Neither do I accept his conclusion that fitting a pressure flashing above each door and window opening is sufficient to rectify this defect. I accept Mr Ryan's conclusion that the flashings have not been installed in accordance with sheets A02 and A05 of the drawings.
- 50 Mr Simpson has not costed the work recommended by Mr Ryan, but only the work recommended by himself. I accept as necessary Mr Ryan's scope of work and his costing of \$20,735.30, which Mrs Pollara must pay the Owners.

### First floor balcony

- 51 The first floor balcony appears to have been the source of the water that leaked through the family room ceiling. The Owners have had repairs done, as discussed under "Findlay-Evans Waterproofing" below.
- 52 The two remaining issues identified by Mr Ryan are rotting of the timber door frame between the bedroom and the balcony, and gaps in the mitred joint to the foam cladding to the rendered balcony balustrade.
- 53 The level of the bedroom floor and of the balcony are similar in height, but as discussed below, the balcony floor is higher than the bedroom. In order to gain access to the balcony, there is a step over the hob, which supports the window and door.
- 54 I accept Mr Mohamed's evidence that at the time of the leak through the ceiling there was decking on the balcony which brought the level of the

balcony up to approximately the level of the hob. I understand that water could flow between the decking boards down onto the balcony floor.

55 In his first report, Mr Ryan identified the following:

- a. The tiled balcony floor is higher than the bedroom floor and as seen at the on site inspection, this is accurate.
- b. Sheet A04 of the architectural drawings shows the balcony floor and the bedroom floor as level. Mr Ryan described this as "non-compliant", but he did not mention the hob, so I am unable to determine whether he took it into account.
- c. At paragraph 8.54:

... the previous balcony floor level was higher than the bedroom external door sill. This has resulted in the timber door frame rotting.

I am not satisfied that Mr Ryan saw the balcony in this condition, therefore I am not confident that he can accurately report its previous state. However, I accept his evidence that the door sill and frame are damaged from rot.

- d. At paragraph 8.55, Mr Ryan remarked that:

The newly tiled balcony appears to be lower than the original balcony floor level.

Mr Ryan has drawn this conclusion by observing that there is approximately 35 mm of grout between the top of the tiled surface and the bottom of the existing timber skirting installed on the rendered balustrade. Mr Ryan has not described how the new tiled floor could be lower than the old, without substantial reconstruction of the substrate to the floor. I am not satisfied that the only explanation for the height of the grout is the height of the pre-existing floor.

Mr Ryan has based his conclusion that the owner-builder is responsible for rotting to the door frame and sill on his view that there should have been a step down to the tiled balcony of between 50 mm and 100 mm. While I agree that a step is necessary, the Owners have had the balcony floor finished at a level which is too high and have either caused or exacerbated the lack of drainage from the sill.

- e. At paragraphs 8.60 and 8.61 Mr Ryan reported that the mitred joint at the rear right side had been poorly installed with a large gap and filling material has been installed which is not appropriate as the joint has opened up and allowed water to enter the timber balustrade framing. I saw the gap on site.

56 Mr Ryan's recommendations for rectification of the first floor balcony were:

- a. Remove doorframe architraves and door frame.

- b. Supply new sliding timber door frame reduced in height by 100 mm to provide step down to tiled balcony.
- c. Supply new frame materials, architraves and trims.
- d. Remove damaged frame materials and install new materials.
- e. Install new window, architraves and door frame trims.
- f. Repair gap in balustrade mitre.
- g. Waterproofing contractor to install metal corner angle and apply waterproofing membrane to balcony and all junctions.
- h. Install skirting tiles as required below doorframe and wall. Paint door unit, architraves, trims and walls as required – three coats to each.
- i. Install polyurethane sealant to tile and wall junctions.

57 Mr Ryan assessed the value of this work at \$8,925. It is not clear how much of this amount relates to the mitre joint. There is a clear item for filling the gap of \$30, but some of the cost of painting must also be referable to this item.

58 Mr Simpson reported:

I have been advised that the original balcony was constructed of timber decking over an aluminium alloy metal deck roof and that the new owners have replaced this with tiling at the same level as the internal finished floor level, which is therefore considered to be a breach of Australian Standard 4654.2 – 2009 regarding Waterproofing Membranes to External Aboveground Areas.

59 During cross-examination Mr Pollara asked Mr Mohamed whether the latter was aware that there was a tile layer under the original deck. This seems inconsistent with the information given to Mr Simpson. Further, it is noted that the photograph at page 127 of the Respondent's Tribunal Book shows a tiled surface and is entitled "balcony rubber membrane and sealed concrete finish stage five". I note further that there is no sign in that photograph of a timber skirting on the rendered balustrade.

60 In the course of cross-examining Mr Ryan, Mr Pollara said that the deck had gaps to allow water to penetrate and that the original floor of the balcony was tiles with aluminium on top. The wooden deck was then built on top of this structure.

61 Mrs Pollara cross-examined Mr Mohamed about when he had the deck removed. I accept his evidence that he had it removed after the leaking from the ceiling became apparent which was some months after the Owners moved into the home.

62 The cause of damage to the sill and doorframe is made more obscure because the Owners appear to have changed the door from the inward swinging door apparent on their pre-purchase inspection report, to a sliding door. The extent and adequacy of the work done is not clear. Under cross-

examination Mr Ryan admitted that he was not aware that the door previously opened inwards.

- 63 When Mr Pollara pointed out that screw holes from the original swinging door were still visible, Mr Ryan agreed that their presence would not assist in preventing the wood from rotting.
- 64 Mr Simpson stated that with timber decking there is no requirement for a step down as the decking allows the drainage between decking boards. He attributed the excessive moisture in the timber around the base of the door opening to finishing the new tiled balcony level with, or higher than, the internal finished floor level.
- 65 Mr Simpson concluded that there was no defect when work to the balcony was completed in 2008, and therefore no repair work is necessary which is attributable to the fault of the owner-builder.
- 66 Of the balustrade capping, Mr Simpson said that he had been advised vapour barrier was fitted below the capping that would make the system waterproof. Mr Simpson said he had seen photographs by the owner-builder taken at the time of the balustrade was constructed, indicating that the top of the balustrade was fully protected prior to installing the capping. This is consistent with the photograph at page 135 of the Respondent's Tribunal Book.
- 67 Mr Pollara cross-examined Mr Ryan about this photograph. Mr Ryan said that the black material depicted appeared to be Poly-flashing.
- 68 Mr Simpson said he saw some deterioration of the fillers used between sections of capping but was of the view that this was a cyclic maintenance issue. He also said that:
- ... it was brought to my attention that the present owner had undertaken major structural works to the balcony area, and any damage to the balustrade capping could have occurred during these works.
- 69 Because I am not satisfied that the owner-builder constructed the balcony floor higher than the sill, I am not satisfied that the rot and deterioration to the window frame and sill was caused by a failure by the owner-builder and I make no allowance for it.
- 70 I am satisfied that the deterioration of the balustrade capping has been caused by defective installation and in the absence of evidence from the experts about the cost of rectification of this item alone I allow \$250, which Mrs Pollara must pay the Owners.

#### Alfresco tiled floor

- 71 This area is to the east of the ground floor living room and is used by the Owners as their barbeque area. It is roofed, open only to the south. I accept Mr Mohamed's evidence that after rain, water pools in two areas. I also accept his evidence that the Owners do not wash the alfresco down because the water pools.

- 72 I accept Mr Mohamed's evidence that there are six lights set into the floor surface, but only three work.
- 73 This area now has a wrought iron balustrade at the open end which I am satisfied was constructed after the home was sold to the Owners. I note in particular the photograph on page 147 of the Respondent's Tribunal Book, taken before or at the time of sale.
- 74 In his first report, Mr Ryan identified the following:
- a. At paragraph 8.65:  
...the [owner-builder] has installed slate floor tiling without an appropriate overhanging and drip. As a result, a crack has developed in the grouting which is allowing moisture to be drawn back in between the grouting and the timber framing.
  - b. The moisture could damage the structural timber framing.
  - c. The tiled grouting is falling out and cracking is appearing in the grouting.
  - d. When rain falls from the south-east, water enters the alfresco area and ponds. The floor does not fall towards the open end of the alfresco, but in places falls away from the opening.
  - e. The tiled floor to the alfresco is level with the floor in the house, which Mr Ryan regards as a defect. Mr Ryan noted that this is as the extension has been designed on drawing sheet A05.
  - f. There is insufficient cross ventilation beneath the alfresco area.
- 75 Mr Ryan's recommendations for rectification of the alfresco area are:
- a. Remove metal balustrade and store on site then reinstall later.
  - b. Allow for an electrician to disconnect then reinstall the recessed floor lights.
  - c. Remove floor tiles, clean and store on site then reinstallation.
  - d. Remove alfresco floor sheeting. Store on site then reinstallation.
  - e. Install new concrete stumps.
  - f. Adjust timber bearer height by installing new stumps to provide fall on timber frame to the south as required.
  - g. Install new compressed external floor sheeting.
  - h. Allowance for timber and floor tile [breakage/damage] replacement.
  - i. Install slate floor tiles with appropriate flexible adhesive and grout as required.
  - j. Install colour matching polyurethane flexible sealant to wall and floor tile junctions.
  - k. Allow for painter to touch up any damaged walls.

- 76 The amount allowed by Mr Ryan for this work is \$12,208.80.
- 77 Mr Simpson agreed that the work in this area is defective and must be rectified to ensure that water does not pond or leak and that it does drain to an outer edge or storm water outlet. His scope of works is to remove and relay the tiles on the alfresco dining area to ensure fall and proper drainage of the balcony.
- 78 Mr Simpson did not specifically address the issue raised by Mr Ryan that the alfresco floor is too high because it is at the same level as the interior floor. He correctly remarked that ventilation is not required as the new extension and alfresco dining areas are constructed over a concrete slab.
- 79 Having regard to Mr Simpson's costing of \$4,872.37, it is clear that he contemplates no work will be done on the sub-floor, but that a screed will be laid to properly drain the alfresco area to the south.
- 80 I prefer Mr Simpson's costing for this item to that of Mr Ryan, because Mr Ryan has costed on the mistaken assumption regarding the sub-floor as described above at paragraph 14. However, I note that Mr Simpson has not allowed for an electrician to disconnect and reconnect the recessed lights. To the sum of \$4,872.37 allowed by Mr Simpson I add, for the recessed lights \$320 as costed by Mr Ryan, adjusted in accordance with Mr Simpson's on-costs:

Recessed lights	\$320.00
Preliminaries 5%	<u>\$16.00</u>
	\$336.00
Builder's margin 30%	<u>\$100.80</u>
	\$436.80
GST 10%	<u>\$43.68</u>
	<u>\$480.48</u>

- 81 Mrs Pollara must therefore pay the Owners \$5,352.85 for this item.

#### Downpipe installation – west side

- 82 For the same reason as discussed under “Rectification of drainage to the south side of the dwelling”, this item is dismissed.

#### **AAMI excess for the household insurance claim of 2010 - \$300**

- 83 I accept Mr Mohamed's evidence that the Owners made a claim on their insurer in 2010 as a result of water ingress in the area renovated by Mrs Pollara. I accept Mr Mohamed's evidence that the Owners had to pay an insurance excess of \$300. Mrs Pollara must pay the Owners this sum.

#### **Findlay-Evans Waterproofing - \$2,046**

- 84 I accept Mr Mohamed's evidence that the Owners paid Findlay-Evans \$2,046 to prevent water entering through the floor of the balcony above the

rear living room. The invoice, at document 15 of the Applicants' Tribunal Book states:

Job: As quoted by email 20-4-10. Supply and install Liquid Rubber Membrane system to upper level deck area.

85 Mrs Pollara must pay the Owners this sum.

**Temporary repairs by Vic Constructions Pty Ltd - \$2,547.40**

86 I accept Mr Mohamed's evidence that the Owners engaged Vic Constructions Pty Ltd to replace the rotted door jamb and timbers supporting it. Mr Mahfouz referred to a video clip when he gave evidence on 20 March 2014, and I accept his evidence by affidavit dated 20 July 2014 that the video clip shown at the hearing of 15 July 2014 was taken by him and that the rotting timber of the door frame and architraves peeled off readily. Mr Mohamed described it as peeling "like tissue" which is a fair analogy. I accept Mr Mohamed's evidence that Vic Constructions kept demolishing until they reached sound materials. I also accept his evidence that he was told that this was a temporary measure only – the problem would return until the cause of water ingress was identified and rectified.

87 In accordance with document 19 of the Applicants' Tribunal Book, I accept Mr Mohamed's evidence that he was invoiced, and he paid, \$2,547.40. I note that the time taken was two carpenters at one day each, plus some painting and clean up labour.

88 Mrs Pollara must pay the Owners \$2,547.40 for this item.

**Rectification of drainage to the south side of the dwelling, leading from the portico - \$866**

89 At page 14 of the "Pre-purchase inspection report" under "Roof – roof exterior" is:

Down-pipes Not connected to the storm water system. Minor defect  
Type F

*Water ponding close to footings will cause subsidence over time.  
Connection to the stormwater system should be carried out  
immediately.*

The accompanying photograph is of the bottom of the down pipe claimed in this item, but I note that the report concerns "down-pipes" expressed as plural, not singular.

90 Under cross-examination by Mr Pollara, Mr Ryan stated that he had not seen the pre-purchase inspection report.

91 I find that the Owners were aware of this defect at a time when they could have withdrawn from the contract, but chose not to. I am not satisfied that a defect of which the purchasers were aware at the time of purchase is one for which they can recover for breach of warranty under s137C of the *Building Act*.

92 I dismiss the Owners' claim regarding this item.



## Inconvenience and loss of quiet enjoyment

- 93 I accept Mr Mohamed's evidence that the living room is the family's main living area and that for the month the air extractor was in operation, it was very noisy and inconvenient.
- 94 The Tribunal has jurisdiction to award damages for inconvenience, but it is rarely exercised and when it is, the amounts awarded are modest. I am not satisfied that this is a proceeding justifies such an award and I make none.

## RECONCILIATION

- 95 Mrs Pollara must pay the Owners \$32,712.03 as follows:

Rear landing and steps	\$1,000.00
Extension moisture ingress damage	\$20,735.30
First floor balcony	\$250.00
Alfresco tiled floor	\$5,352.85
AAMI insurance excess	\$300.00
Findlay-Evans Waterproofing	\$2,046.00
Temporary repairs by Vic Constructions Pty Ltd	<u>\$2,547.40</u>
	<u>\$32,231.55</u>

## COSTS

- 96 Costs are reserved with liberty to apply until 30 January 2015. Any application for costs should be accompanied by a brief outline of facts and contentions. **I direct the Principal Registrar to list any costs hearing before Senior Member Lothian with an estimated duration of 2 hours.**

**SENIOR MEMBER M. LOTHIAN**