Claim No:	1092
Under	the Weathertight Homes Resolution Services Act 2002
In the matter	of an adjudication claim
Between	**Auckland City Council (as assignee)**
	Claimant
And	**David Irwin**
	First respondent
And	**Paterson Cullen Irwin Limited**
	Second respondent
And	**Stuart Brentnall**
	Third respondent
And	**S J Brentnall Limited**
	Fourth respondent
And	**Carl Ruffels**
	Fifth respondent
And	**Auckland City Council**
	Sixth respondent

Partial Determination
28th October 2005

1. Index

2. Summary

2.1 The claim is by the Auckland City Council which was sixth respondent, it having taken an assignment of the claim from the original claimant, Mr K Gunji, the owner of the subject dwellinghouse.

2.2 The claim by the Auckland City Council as assignee is limited to a claim against the third respondent, Mr Brentnall personally, for a determination of his apportioned contribution to damages totalling $841,059.00.

2.3 That claim is on the basis of an alleged duty of care owed by the third respondent to the owner of the dwelling, Mr Gunji, with allegations of breach of that duty in relation to various construction aspects.

2.4 Construction of the dwelling was carried out for the owner, Mr Gunji, under contract with the fourth respondent, S J Brentnall Limited, and the contract documents included extensive specification and working drawings.

2.5 The first respondent, Mr Irwin, and the second respondent, Paterson Cullen Irwin Limited, were involved in the construction process including the drafting of the specifications and working drawings, the call for and acceptance of tenders, appointment as engineer under NZS3910:1987 and nomination as "project manager" in the specifications.

2.6 In considering the claimed liability of the third respondent, Mr Brentnall personally, I have had regard to the principles in various cases including *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA). There is a distinction with cases such as *Callaghan v Robert Ronayne Ltd* (1979) 1 NZCPR 98 and *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 which

were claims by subsequent purchasers against directors/employees of the contractor company.

2.7 Having regard to the principles enunciated in the cases I have considered the individual aspects of the construction of the dwelling by S J Brentnall Limited under contract with Mr Gunji and the level of involvement in those processes by the director of that company, Mr Stuart Brentnall. I have concluded that in no respect did he owe a duty of care separately from the contractual (and possibly tortious) duties owed to Mr Gunji by S J Brentnall Limited and therefore he has no liability to the Auckland City Council as assignee of the claims made.

2.8 I have reserved costs for further submission as I was requested.

3. The Adjudication Claim

3.1 The adjudication claim commenced with an application dated 9 July 2003 by Kiyomi Gunji as owner of 22 Vale Road, St Heliers, Auckland, being an application under s9 of the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**).

3.2 Mr Gunji then gave notice of adjudication under s26 of the WHRS Act dated 13 January 2005 in which he named the respondents as respondents and gave a brief description of his claim against them.

3.3 I conducted several preliminary conferences and fixed various timetabling. I also dealt with an application by the sixth respondent to transfer the claim to the High Court pursuant to s58 of the WHRS Act which I declined for the reasons set out there.

3.4 The claim was finally scheduled to commence as a hearing on 15 August 2005 and Mr Gunji, as the then claimant, submitted through his solicitors various statements of proposed evidence and submissions.

3.5 An Amended Notice of Adjudication dated 5 August 2005 was lodged with the Weathertight Homes Resolution Service (**WHRS**) signed by Mr Paul Robertson, who described himself as counsel for the claimant, Mr Gunji, and the Amended Notice of Adjudication showed Heaney & Co as the solicitors for the claimant. Those solicitors and Mr Robertson had been solicitors and counsel respectively for the sixth respondent up until that time. The Amended Notice of Adjudication made allegations and sought relief only against the third and fourth respondents, Stuart Brentnall and S J Brentnall Limited. The relief sought was:

3.5.1	Cost of repairs	$811,925.00
3.5.2	Costs (consultants)	4,134.00
3.5.3	Alternative accommodation (24 weeks @ $500/wk)	12,000.00
3.5.4	General damages	25,000.00
	Total	$853,059.00

3.6 That amended application was accompanied by a letter dated 5 August 2005 from Heaney & Co advising that:

> "… pursuant to a settlement reached between the parties, the claimants have assigned all rights to Auckland City Council.
> …
> Pursuant to an agreement dated 4 August 2005, the claimants have assigned all rights against Stuart Brentnall and S J Brentnall Limited to Auckland City Council. Pursuant to section 130 of the Property Law Act, this letter is notice to Mr Brentnall/S J Brentnall Ltd and the WHRS of this assignment. The agreement itself is confidential to the parties.
>
> It is not proposed to substitute Auckland City Council for the current claimants. As a matter of law, no change is necessary (see *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 NZLR 724)."

3.7 In a letter dated 8 August 2005 the solicitor for Mr (and Mrs) Gunji advised the WHRS that they had:

> "… reached a settlement with Paterson Cullen Irwin Ltd, David Robert Irwin, Carl Wayne Ruffles [sic] and the Auckland City Council. As part of that settlement the claimants have assigned their rights and remedies to pursue any other party in respect of the building defects to the Auckland City Council."

3.8 Following a telephone conference then I commenced a hearing on 15 August 2005 which was attended by:

3.8.1 Mr Paul Robertson as counsel for the claimant, namely the Auckland City Council as assignee;

3.8.2 Mr John Cox as counsel for the third respondent, Mr Stuart Brentnall.

3.9 The third respondent made application then to be struck out pursuant to s34 of the WHRS Act. There were some other matters raised by way of preliminary and I made a ruling at the time, a copy of which is annexed as an Appendix.

3.10 As I recorded in that ruling the claimant indicated an amendment to the adjudication claim. On 16 August 2005 a Second Amended Notice of Adjudication was handed to me in which the claimant (now the Auckland City Council as assignee) sought:

> "… a determination of [the third and fourth respondents'] apportioned contribution to [the following items of] damage"

and these were set out as:

3.10.1	Cost of repairs	811,925.00
3.10.2	Costs (consultants)	4,134.00
3.10.3	General damages	25,000.00
	Total	$841,059.00

3.11 The nature of the claim had therefore changed significantly from that which had been anticipated by the WHRS Act, the purpose of which is described in s3 as being:

> "… to provide **owners** of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings."

3.12 Now the claim was one by a territorial authority as assignee of the owners' claims and was limited to a claim against two of six named respondents which still included the Auckland City Council itself as a respondent.

3.13 However I do not regard that as improper because the purpose of the Act as set out above is being achieved in providing the owners of the dwellinghouse with a procedure which assessed and resolved their claims relating to those buildings through the mediation process.

3.14 I ordered in Ruling No 1 the confidentiality that is referred to there and I was asked to maintain that order through the hearing and indeed in this Determination. The confidentiality order made on 15 August 2005 is extended indefinitely.

4. Grounds for Claim

4.1 The amended claim by the claimant against the third and fourth respondents is for the determination of their apportioned contribution to the damages mentioned on the following basis:

> "In breach of contract and duty of care, failed to take reasonable care in the construction of the dwelling and built the dwelling otherwise than in compliance with the Building Code, in the following respects:
> (a) Lack of effective deflection and waterproofing at the parapet at roof level.
> (b) Inadequate waterproofing of window frames.
> (c) Lack of cap flashings/saddle flashings on columns.
> (d) Solid balustrades formed inappropriately.
> (e) Inadequate step down between inside and outside level of floors on upper and lower decks.
> (f) Inadequate fall on upper and lower decks.
> (g) No gap between base of plaster on walls and horizontal surfaces on upper and lower decks.
> (h) Inadequate subfloor ventilation.
> (i) Lack of fall to decks.
> (j) No waterproofing protective layer on lower concrete deck.
> (k) Lack of drained and ventilated wall cavity.
> (l) Control joints omitted."

5. The Construction Process

5.1 Mr & Mrs Gunji commissioned Mr Irwin (the first respondent) to carry out design work for their home at 22 Vale Road, St Heliers, and on 10 November 1993 Mr Irwin wrote to them under cover of a letterhead "Robert Paterson Associates – Architecture Interior Design Landscaping" setting out stages for his involvement and the fee structure for those stages. That

proposal included prices for the removal of the existing houses, sketch design of the proposed house with floor plans and elevations, working drawings including contract documentation and specifications, further working drawings with details and specifications of an interior nature such as kitchen and bathrooms and "calling and veting tenders, contract administration, site observation and liaising with the interior decorator". The fee structure was for 4% plus GST of the contract price for certain stages apportioned between them and a fee for the Stage I (removal of the existing houses) and Stage IV (as quoted above) being based on an hourly rate. Mr Irwin's evidence was that there was a budget for construction of $500,000.00 and that he worked strenuously to ensure that costs were proportionate to the project and the budget indication.

5.2 In his evidence, Mr Gunji said that he had met with Mr Irwin and after that meeting received favourable feedback to enquiries about Mr Irwin's firm. He said he wanted a "professional" person to oversee the whole project as he had never previously been involved in building a house and knew he would not have the time to spend on the project himself due to heavy business commitments. He did not understand the difference between a draftsperson and an architect and this difference was not explained to him. He believed he was dealing with an architectural firm and noted the word "architecture" on the letterhead recording the fee proposal for engagement.

5.3 Mr Gunji said that he dealt solely with Mr Irwin who arranged the removal and sale of the two existing houses on the site, carried out design work, lodged the plans for building consent and arranged the tender process.

5.4 Three tenders were received for the construction of the dwelling, one being from the fourth respondent, S J Brentnall Limited, for $689,102.00 plus GST dated 15 April 1994.

5.5 Mr Gunji consulted with Mr Irwin about the three tenders and chose the tender from S J Brentnall Limited which he accepted in a letter dated 23 May 1994.

5.6 A form of agreement was drawn up by Mr Irwin and is dated 27 May 1994 between S J Brentnall Limited and Mr Gunji. It is the form which comprises the second schedule to NZS3910:1987. It refers to the contract price which had been tendered and to various documents forming the Contract Documents.

5.7 These included (clause 4(e)) the General Conditions of Contract NZS3910:1987, (clause 4(g)) the specification and (clause 4(h)) the drawings. In the First Schedule to the General Conditions of Contract NZS3910:1987 the nominated engineer under clause 6.2.1 of the General Conditions was Paterson Cullen Irwin Limited, the second respondent and its "professional qualification" was not specified.

5.8 I was told in evidence that it was quite usual for the NZS3910:1987 form to be used in a construction contract such as this and that there was no limit to the required qualification for the nominated engineer. The definition of "Engineer" in clause 1.2 of General Conditions of Contract in NZS3910:1987 is:

> "… the professional engineer, architect, surveyor or other person named or identified … or such other one person as may be subsequently appointed by the Principal …"

The role of the engineer in section 6 of the General Conditions of NZS3910:1987 are both as expert adviser to, and representative of, the principal, and independent decision-maker to value the work and issue certificates at due times.

5.9 I was also told in evidence that the appointment of the engineer to the contract under NZS3910:1987 did not of itself make that person project manager.

5.10 The specifications were prepared by Mr Irwin then trading as Paterson Cullen Irwin. The front page of those refers to:

"Architectural Consultants – Paterson Cullen Irwin"

and:

"Engineer – McGuigan Syme"

5.11 The introduction to those specifications names the:

"Project Manager - Paterson Cullen Irwin Ltd or as nominated"

"Engineer - where stated in General Conditions of Contract NZS3910:1987 and contract related documents shall be Paterson Cullen Irwin Ltd. or nominated Project Manager."

"Engineer - where stated through Specification text shall be the Consulting Engineer"

5.12 Significant reference was made to clause 1.12 of the Specification which reads:

"**MATERIALS AND WORKMANSHIP** (Refer also to NZIA General Conditions 6.12)

A higher than normal standard of finish is expected for this contract. All workmanship must be careful and thorough and all materials must be the best of required kinds to produce a first class finish, unless distinctly otherwise specified. If the Contractor varies in any respect from the requirement of these Specifications or the accompanying Drawings without written permission of the Project Manager, he shall, upon demand of the Project Manager, make good at his own expense any and all such variations at any time before or after the completion of the work prior to final settlement. The Contractor shall furnish all facilities for, and pay the expense of, any testing of materials and prove their efficiency or their correspondence to the requirements of this Specification."

5.13 There is other reference in the Specification to the Project Manager.

5.14 That party was, of course, as stated above, the second respondent, Paterson Cullen Irwin Limited, which was also the nominated engineer in both the schedule to NZS3910:1987 and the introductory pages to the Specification.

5.15 There were criticisms made of the Specification. First, it appears to have been substantially a reproduction of the New Zealand Institute of Architects (**NZIA**) form. Mr Irwin could not use the NZIA contract form because he is

not, and was not then, a qualified architect. The processes and provisions in that form have some inconsistencies with NZS3910:1987. Secondly, there are apparently insertions in the standard form which have been drafted specifically for this contract but which are in some respects inconsistent with the standard provisions in the contract. These matters impacted upon the respective roles of Mr Irwin as architectural draftsman and S J Brentnall Limited as contract builder to which I shall refer.

5.16 In clause 5.2.1 of NZS3910:1987 which applies to this contract there is this:

> "The Contractor shall provide all necessary supervision during the contract. He shall have on the Site at all working times a competent representative whose name shall be notified to the Engineer in writing and who shall be authorised to receive on behalf of the Contractor any instructions from the Engineer or the Engineer's representative. All work shall be carried out under the supervision of the Contractor's representative."

None of that process seems to have been followed as such but it does refer to the supervision role of S J Brentnall Limited in this contract. The provision in the specifications that Paterson Cullen Irwin Limited is the Project Manager may be said to be in conflict with the provisions of that clause.

5.17 An application for building consent was lodged on 14 March 1994. It was in the name of Mr Gunji but signed by Mr Irwin on his behalf. It named the contact as Paterson Cullen Irwin Limited and the designer as Paterson Cullen Irwin but all other nominated Key Personnel were "TBA".

5.18 The consent was given about 19 April 1994.

5.19 I was given evidence about progress of construction of the dwelling. This included a process for variations where these were discussed between Mr Gunji and Mr Irwin which were then the subject of a Variation Price Request (the first being dated 13 June 1994 and the last, no 12, dated 12 June 1995), a price would be fixed by S J Brentnall Limited and

communicated to Mr Irwin. In due course various Site Instructions were issued by reference to the items for which a price had been requested and the price that had been supplied by S J Brentnall Limited for the purpose. The first Site Instruction is dated 23 September 1994 and the last, no 7, is dated 25 July 1995.

5.20 The initiation of the variation with the contractor, S J Brentnall Limited, was through Mr Irwin and, from time to time where necessary, amended drawings were prepared by him and supplied to the contractor.

5.21 Paterson Cullen Irwin rendered various accounts to Mr & Mrs Gunji between 31 July 1994 and 30 June 1996, these apparently being in relation to stages I or IV because they are all based on an hourly rate (apparently at $60.00 per hour where the proposed rate had been $62.00 per hour). From the invoices and other records supplied (at least until 31 August 1995) Mr Gunnigle concluded that 266 hours were paid for work in respect of Mr Irwin's administration and site visits which included visits at crucial stages as work proceeded. He also concluded that the invoices made it clear that Mr Irwin was acting as Mr Gunji's representative in respect of the building work and therefore had an obligation to ensure that the dwelling was built in accordance with the building consent, plans, architectural specification and Building Code.

5.22 Paterson Cullen Irwin Limited issued progress Certificates between 11 July 1994 and 17 July 1996. These totalled 16 in all. They referred to the contractor as S J Brentnall Limited and certified progress payments under the contract. The amounts certified were from time to time paid by Mr Gunji and receipted by the contractor.

5.23 There were produced to me two extracts from the Auckland City Council records being apparently records of inspections. They are significantly abbreviated and indeed partially illegible. No explanation of them was given to me but they are helpful in showing what inspections were made. Mr Jordan said it appeared the Council had undertaken 14 inspections

which "should have been an adequate degree of inspection to identify the defects listed [in his written witness statement]".

5.24 By 3 May 1995 Mr Irwin was able to certify that the works qualified for a Practical Completion Certificate.

5.25 The only invoices that were supplied to me as having come from the contractor were for such things as extras, variations and the like.

5.26 The documents recording completion to the satisfaction of the Auckland City Council are dated 23 June 1995. The Code Compliance Certificate was ready for issue in August 1995 but required that the main stairway be fitted with a continuous handrail which apparently was not done and has not yet been done because Mr & Mrs Gunji did not wish to do this.

6. Respective Roles

6.1 It is important that I determine the respective roles of the relevant parties. This is because the claim is now addressed to the proportionate liability (if any) that the third and fourth respondents have which in turn requires a determination of my assessment of the liability of the other principal parties.

7. David Irwin

7.1 Mr Irwin and the partnership in which he was involved, Paterson Cullen Irwin, and the company of which he was a director, Paterson Cullen Irwin Limited, had a significant responsibility in this contract. The contact was made with him by the owner, Mr Gunji. He was the one who developed the design plans and specifications. He had the specifications drawn using the NZIA form but with the adaptations that he thought appropriate. He chose to use NZS3910:1987 in which he or his company were nominated as engineer. He was the one who had contact with Mr Gunji during construction. He was the one who requested variation prices and who issued Site Instructions. He was the one who certified the payments to be

made. He was the one who lodged the application for building consent and supporting documents. His role included the work set out as Stage IV in his original tender letter for which there were many hours of work charged.

7.2 As to the inclusion in the Specification of the reference to Paterson Cullen Irwin Limited as project manager, Mr Irwin at first said that this was a typographical error. He later changed that to refer to a clerical insertion which had slipped him by. I do not regard it as a "typographical error", an expression which to me connotes some mistake that a typist may make in transcription or the like.

7.3 I regard the reality as being that the Specification was drawn by Mr Irwin or at his direction without careful analysis of the "Project Manager" role as commonly understood on the one hand, the responsibilities for that role as spelt out in the Specification as drawn on the second, and the role of an "engineer" under NZS3910:1987. The end result is that there is uncertainty as to exactly how Mr Irwin or Paterson Cullen Irwin Limited would discharge their functions and what were the parameters of the responsibilities that they had in this construction.

7.4 So far as the contractor was concerned, the call for tenders included the documentation mentioned and the specifications with those entries in them. A contractor submitting a tender would do so on the basis that Paterson Cullen Irwin Limited was not only the engineer under NZS3910:1987 but also the nominated project manager. Whether that had not been intended by Mr Irwin or whether that had not been the basis agreed between him and Mr Gunji is beside the point; the fact is that that is how it was presented to tenderers and there was nothing in the written documents to dispel the belief created that there was to be project management by Mr Irwin or Paterson Cullen Irwin Limited.

7.5 Mr Brentnall's evidence included that he:

> "… met with Mr Gunji and David Irwin to discuss the project. David Irwin confirmed that he would be project managing the construction of the dwelling and that he would have a hands on role in that regard. David Irwin was to be the point of contact regarding the construction, as opposed to Mr Gunji who had no real involvement at all with the construction project once it started. I understood that David Irwin was being retained by Mr Gunji specifically to project manage the contract, and that he was being paid for his attendances on site."

7.6 Mr Irwin's evidence refers at length to his exchanges with **Mr Gunji** about his (Mr Irwin's) role and that he:

> "… clearly explained to Mr Gunji [who] understood that [Paterson Cullen Irwin Limited] was to look after his interests regarding payments, changes, liaising between the contractor, landscaper, decorator and suppliers."

He does not say in his evidence, however, that any of this was explained to Mr Brentnall at the time.

7.7 In assessing any contributory liability from Mr Irwin, it is the obligations that Mr Irwin or his company owed to the **claimant** that is the primary question I have to **consider**, but in doing so and further in assessing what obligation (if any) Mr Brentnall or his company owed to the claimant I must also take into account what their understanding of the role of Mr Irwin or his company was.

7.8 The liability of Mr Irwin (if any) may be a contractual liability to Mr Gunji or there may be some collateral tortious liability from a duty of care. If I am to assess a "net" liability of Mr Brentnall to the Auckland City Council as assignee of Mr Gunji, I may need to determine whether he would have been entitled to contribution from Mr Irwin under the Law Reform Act 1936, an entitlement which would arise only in respect of found tortious liability on the part of Mr Irwin and not necessarily in respect of any contractual liability.

7.9 I will deal with the individual elements later but I have formed the view that Mr Irwin had assumed a significant role in this construction project, perhaps beyond what he may now, with hindsight, think desirable. He

effectively held himself out as having appropriate architectural qualifications; he took a significant role in the design issues, the obtaining of building consent and the conclusion of a contract; he drafted that contract; he or his company were nominated as project manager and engineer; he had significant contact with the owner during construction; he was directly involved in all variations sought and requested pricing for, and gave instructions for, these.

7.10 The position of the Auckland City Council appears to have changed during the course of this adjudication on the issue of the role of the first and second respondents. As sixth respondent, it applied on 2 May 2005 pursuant to s58 of the Act for the claim to be transferred to the High Court on the grounds that the claim presented a novel claim because legal issues included:

> "Whether any duty of care is owed by the Council to the claimants given that the first/second respondent … was engaged by the claimant to:-
> (1) Prepare the plans and specifications.
> (2) Put the work out to tender.
> (3) Give approval to the appointment of the builder.
> (4) Project manage the project in accordance with NZS3910:1987, and;
> (5) The architect attended site, liaised with the builder and other trades (particularly the plaster),
> (6) The architect gave design advice and site instructions,
> (7) The architect approved variations to the specifications,
> (8) The architect certified payment and practical completion."

7.11 It was submitted that on the facts as they then stood:

> "… the claimants had a house constructed for them in accordance with specifications and design accepted by them **and with the hands on involvement of their supervising architect**." (emphasis added)

7.12 That application was declined by me. I accept that in taking the assignment of the claimant's rights the Council can argue differently from a position taken by it as respondent; and I accept that there was deeper enquiry into the facts at the hearing I had. Certainly the thrust of that application then had been that the involvement of the first and/or second respondents was so great that it might have affected any liability on the part of the Council.

8. S J Brentnall Limited

8.1 The claim included a claim against the company, S J Brentnall Limited, but I was advised by counsel for the Auckland City Council at the conclusion of the hearing that it did not seek a determination of the liability of the company.

8.2 It was on its letterhead that the tender was submitted to Paterson Cullen Irwin dated 15 April 1994 and it was to that company that Mr Gunji addressed his acceptance. That was the company named as the contractor in the building contract agreement. Although some of the progress payment certificates and other documents refer to "S J Brentnall" I am satisfied that that is just an omission and that the parties were treating the contractor as S J Brentnall Limited.

8.3 Mr Brentnall gave evidence that there were three carpenters contracted to complete the construction of the dwelling as independent contractors who were separately registered for GST and paid on an hourly rate. He said that the two senior carpenters had been recommended by a plumber contact of his and they were brothers named Devereux aged approximately 35 and 40 years of age.

8.4 I deal with Mr Brentnall's involvement on site below, but so far as the company, S J Brentnall Limited, was concerned any liability it may have had to Mr Gunji would be primarily arising under the building contract or otherwise vicarious liability for negligent acts on the part of its servants, agents or employees.

8.5 There is argument that in addition to any contractual liability that S J Brentnall Limited may have had to Mr Gunji for breach of contract, there is a parallel duty of care where, if there is negligence proven, there may be liability in tort with consequential outcome in damages. That was not argued before me and I do not address it further.

8.6 Again in assessing the question I have to answer (the liability, if any, of Mr Brentnall personally) I may need to consider the extent (if any) of liability of S J Brentnall Limited. There may be a contribution liability under the Law Reform Act 1936 for any tortious liability found in respect of those respective parties but that contribution liability does not apply necessarily to a breach of contract by the contracting party, S J Brentnall Limited.

9. **S J Brentnall**

9.1 The claimed liability against Mr Brentnall goes to the heart of this adjudication claim as it now stands. The Auckland City Council as assignee is claiming from Mr Brentnall personally an "apportioned" contribution to the claimed damages that Mr Gunji has suffered as set out above totalling $841,059.00. That claim is framed as being "in breach of contract and duty of care" although there can only be a claim in breach of contract against the contracting party, S J Brentnall Limited.

9.2 As regards Mr Brentnall, it is claimed that he had a duty of care and he "failed to take reasonable care in the construction of the dwelling and built the dwelling otherwise than in compliance with the Building Code" in the respects given in paragraph 4.1 above.

9.3 To my mind that involves answering five questions.

9.3.1 Whether the Auckland City Council as assignee can pursue this claim.

9.3.2 Did Mr Brentnall owe a duty of care?

9.3.3 If so, did Mr Brentnall breach that duty?

9.3.4 If so, what liability does Mr Brentnall have for that breach of that duty of care?

9.3.5 What is the amount that he is liable for as damages to the assignee, the Auckland City Council?

That question in turn raises issues of contribution, if any, from other parties and questions of damage that has been suffered and net loss.

10. **Ability to Claim**

10.1 Two questions were raised by Mr Brentnall in relation to the assignment:

10.1.1 Whether it was an absolute assignment and so valid under s130 of the Property Law Act 1952.

10.1.2 Whether the assignment infringed the rules of champerty.

10.2 It was submitted for Mr Brentnall that under s130 of the Property Law Act there had to be an absolute assignment; that a right to litigate cannot be assigned; that an assignee who can show it has a genuine commercial interest in the enforcement of another's claim may take an assignment provided that does not infringe the rules of champerty.

10.3 These issues were raised at the outset of the hearing on 15 August and I refer to my Ruling No 1 given at the time (refer Appendix).

10.4 In the course of the hearing there was produced to me first a copy of the assignment referred to and under that Mr (and Mrs) Gunji assigned to the Council:

> "… the rights and remedies of the claimants to pursue any other liable party in respect of the defects [to the dwellinghouse], and the Council shall be entitled to be placed in the position of the claimants and succeed to all of their rights and remedies against such parties in respect of such defects"

with the right to continue with the adjudication claim and other recovery processes.

10.5 There was also produced to me advice of the amount that the Council had paid in full and final settlement of the claim against it which, as I said in Ruling No 1, was paid pursuant to a mediation under the Act and therefore subject to confidentiality as provided by the Act.

10.6 Because this claim has been presented to me on the basis that the Council is seeking to recover from Mr Brentnall **only** the amount that he would have been liable to Mr Gunji for had the claim proceeded against all the named respondents with his rights of claim for contribution against other respondents, I have formed the view that provided I limit my determination of any liability that I find he has to such an amount and that amount is not greater than the amount which I have been told the Council has paid to Mr Gunji in settlement, then there can be no element of champerty arising.

10.7 I have formed the view that the Council has a genuine interest in the enforcement of this claim. That has arisen because of the process that it has gone through to achieve settlement of the claim for the claimant. The purpose of the Act under s3 is to provide **claimants** with a speedy, flexible and cost-effective procedure for resolution of his claims and if the course that this claim has taken has achieved that for Mr Gunji, the purpose of the Act has been achieved for him. That course is that a settlement has been reached with him under which he has been paid a certain sum or sums in settlement of his claims against other parties and the Council has taken the burden of pursuing the adjudication claim against S J Brentnall Limited and Mr Stuart Brentnall. That is a genuine commercial interest sufficient to meet the test for assignment of a right to litigate as mentioned by Gault J in *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710, 756, citing *Trendtex Trading Corp v Credit Suisse* [1980] QB 629.

11. Role of S J Brentnall

11.1 Mr Brentnall is now 70 years of age and retired. He was (and still is) a director and shareholder of S J Brentnall Limited, the other director and

shareholder being his wife. He retired from building in May 2001 but he has had some part-time building and project management work.

11.2 Following his apprenticeship he traded as a builder on his own account from about 1963. The company S J Brentnall Limited was incorporated in 1969. That was on advice from his accountant to form a limited liability company and operate his building business through that.

11.3 He said that from approximately 1992 when he was 58 years of age he did less of the building work himself and focused more on having the company engage experienced contractors for specific projects to carry out the physical building work with Mr Brentnall himself organising material, subcontractors and administration. During the 1990s the company often had two or three jobs under way at the same time and co-ordination was, he said, a full time job. The company completed two dwellings during the 1990s which had been designed by Mr Irwin and Mr Brentnall said that he had found Mr Irwin "very particular about his designs and detailing, and he required the work to be completed to a high and professional standard".

11.4 On the subject site for Mr Gunji, Mr Brentnall's tasks had first been to put the costings together and establish the tender. He then signed the building contract with Mr Gunji which he did in his capacity as the director of the company. He met with Mr Gunji and Mr Irwin to discuss the project and said he understood that Mr Irwin was being retained to project manage the contract.

11.5 He said that he did not personally carry out any construction work on the subject dwelling and I accept that. There was no evidence of his actually doing physical work to the dwelling. That physical work was done by the two Devereux brothers mentioned who he described as "senior carpenters" and the apprentice aged about 21 years. Mr Brentnall said he went personally to the site on average three times per week "mainly to take materials required for the job to the site and to arrange orders and meet with subcontractors". The company had two other projects under way at

the time with carpenters on each site carrying out construction and Mr Brentnall's role was to work between all three jobs organising materials, subcontractors and meetings on site when required.

11.6 Mr Brentnall personally submitted payment claims, variations and documentation and it was he who calculated the prices for the respective variation price requests issued by Mr Irwin which then became the subject of Site Instructions.

11.7 I deal with Mr Brentnall's role in respect of the individual items that comprise the claim later but at this stage comment that, in my view, Mr Brentnall's personal role was **not** that of the principal carpenter on site. He was leaving that work to the Devereux brothers and their apprentice. I accept that his involvement was as he described in evidence and set out above. Mr Gunji was not in a position to know how much time Mr Brentnall was in fact on site because he had his own responsibilities by day and visited the site usually after working hours. Mr Irwin, for his part, only went on site when he needed to and would not have first hand knowledge of the amount of time that Mr Brentnall was on site or whether he was doing physical building work.

12. S J Brentnall Claimed Liability

12.1 This claim is solely about the proportion, if any, that Mr Brentnall personally should contribute to the damages claimed as suffered by Mr Gunji.

12.2 As I have said above, that involves to a degree an assessment of the liability of any other party for that damage and the entitlement that Mr Brentnall may have to a contribution from that party. That includes Mr Irwin and Paterson Cullen Irwin Limited and it includes the Auckland City Council. It also includes the company S J Brentnall Limited.

12.3 The **sole** basis on which the claim is made by the Auckland City Council as assignee of the owner is an alleged breach by Mr Brentnall personally

of a duty of care it is claimed he owed to Mr Gunji and I have considered the claim **solely** on that basis. There was never any suggestion of a claim being made for breach of any statutory duty, such as any claimed duty to comply with the Building Code. I have only considered matters such as that in the context of the allegation of duty of care and breach of that duty.

12.4 There are these important matters to emphasise. The first is that this is **not** a case of a subsequent purchaser making claim for any loss alleged to be suffered as the result of the negligence of any party involved in the construction of the dwellinghouse. In that regard the claim is distinguished from such cases as *Callaghan v Robert Ronayne Ltd* (1979) 1 NZCPR 98 and *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548. In both of those cases the claims were by subsequent purchasers of the respective dwellings and questions as to whether individual directors of the respective companies which constructed or had responsibility for construction of the dwellings had any liability to those subsequent purchasers under an alleged duty of care. Although the duty was found in both cases, in *Robert Ronayne* on the facts there was found to be no breach while in *Douglas Homes* on the facts there was found to have been a breach and liability arising.

12.5 That is not the case here. This is a case where the **owner** of the subject site entered into a contract with a builder, S J Brentnall Limited, to have the dwellinghouse constructed. It is now claimed (by the assignee of that owner) that there was a duty of care owed by Mr Brentnall as director or other agent of the company.

12.6 The second principle is that this is not a case where the "one man company" builder was a vendor. Cases such as *Frost v McLean* (Wellington High Court AP184/01: 2/11/01: Gendall J) deal with the obligations of the director of a building company in circumstances such as that. That is not the case here. Neither S J Brentnall Limited nor Mr Brentnall had any interest at all at any stage in the subject site.

12.7 The other point is that the primary relationship between the owner, Mr Gunji, and the builder, S J Brentnall Limited, was determined by a detailed and complex contract entered into by them both. That is the primary source for consideration of the liability of S J Brentnall Limited to Mr Gunji. Questions of whether there is a collateral duty of care such that there can be tortious relief for negligent breach of that duty do arise. I deal with that later. In my view it is in that context however that any claimed liability on Mr Brentnall's part must be considered.

12.8 There are a number of principles which emerge from the cases that were referred to me.

12.8.1 A company is a different legal entity from its shareholders and employees (*Salomon v Salomon & Co Ltd* [1897] AC 22; *Lee v Lee's Air Farming Ltd* [1961] NZLR 325).

12.8.2 The primary thrust of the limitation of liability is in respect of the liability of the shareholder of the company. Section 91 of the Companies Act 1993 provides that:

> "… a shareholder is not liable for an obligation of the company **by reason only of being a shareholder**" (emphasis added)

There may be some relevance as regards creditors (see below) but primarily it is a shareholder's limitation and there are policy reasons encouraging company investment with the entitlement to limit liability in that way.

12.8.3 A company can have liability for the acts of its employees or agents which may arise vicariously or by attribution.

12.8.4 Individuals may have a liability for their acts while acting in the course of a company's business. That liability may arise because the individual is found to owe a duty of care and to have breached that in some actionable way. That liability arises not necessarily

because of the status of the individual as a **director** of the company, but rather because of that person's status as **an agent or employee** of the company.

12.8.5 Distinctions are drawn between a director's role as managing the business of the company and when that person is fulfilling some other function. The distinction is sometimes described as the director acting **as** the company in the first type of case and the director acting **for** the company in the other. An example is *Lee's Air Farming* where the late Mr Lee had been employed by the company as an aircraft pilot. He was also the director of the company. The Court held that his estate could, representing **his capacity as employee**, sue the company of which he had also been director.

This distinction was recorded in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608, 602:

> "When a person is acting **for** the company it is easier to view his conduct as both his own and vicariously that of the company. When a person is acting **as** the company it is, as just noted, more difficult, at least in general terms, to regard the conduct as that of both the person so acting and the company."

12.8.6 A director or other employee or agent of the company can owe a duty of care quite independently of the obligations (whether contractual or tortious) owed by the company itself. *Robert Ronayne* and *Morton Homes* are cases of that kind. Both are construction cases. In *Robert Ronayne* the directors of the company were airline pilots who were found in fact to have had no sufficient personal involvement in the construction to give rise to a duty of care. The directors of Morton Homes Ltd conversely were found to have been involved in the construction of the units in question to varying degrees such that they had varying liabilities personally in respect of each director and in respect of each unit.

12.8.7 In any strike out application it is only if the position is quite clear that there can be no factual basis for claimed duty of care negligence liability that a claim will be struck out. If the facts require consideration to determine that issue, that can only be done at trial. In *Drillien & Anor v Tubberty & Ors* (Auckland High Court: CIV 2004-404-2873: 15/2/05: Associate Judge Faire) it was found by the Court that there was no factual basis at all on which the first defendant could be found to have any liability to the plaintiffs in respect of construction work carried out by a company in which the first defendant was director and shareholder and the claim was struck out. Conversely in *Body Corporate No 202254 & Ors v Approved Building Certifiers Ltd & Ors* (Auckland High Court: CIV 2003-404-3116: 13/4/05: Keane J) and *Body Corporate No 187947 & Ors v E P Maddren & Sons Ltd & Ors* (Auckland High Court: CIV 2004-404-1149: 13/5/05: Rodney Hansen J) applications to be struck out by individual company directors were declined and in *Carter v Auckland City Council & Ors* (Auckland High Court: CIV 2004-404-2192: 14/10/04: Associate Judge Christiansen) a summary judgment application by a defendant was refused; all on the basis that there was sufficient arguable liability on the part of the respective company directors that the matter should proceed to trial.

12.8.8 There can be parallel or collateral obligations of care for which a claim in tort can be made where there is a contract between the respective parties under which claims in contract can be made.

12.8.9 Where a company gives negligent advice and acts solely through its director in doing so and it is made clear that it is only the company that is giving the advice and there is no representation of personal involvement of the director, it is only the company that can be held liable at a substantive hearing. The facts at a substantive hearing might show that there has been an

assumption of responsibility by an individual acting on behalf of the company (*Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517).

In *Trevor Ivory* the plaintiffs were owners of an orchard including a raspberry plantation and they contracted with Trevor Ivory Ltd to give advice for the control of couch grass believed to be threatening the raspberry crop. Trevor Ivory Ltd was a one-person company carrying on a business as an agricultural and horticultural supplier. Mr Ivory on its behalf gave advice but failed to instruct the plaintiffs to protect their raspberry plants from the effect of the herbicide. While in the High Court Mr Ivory had been found to owe a duty of care to the plaintiffs which he had breached with his negligent advice, it was found in the Court of Appeal that the test as to whether an officer or servant of the company, no matter what the status of that person was, had any liability depended on whether there had been an assumption of a duty of care actual or imputed which depended on the facts, on the degree of implicit assumption of personal responsibility and the balancing of policy considerations. It was found that Mr Ivory had by forming his limited liability company made it plain that limited liability was intended and there was no just and reasonable policy consideration for imposing an additional duty of care.

12.8.10 The assumption of responsibility for a statement or task where a defendant is found to have undertaken to exercise reasonable care and it is foreseeable that the plaintiff will rely on that undertaking creates an assumption of legal responsibility and, subject to any countervailing policy factors, a duty of care will arise; or where it is "fair, just and reasonable" to do so, the law will deem a defendant to have assumed responsibility; but this depends on a combination of factors including assumption of responsibility, vulnerability of the plaintiff, special skill of the defendant, the need for deterrence and promotion of professional standards and lack of alternative means

of protection (*Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324).

12.9 I need to refer further to *Trevor Ivory Ltd v Anderson*. The judgment of Cooke P refers to several authorities which included *Sealand of the Pacific v Robert C McHaffie Ltd* (1974) 51 DLR (3d) 702 and the following extract from p706:

> "Here Mr McHaffie did not undertake to apply his skill for the assistance of Sealand. He did exercise, or fail to exercise, his skill as an employee of McHaffie Ltd in the carrying out of its contractual duty to Sealand. Further, while Sealand may have chosen to consult McHaffie Ltd because it had the benefit of Mr McHaffie's services as an employee, **it was with McHaffie Ltd that Sealand made a contract and it was upon the skill of McHaffie Ltd that it relied**." (emphasis added)

Cooke P also referred to *Morton v Douglas Homes Ltd* but distinguished that case on the basis that the particular facts indicated an assumption of responsibility. His Honour has not drawn the distinction which, with every respect, I think is appropriate, that is that *Douglas Homes* was a case where the claim was not by the contracting party as in *Trevor Ivory* but rather by a third party.

His Honour concluded at p524:

> "… I commit myself to the opinion that, when he formed his company, Mr Ivory made it plain to all the world that limited liability was intended. Possibly the plaintiffs gave little thought to that in entering into the consultancy contract; but such a limitation is a common fact of business and, in relation to economic loss and duties of care, the consequences should in my view be accepted in the absence of special circumstances. It is not to be doubted that, in relation to an obligation to give careful and skilful advice, the owner of a one-man company may assume personal responsibility. [Fairline Shipping Corporation v Adamson [1975] QB 180] is an analogy. But it seems to me that something special is required to justify putting a case in that class. To attempt to define and advance what might be sufficiently special would be a contradiction in terms. What can be said is that there is nothing out of the ordinary here."

12.10 In his judgment in *Trevor Ivory* Hardie Boys J said at p527:

> "But one cannot from that conclude that whenever a company's liability in tort arises through the act or omission of a director, he, because he must be an agent or an employee, will be primarily liable, and the company

> liable only vicariously. In the area of negligence, what must always first be determined is the existence of a duty of care. As is always so in such an inquiry, it is a matter of fact and degree, and a balancing of policy considerations. In the policy area, I find no difficulty in the imposition of personal liability on a director in appropriate circumstances. To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation. Those purposes relevantly include protection of shareholders from the company's liabilities, but that affords no reason to protect directors from the consequences of their own acts and omissions.
> …
> Essentially I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for the personal liability of both a director and an employee."

His Honour referred to his own judgment in *Douglas Homes* but only in passing and only in the apparent context of "clear allocations of responsibility" (p527).

12.11 In that same case McGechan J expressed concern about *Fairline* and said he was:

> "… unable to treat *Fairline* as establishing a proposition that where a 'one-man' company owes an obligation of skill and care an executive director automatically owes a corresponding duty of care." (p529)

He concluded his judgment (p532):

> "When it comes to assumption of responsibility, I do not accept a company director of a one-man company is to be regarded as automatically accepting tort responsibility for advice given on behalf of the company by himself. There may be situations where such liability tends to arise, particularly perhaps where the director as a person is highly prominent and his company is barely visible, resulting in a focus predominantly on the man himself. All will depend upon the facts of individual cases and the degree of implicit assumption of personal responsibility with no doubt some policy elements also applying. I do not think that this is such a case, although it approaches the line. While the respondents looked to his personal expertise, Mr Ivory made it clear that he traded through a company, which was to be the legal contracting party entitled to charge."

12.12 In *Banfield & Anor v Johnson & Ors* (1994) 7 NZCLC 260, 496 Thorp J expressed the view that *Trevor Ivory* in fact involved a "rather broader position" than assumption of responsibility. He referred to the extract from the judgment of Hardie Boys J I have mentioned but referred to the

broader position taken by Cooke P in the extract from his judgment I have mentioned. *Banfield* was a case of a claim against the director of the contracted building company. An application to strike out the claim against the director based on concurrent liability in tort was struck out so that the fact specific issues of proximity and control and other factors which may indicate a personal liability on the part of the director could be canvassed at trial.

12.13 There has been academic criticism of *Trevor Ivory*. In **Directors' Torts: A Isac and S Todd: Commercial Law Essays. A New Zealand Collection** (2003) at p39 there is discussion of *Trevor Ivory* in the context of certain subsequent judgments. The authors at p42 say:

> "The observations of Lord Hoffmann in [*Meridian Global Funds Management Asia Ltd v Securities Commission* [1994] 2 NZLR 291] must cast doubt upon the principles applied by the Court of Appeal in *Trevor Ivory*. As we have seen, both Cooke P and Hardie Boys J began their analyses by reference to identification principles as articulated in [*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705] and [*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153] cases. Identification reasoning, as *Meridian* tells us, is an example of a special rule of attribution, to be used where the primary rules of attribution and the general rules of attribution such as agency do not suffice to determine the rights or obligations of a company, as a fictitious person … As the liability of Trevor Ivory Limited could have been satisfactorily determined by reference to the law of agency, it was wrong of the Court of Appeal to utilise a special rule of attribution, namely identification, to determine the liability of an individual."

After discussing *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 they reach this conclusion at p44:

> "Their Lordships seem to hold that persons acting on behalf of a principal who are negligent while giving advice or providing services in the course of carrying out a contract made by the principal are not liable to the other contracting party unless they have given some positive indication that they have taken on personal responsibility for their conduct."

Later at p45 they say:

> "The cases identifying an individual with a company or attributing individual conduct to the company are concerned only with the question whether the *company is* liable. They do not suggest that the *individual is not* liable."

They make the point (in my view an important one) at p58:

> "Without doubt it is the existence of a contractual framework which best supports the conclusion in *Ivory* and *Williams* that personal liability was not intended. To hold an individual liable for a breach of a contractual obligation to exercise reasonable care and skill will, in the case of one-person and small private companies, amount to a re-allocation of risk and abrogate any benefits of the corporate veil."

12.14 Those principles seem important to me. Mr Gunji had the opportunity to accept or reject the tender that had been placed with him by S J Brentnall Limited. As part of the contracting process he could have insisted on some personal guarantee or liability from Mr Brentnall. He chose not to do so. He contracted with a limited liability company and the law assumes that he knew that the identity of that contractor company was separate from the identity of its director. I think there is a significant contrast between the position of Mr Gunji in this case and that of a subsequent purchaser from him. The control of his legal position lay in Mr Gunji's hands and it was open to him to seek as a matter of contract to define the legal boundaries of responsibility. A subsequent purchaser has no such freedom. That person buys the property as he or she finds it and, if it proves to be defective, can only pursue the legal remedies available. That may be one in contract from the vendor. It may be a claim against parties involved in the construction who in law owe that purchaser a duty of care such as the local territorial authority, the builder, **and an agent or employee of the builder** (if the facts are such as to impose that duty on that person or those persons). That is the only recourse that that purchaser has against those persons. In the instant case Mr Gunji had full control of the extent to which he was prepared to agree to liabilities being assumed or limited.

Perhaps that was recognised by him insofar that when this adjudication claim was first brought it named one of the respondents as "Stuart Brentnall, S J Brentnall Limited". I was uncertain whether the claim was being made against Mr Brentnall or the company or both and sought to

clarify that at an early stage. In a memorandum from Mr Gunji's solicitor dated 7 February 2005 he expressly said that:

> "… the claim is made against … S J Brentnall Limited and not personally against … Mr Brentnall. … Mr Brentnall can be removed as [a respondent]."

That position changed as the claim developed but I suspect that initially it was appreciated that Mr Gunji's rights and remedies may have been limited to contractual obligations owed by the contractor, S J Brentnall Limited. I have proceeded to consider the claim against Mr Brentnall personally as it has been presented.

12.15 Relevant also is the extent to which it might be said that there is a collateral duty of care owed by S J Brentnall Limited to Mr Gunji beyond its contractual obligations under the building contract. In *R M Turton & Co Ltd (in liquidation) v Kerslake & Partners* [2000] 3 NZLR 406 the contractor, Turton, was under contract to build a new hospital. There was a separate contract by the owner with a firm of architects which had subcontracted the engineering firm, Kerslake, to advise on engineering aspects. In considering whether Kerslake owed Turton any duty of care, the majority of the Court of Appeal (Henry and Keith JJ) found there was no prima facie duty of care and it was not appropriate to use a two-stage enquiry, first of considering general criteria and secondly, then whether the contractual matrix negated that duty. In the circumstances of the case it would not have been fair, just or reasonable to impose the claimed duty. The dissenting judgment of Thomas J approached the matter from the opposite viewpoint, namely that the first stage was to enquire as to whether there was a duty of care and then, if there was, to see if the contractual matrix negated that. But that was a dissenting view.

13. Was a Duty of Care owed Independently of the Contractual Obligations?

13.1 The starting point must be the contract itself and I have referred earlier to the process by which the contract was concluded, its extensive terms, and

the roles of the parties it provided. To summarise, there was a formal process of calling for tenders and tenders being submitted; three tenders were submitted including one from S J Brentnall Limited; Mr Irwin discussed these with Mr Gunji; on the basis of that discussion Mr Gunji accepted the tender from S J Brentnall Limited; a contract was drawn by Mr Irwin which included NZS3910:1987 and extracts from the NZIA form; those documents included reference to Mr Irwin and/or Paterson Cullen Irwin Limited as the "Project Manager" and the "Engineer" (as that term is defined in NZS3910:1987). Although there may have been some understanding or agreement between Mr Gunji and Mr Irwin as to the limits of Mr Irwin's role, so far as S J Brentnall Limited was concerned the contract documents defined roles. Although Mr Irwin in evidence said that he knew "with 100% certainty, that Mr Brentnall knew it was not a supervision or project management role being undertaken", in his evidence at the hearing Mr Brentnall said that he took it that Mr Irwin was to run the job between the owner and the builder and that he would be in the middle.

13.2 I have also referred earlier to the process for variations which, again to summarise, involved variation price requests being initiated by Mr Irwin after discussions he had had direct with Mr Gunji, the prices being calculated by S J Brentnall Limited and advised to Mr Irwin and site instructions being issued for variations at the nominated price. In the site instructions presented to me there are some 89 items of variation listed (although I note Mr Irwin's evidence was that there were 67). I also note that his evidence records at least 214 hours on variations; and his evidence mentions at length the detailed discussions **he had direct with Mr Gunji** concerning these variations. Mr McGunnigle said that his records showed that between July 1984 and August 1995 Mr Irwin was paid for 266 hours for administration and site visits.

13.3 The progress payment procedure was, as I have said, for there to have been a certificate from Mr Irwin to Mr Gunji about the amount payable; a direct payment from Mr Gunji to S J Brentnall Limited; and a receipt issued. As the contract progressed to finality S J Brentnall Limited issued

certain invoices to Mr Gunji variously care of Mr Irwin and direct to the site and these were paid.

13.4 There was significant evidence given to me about the involvement of various other parties. Mr James B Morrison, a building consultant and registered architect, was critical of the plans and specifications submitted to the Council for building consent; he was critical of the issue of a building consent by the Council on the basis of those plans; he was critical of Mr Irwin in relation to his "contractual administration duties" as he perceived them but he made no criticism in his brief of evidence of the builder.

13.5 Mr Peter R Jordan, also a building consultant with appropriate qualifications, gave evidence about the Auckland City Council involvement in considering the application for building consent and inspection roles. He too was critical of the detail in the plans and the specifications and he was critical of the Council inspection practise and the failure of its officers to notice various aspects of construction. He too in his written brief made no reference to inadequacies on the part of the builder.

13.6 Those two witnesses had been originally intended as witnesses for the claimant and the written witness statements from them had been supplied by Mr Gunji's solicitor. As it transpired, they were not called as witnesses for the claimant (by then the Auckland City Council as assignee) but were rather called by Mr Brentnall.

13.7 The only extent to which I need consider the respective involvement of Mr Irwin or the Auckland City Council is in considering any respective contributions that they would have been required to make had the claim continued against them, contributions which I could take into account if I find that Mr Brentnall has any liability in these matters.

13.8 Mr Irwin was himself called as a witness for the claimant. In his written witness statement he is critical of the builder, first in the failure to install flashings on the windows, secondly the lack of adequate cross ventilation

and thirdly, in general terms, the failure to construct the house "by adopting good trade practise". (He is also critical of the omission of control joints in the plaster cladding but as I understood the evidence, there is no separate claim based on that issue). The preponderance of his written witness statement was in answering criticisms that had been made of him.

13.9 The other witness called to give evidence as an expert on responsibilities was Mr Kenneth McGunnigle, a building consultant with appropriate qualifications. His written witness statement dealt at length with aspects of failure on the part of Mr Irwin on the one hand and the Council on the second. In relation to the builder, he was also critical and I shall refer to the detail later. It is of note however that his criticisms are under the heading "S J Brentnall Limited" and he commences with the words:

> "Stuart Brentnall carried out the building work for the dwelling in accordance with the contract agreement dated 27 May 1994 between Mr Gunji and S J Brentnall Limited"

The whole of his evidence then is addressed to the failures of "the builder". In evidence at the hearing he said that he made no allegations against Mr Brentnall personally because it was the company that had the contractual relationship.

13.10 I turn now to consider the individual elements of construction in question. In each case quantum as assessed by Mr McGunnigle is not in question.

Parapet at Roof Level

13.11 The claimed repairs is $171,394.00. Mr McGunnigle expressed the view that there is shared responsibility between the Council in the building consent process and in the inspection process, the builder in the building consent process and in failing to ask for further information, the architect at both building consent and inspection stages and the plasterer at the building consent stage and that he should have requested further information.

13.12 Mr McGunnigle was very critical of design issues in respect of the parapet and the fact that there was no provision for flashing either at the top of the parapet or at the lower horizontal section. He said that a failure to provide effective deflection and waterproofing and to detailed flashing was a failure to meet the standard required of a reasonable architect. Mr Morrison referred to the butyl rubber wrap lapped over the top of the framing and under the plaster and described the detail as inappropriate.

13.13 Mr Irwin referred to under-flashings as often having been used as parapet flashings at the time of the construction of this dwelling and that the plans adopted the same flashing detail as documented in the BRANZ Good Stucco Practice Guide of 1996. He attempted to minimise the inadequacy of the design by claiming that the building detail of the extent of the under-flashing had been decided upon by the builder.

13.14 Mr Brentnall said that with his experience of nearly 40 years he believed that the lack of impervious flashings over the parapets and balustrades (the latter to be mentioned later) was the factor most dramatically affecting weathertightness. He said that he voiced his concerns to Mr Irwin about there being no cap flashings on the parapets and balustrades and the response was that he was to "just follow the plans". There was concern expressed that the dwelling with flashings over the parapets would not appear as visually attractive as had been designed. For his part Mr Irwin in evidence said he could not recall the conversation about cap flashings.

13.15 I am satisfied that the primary responsibility for an absence of flashings on the parapets lies with Mr Irwin. I am also satisfied that there is responsibility on the part of the Council for not having picked that up at building consent stage and then later during any inspection. So far as the responsibility of the builder is concerned, Mr McGunnigle simply said in his written witness statement that "a reasonable and prudent builder should have insisted that these be provided". I do not think that in the circumstances of this contract the builder could "insist" on items. It had its contract with the owner. There were plans and specifications in detail

drawn by Mr Irwin. These had been approved by the Council. When Mr Brentnall questioned the absence of flashings he was told to continue with the job.

13.16 There may have been some liability on the part of S J Brentnall Limited to comply with the Building Code but that is not an issue that has been put to me. In the context of the alleged duty of care owed by Mr Brentnall personally, it is claimed that he failed to bring his concerns about the detail of the drawings as to the parapets to the attention of Mr Irwin when initially reviewing the drawings; alternatively he failed to stress the importance of a cap flashing; he failed to invoke the dispute provisions of NZS3910:1987; and he proceeded to direct his contractors to build without cap flashings when he knew this was inappropriate.

13.17 I do not regard in this context or any other the dispute provisions of NZS3910:1987 to be relevant. Those provisions apply when there is a dispute between the contractor (in this case, S J Brentnall Limited) and the owner which in the first instance is referred to the "Engineer" (in this case, Paterson Cullen Irwin Limited). In this case there simply was no dispute between the owner and the contractor. The contractor had its directions from the engineer and proceeded in accordance with those.

13.18 The evidence is that Mr Brentnall did bring his concerns to the attention of Mr Irwin and, in the totality of the contractual relationship and performance of the contract, my view is that Mr Brentnall did so on behalf of his company sufficiently to discharge any duty of care or contractual obligation that the contractor had.

Solid Balustrades

13.19 The amount claimed here is $84,503.00 (which had been only $32,203.00 until late in the hearing). Again Mr McGunnigle's summary of responsibility spreads this around the Council, the builder, the architect and the plasterer

and in the case of the builder at building consent stage and in respect of an alleged failure to request further information.

13.20 The balustrades were changed from that which had been shown in the original drawings. Apparently Mr Gunji sought the privacy of solid balustrades and requested this of Mr Irwin. He issued a variation price request no 6 and was given a price by S J Brentnall Limited for solid balustrades of $191.91. That became the subject of a Site Instruction.

13.21 The procedure for drawing solid balustrades appeared very imprecise. There had been an original sheet A7 to the drawings. This showed the open balustrades. Mr Irwin's evidence was that if there were any changes to the drawings then he would re-letter the appropriate sheet. This had been done, for example, in respect of sheet A1. In respect of sheet A7 there was produced to me a sheet with that description but it had further detail on it which Mr Irwin described as the solid balustrade detail. Certainly it was difficult to find because that sheet is still labelled "A7" and still shows an open balustrade. It was only the profile drawn on one part of the page which Mr Irwin described as being the solid balustrade detailing.

13.22 That was not nearly sufficient. Mr Morrison said that the solid balustrade detail did not appear "to have been documented or lodged with the Council for approval" and there should have been detail including flashings to the junction of the balustrades with walls or posts. Mr McGunnigle was also critical of the design process by which the balustrades were changed to solid balustrades and he said that a "reasonably prudent architect should have provided sufficient detail".

13.23 As I have said above, Mr Brentnall said that he voiced his concerns to Mr Irwin about there being no flashings on the parapets or the balustrades. Mr Irwin was critical of the builder in having allowed its workers to build the solid balustrades straight over the waterproof membrane that had already been laid which he described as "hugely incorrect" and which he said he would have brought to the builder's attention if he had seen such a thing.

13.24 The respects in which it is claimed that Mr Brentnall personally owed a duty of care in relation to the solid balustrades was that he failed to obtain design advice; he either allowed his contractors to build the solid balustrades unsupervised or directed them to build the balustrades in that way; he failed to "liaise" with the membrane applicator to ensure that work would not affect the membrane; and he failed to take steps to ensure that the balustrades would not leak water.

13.25 There was a woeful inadequacy of design on the part of Mr Irwin in relation to the solid balustrades. There was no evidence that Mr Brentnall personally was involved in their construction. I do not regard there as being a requirement that he personally supervised the tradesmen who were working for the company, S J Brentnall Limited, and there is no evidence that he directed them to build the balustrade in the way that he did.

13.26 Certainly the method by which the solid balustrades were constructed was inadequate and has caused leaking and damage. In that regard there may have been a breach of its contractual obligations by S J Brentnall Limited and/or negligence in the discharge of any collateral duty of care that it owed.

13.27 I am not, however, persuaded on the basis of the respective roles of the parties that there has been any separate duty of care owed by Mr Brentnall personally or that, if there was any such, he has breached the same.

Windows and Sill Flashings

13.28 The amount claimed here is $125,519.00. Mr McGunnigle's summary of responsibility includes the builder. His evidence was that there should have been sill and jamb flashings. Mr Brentnall acknowledged this and indeed said that he ordered the flashings and had seen them on site. He

could give no explanation as to why they had not been included in construction.

13.29 It is claimed that he failed to provide his contractors with windows with suitable flashings which apparently is not correct; he failed to supervise his carpenters to ensure that the flashings were installed and I do not accept that he personally had a duty of care to do that; that he failed to raise any inadequacies in the flashings sufficient to bring into play the dispute resolution provisions of NZS3910:1987 and I have said that I do not think that that situation arose in respect of any of the disputes; and that he failed to take steps to ensure that the windows would not leak and although that may have been an obligation on the contract builder, S J Brentnall Limited, I am not of the view that Mr Brentnall personally owed any duty of care to do that.

13.30 I am not asked to determine the liability of S J Brentnall Limited but solely that of Mr Brentnall on the basis of an alleged duty of care which is said to have been negligently breached. In relation to the sill flashings I do not consider there has been any duty of care on him personally or that there has been any breach.

Cap Flashing on Columns

13.31 The amount claimed is $104,285.00. Mr McGunnigle's criticism is that "a reasonable and prudent builder should have allowed for weatherproofing including flashings". The allegation is that Mr Brentnall, despite his concerns about design detailing, failed to bring concerns to the attention of Mr Irwin, alternatively failed to stress the importance of applying cap flashings or other waterproofing techniques, failed at any time to invoke the dispute provisions, and proceeded to direct contractors to build without appropriate waterproofing.

13.32 It was submitted for the Council that Mr Brentnall "should have had the courage of his convictions and he should have resisted building in

accordance with the detail provided" or at least should have recorded his concerns in writing.

13.33 I view this aspect in the same category as others, namely that there was detail in the drawings provided by the architectural draftsman which had been approved by the Council and it was in that context that the builder proceeded.

13.34 I do not think that the builder, S J Brentnall Limited, had any extra duty of care over and above contractual obligations. There has been no breach of the building contract and therefore no claim available against the builder.

13.35 Certainly in respect of Mr Brentnall personally I do not consider that he had any greater duty of care or that there has been any breach of any such duty by him.

Inadequate Step Down/Inadequate Fall/No Gap Between Base of Plaster and Walls and Horizontal Surfaces

13.36 The amounts claimed are respectively $25,671.00, $104,599.00, $52,300.00 and $5,230.00. Mr McGunnigle again attributed responsibility to various parties including the builder. His evidence was that plan A13 showed certain dimensions for the floor joists and the deck joists which only left 50mm from the indoor to the outdoor deck. Mr Brentnall said there was no way to alter that differential as the joists had formed the basis for the roof of the downstairs room. He said that he discussed this with Mr Irwin who told him that a 50mm step down was adequate. Mr Jordan gave evidence that the plans were inadequate in failing to show detail of how the step down between levels was to be formed. It was submitted for the Council that scaling up the information that had been provided was "an inappropriate way of working" and Mr Brentnall should have obtained clarification.

13.37 The allegations against Mr Brentnall personally are that he failed to appreciate the need to set levels; he failed to refer to Mr Irwin for advice;

and he either instructed his carpenters to build at inappropriate levels or failed to supervise them.

13.38 The genesis of the problem here is inadequate detailing in the plans as mentioned by Mr Jordan forcing the contract builder to try to extrapolate detail itself from measurements given which in the event proved to be impossible. I do not consider that the contract builder has breached its contract with the owner by constructing in accordance with the plans that were provided.

13.39 I certainly do not consider that there was a duty of care on Mr Brentnall personally to make enquiry about the matter.

Subfloor Ventilation

13.40 The amount claimed here is $105,553.00. There are two apparent causes of damage in this category, the first being water entry at a higher level and the second being the inadequacy of subfloor ventilation to ensure adequate dryness and removal of subfloor moisture.

13.41 The latter may have given rise to questions of whether there was entry of water causing damage so as to qualify this category of claim in the jurisdiction under the Weathertight Homes Resolution Services Act 2002 but I do not need to consider that issue. Such a claim was allowed in claim 277 *Smith v Waitakere City Council*.

13.42 The plans showed vents to the outside of the subfloor but there was constructed a further wall inside that subfloor area which was not adequately ventilated. There were some vents shown on the inner concrete wall in the drawings but apparently they were inadequate.

13.43 The allegation against Mr Brentnall is that he failed to obtain advice and in the absence of that advice instructed his carpenters to install inadequate ventilation or failed to supervise them on that subject.

13.44 In the context of the respective position of the principal players, the drawings that there were, the Council consent to those drawings and the responsibilities that S J Brentnall Limited left with its employee carpenters, my view is that there was no separate duty of care on the part of Mr Brentnall personally and so no liability on his part.

Waterproofing Protective Layer on Lower Deck

13.45 The amount claimed is $32,870.00.

13.46 The allegation against Mr Brentnall is that he failed to appreciate the need to apply some form of membrane or failed to ensure that this was applied.

13.47 The Firth brochure produced at the hearing by Mr McGunnigle is a current brochure and was in existence at the time the building was constructed in 1994. That brochure includes:

> "When Unispan is to be used as either a roof or deck exposed to weather, special precautions must be taken to ensure a weather proof surface. We recommend the topping concrete be cut and sealed above the precast joints or the whole area should be membrane sealed."

13.48 Mr Irwin's evidence was that he referred to the brochure and that the brochure:

> "… indicated that Unispan may be left untreated, painted or sprayed to match colour schemes"

13.49 He was plainly wrong in that as is acknowledged by submissions from counsel.

13.50 This is another aspect of the construction where I believe the builder was entitled to rely on the specification and drawings of the designer as approved by the Council. I do not regard there as having been any breach of its duties by the builder.

13.51 I do not regard there being any other duty of care on the part of Mr Brentnall personally which could give rise to any liability.

Lack of Drain and Ventilated Wall Cavities

13.52 The amount claimed for this is included in other costs claims and responsibility is alleged by Mr McGunnigle across various parties including the builder.

13.53 The allegation is that despite his extensive experience Mr Brentnall failed to appreciate the need to construct a house with a cavity and allowed carpenters to proceed without the same.

13.54 This is certainly one of those categories where the primary responsibility lies with the designer and with the Council giving consent. If there has been no inclusion of a cavity and that is consented to by the Council, then I cannot see that any builder can have a contractual liability for failing to provide a cavity. The contract provides for construction in accordance with the drawings not the other way around.

13.55 So far as any collateral duty of care on the part of the builder is concerned, then I do not think that there can possibly be one where there is design and consent in that way.

13.56 Finally, it certainly is not the case that Mr Brentnall personally owed any extra duty of care such that he has any liability for that.

Control Joints

13.57 Although there is reference to failure to ensure control joints, there is in fact no monetary sum claimed for this, Mr McGunnigle simply saying that the cost of this is "included". It makes it virtually impossible for me, even if I found there was some liability, to quantify that for this item separately from any others and in any event I have made findings in respect of other matters above. In submissions from counsel there is reference to there

being no separate apportionment or contribution sought in respect of this item (and the ventilated wall cavities item mentioned above) but that does not accord with Mr McGunnigle's schedule which apportions responsibility for both those items variously between four parties.

13.58 It is alleged that Mr Brentnall failed to supervise the plasterer or failed to take issue with site instructions given by Mr Irwin and failing to use the dispute process in the building contract.

13.59 The evidence was that it was Mr Irwin who directed the plasterer, Mr Ruffels, not to include control joints. Mr Ruffels gave evidence to that effect saying that Mr Irwin did not require control joints for cosmetic reasons. Mr Ruffels said that although Mr Brentnall was always with Mr Irwin, it was Mr Irwin who "seemed to be in charge". He said he was following the architect's orders in not putting in control joints.

13.60 Again in this context I do not see that Mr Brentnall personally had any extra duty of care beyond the contractual obligations of the builder. It was Mr Irwin who directed the absence of control joints and liability for that must lie with him.

14. **Conclusion**

14.1 Having considered carefully all evidence and submissions put to me concerning the individual aspects of construction fault to the dwellinghouse which have caused leaks and damage and having considered the legal authorities and submissions thereon, I have reached the conclusion that the third respondent, Mr Stuart Brentnall, did not owe a duty of care to the then owner, Mr Gunji, in relation to the matters claimed and therefore has no liability to him as claimed.

14.2 It may be that the contract builder, the fourth respondent, S J Brentnall Limited, has a liability either under the building contract for breach of its

terms or for some negligent discharge of a collateral duty of care. That is not something I have had to decide.

14.3 I have formed the view that this claim has been presented in the context of a fusion of the respective roles of the third and fourth respondents. Often in the evidence there was reference to "Mr Brentnall" when it was clear that it was S J Brentnall Limited that was being referred to. Likewise in the submissions on behalf of the Auckland City Council as assignee claimant there was much reference to Mr Brentnall as "the builder". That is not the case. The law distinguishes between a company on the one hand and its directors and/or employees on the other. For Mr Brentnall to have any liability there needs to be a careful consideration of his role in general and his role in specific instances. I have attempted to do that and have come to the conclusion that he has no liability.

14.4 It follows from that that he has no liability either for the claimed general damages or costs.

15. **Costs**

15.1 I was asked by counsel for the third respondent to reserve the question of costs for further submission. Reference was made to the way in which this claim had been mounted against the third respondent despite the claimant's original intention to proceed against the fourth respondent only.

15.2 The grounds on which I might order costs are set out in s43 of the Act and I am bound by those.

15.3 In view of the decision I have reached above I give the third respondent the opportunity to make submissions on costs if he wishes. This Determination is a Partial Determination only at this stage accordingly.

15.4 Any claim for costs and submissions are to be made in writing to the WHRS by the third respondent by no later than **4.00pm on 18 November**

2005 for copying to the claimant (Auckland City Council as assignee) and me. Any reply submissions from the claimant are to be made to the WHRS in writing by no later than **4.00pm on 2 December 2005** for copying to the third respondent and me.

15.5 If there is any reply submission from the third respondent that is to be in writing by **4.00pm on 9 December 2005** to the WHRS for copying to the claimant and me.

15.6 I will then make a final Determination of the claim. If the third respondent is not to claim costs written notice of that should be given to the WHRS as soon as possible so that I may finalise the Determination accordingly.

15.7 Because I have not found any party liable to make a payment I have not included any statement under s41(1)(b)(iii) of the Act.

DATED the 28th day of October 2005.

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David M Carden
Adjudicator

APPENDIX

Claim No: 1092

Under	the Weathertight Homes Resolution Services Act 2002
In the matter	of an adjudication claim
Between	**Auckland City Council** (by assignment)
	Claimant
And	**David Irwin**
	First respondent
And	**Paterson Cullen Irwin Limited**
	Second respondent
And	**Stuart Brentnall**
	Third respondent
And	**S J Brentnall Limited**
	Fourth respondent
And	**Carl Ruffels**
	Fifth respondent
And	**Auckland City Council**
	Sixth respondent

Ruling No 1
Monday 15 August 2005

1. **Preliminary Applications**

1.1 When this claim came for hearing on 15 August 2005 there were the only appearances for the Auckland City Council in its capacity as assignee of the claim by the claimant, Mr Gunji, and Mr Cox representing the third respondent, Mr Brentnall personally. No other parties were represented at

the hearing commencement including any representative for the Auckland City Council, the sixth respondent, in its capacity as such. From the outset Mr Brentnall through counsel raised certain issues and I deal now with those.

1.2 The first concerns removal of other respondents. No application has been made for other respondents to be struck out pursuant to section 34 of the Weathertight Homes Resolution Services Act 2002 (**the Act**) and indeed no such application is made before me. Indeed the basis on which the submissions were made anticipated that the respondents would all remain as respondents so that questions of apportionment of liability, if they arise, can be decided amongst them. I deal with that below.

1.3 The second question Mr Cox raised related to the apparent assignment by Mr Gunji, the claimant, of his claims in this matter. The Notice of Adjudication by Mr Gunji, which also appears to be signed by Kabue Gunji, is dated 13 January 2005 and spells out the various claims that he makes against the then named respondents who remain as respondents in this claim. In that Notice of Adjudication Mr Gunji claims $765,375.00 being the then cost of repair and general damages claimed by him.

1.4 In respect of the builder, the Notice of Adjudication refers to "Stuart Brentnall, S J Brentnall Limited" and refers to breach of contract and duty of care and other claims in respect of 12 listed items.

1.5 The matter has progressed since then with further particulars being given to which I shall refer.

1.6 So far as the assignment is concerned, however, there was sent by Heaney & Co, solicitors for the Auckland City Council, the named sixth respondent, a letter dated 5 August 2005 to the Weathertight Homes Resolution Service (**WHRS**) which I am told was copied to other parties including counsel for Mr Brentnall. That letter refers to a settlement reached between the parties and an assignment by the claimant of "all

rights to Auckland City Council". It enclosed an amended Notice of Adjudication that was dated 5 August 2005. That amended notice alleges that the dwelling has suffered water ingress and damage and that "Stuart Brentnall – S J Brentnall Limited (builder)" is responsible in certain respects, again referring to breach of contract and duty of care and articulating 12 items of alleged defects to the dwelling. They are not articulated in the same words as in the original Notice of Adjudication. The relief sought totals $853,059.00 for cost of repairs, alternative accommodation, consultants' costs and general damages (and I will need significant submission on whether the Auckland City Council as assignee of this claim is entitled to alternative accommodation or general damages from this claim).

1.7 The letter from Heaney & Co referred to the agreement dated 4 August 2005 and stated that the claimants had assigned all rights against Stuart Brentnall and S J Brentnall Limited to Auckland City Council and gave notice pursuant to s130 of the Property Law Act 1952 of that assignment. It said that the agreement was confidential to the parties. Mr Cox's submissions to me today deal first with the question of whether the assignment complies with section 130 of the Property Law Act 1952 which requires that there be an absolute assignment and refers to *Commercial Factors Ltd v Maxwell Printing Ltd* 1994 1 NZLR 724, 732. Mr Robertson for the Council has to take instructions on whether that can be disclosed.

1.8 Secondly, Mr Cox refers to the principle of law that a right to litigate cannot be assigned but an assignee who can show that he has a genuine commercial interest in the enforcement of another's claim may take an assignment provided the assignment does not infringe the rules of champerty. Mr Cox's submission is that until the terms of the assignment are known, it cannot be ascertained whether the same infringes the rules of champerty and therefore is unlawful and unenforceable by the assignee, the Auckland City. He refers to the assumption that in reaching the settlement to which the Heaney & Co letter of 5 August 2005 refers, the parties to that settlement (and although the letter refers only to "the

parties" I am assuming they include all parties other than the third and fourth respondents) may well have compromised their respective positions to achieve a settlement and that if the Auckland City Council as assignee of the claimant proceeds with claims for the full amount that it is now purporting to do, the end result may well be that it receives a greater amount by way of reimbursement than the amount which it has paid to the claimant pursuant to that settlement. Mr Robertson pointed to the commercial interest issue, drawing attention to the fact that the Council has been a respondent throughout and that if the claim had proceeded in the normal course the Council could have claimed a contribution from other respondents including Mr Brentnall. He said that the cross-claims between respondents were still on the table and any decision would take into account apportionment of liability. He offered to amend the claim by the Auckland City Council against Mr Brentnall to refer to its being a claim for only that proportion of liability which Mr Brentnall may be found to have having regard to the normal principles of apportionment of liability under the Law Reform Act.

1.9 My view on this subject is that although the Auckland City Council is a territorial authority and one may anticipate that it is not in the same category as a commercial factor agent which is in the business of factoring debts for the purpose of profit, it cannot necessarily be assumed that the outcome for the Council will be one of neutrality. As Mr Cox has submitted, the end result may well be, even if the claim is amended as Mr Robertson suggests and focuses only on the proportion of liability of Mr Brentnall, that the Council recovers from him more than it may have paid to the claimant in any settlement as consideration for the assignment. Accordingly I am of the view that there needs to be evidence about the content of the assignment and the amount paid by the Auckland City Council as consideration for that assignment so that that question can be explored further.

2. **Strike Out Application**

2.1 The third matter raised by Mr Cox related to an application to strike out his client as a respondent, he referring to all the matters that had been presently put before the adjudication claim and me as adjudicator and submitting that that did not implicate Mr Brentnall in any way. Basically that is a repeat of an application made earlier by Mr Brentnall to be struck out as a respondent. Having reviewed the various briefs of evidence and other matters I have formed the view that there are still questions of fact concerning Mr Brentnall's involvement that do need to be resolved and so I decline to strike him out as a party.

3. **Prohibition of Publication**

3.1 Mr Robertson applied for an order under section 51(3) of the Act prohibiting the publication of this part of the description of the proceedings on the grounds that the settlement reached between the claimant and the first, second, fifth and sixth respondents was reached pursuant to section 16 of the Act. Under section 16(3) no evidence is admissible before me in my capacity as an adjudicator of any document or information required by subsection (1) to be kept confidential and that subsection (1) imposes an obligation of confidentiality on a party to a mediation in respect of any document created for the purpose of the mediation **including a settlement under section 17**. From what I have been told that is the nature of one of the two documents that have been signed by the parties. Mr Robertson has agreed to provide a copy of the assignment of the claimant's claims to the Auckland City Council. He has also agreed to provide a letter of information as to the consideration paid by the Auckland City Council for that assignment but I prohibit the publication of that amount at this stage pursuant to section 51.

3.2 As one final point, Mr Robertson wished to correct that for the purpose of this hearing he is also appearing for the Auckland City Council in its

capacity as sixth respondent. That means that counsel for the claimant is identical with counsel for one of the respondents.

DATED the 15th day of August 2005.

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David M Carden
Adjudicator