

**CLAIM NO: 626**

**UNDER** The Weathertight Homes  
Resolution Services Act 2002

**IN THE MATTER** of an adjudication

**BETWEEN** **LYNETTE BLACK AND  
JOHN HARRINGTON as  
trustees for LYN BLACK  
FAMILY TRUST**

Claimant

**AND** **KW & KR GUTSELL  
BUILDING LTD**

First Respondent

**AND** **ROCKCOTE  
ARCHITECTURAL  
COATINGS NZ LTD**

Second Respondent

**AND** **SOUTHLAND DISTRICT  
COUNCIL**

Third Respondent

**AND** **NEVILLE EXCELL**

Fourth Respondent

**AND** **CALDER STEWART  
INDUSTRIES LIMITED**

Fifth Respondent

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**DETERMINATION  
(Dated 14<sup>th</sup> September 2006)**

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**Hearing:** 6 July 2006

**Appearances:** Marlene Black, on behalf of the Claimant  
Kelvin Gutsell the First Respondent in person  
Andrew Wood, Counsel for the First Respondent  
Neville Excell, the Fourth Respondent in person  
A M Wilson, Counsel for the Fourth Respondent  
Keith Ivey, on behalf of the Fifth Respondent  
Bruce Glennie, Assessor appointed by WHRS

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#### **1.0 BACKGROUND**

1.1 On 9 January 2003 the Claimant made application to the Weathertight Homes Resolution Service ("WHRS") under the Weathertight Homes Resolution Services Act 2002 (the Act) in respect of their property at 5A Kepler Place, Te Anau.

- 1.2 An assessor's report dated 2 July 2004 was provided by T W Marlow of Faris-Marlow Property Services Ltd ("Faris-Marlow report") pursuant to s10 of the WHRS Act.
- 1.3 The claim was accepted pursuant to s7 of the WHRS Act.
- 1.4 The Claimant made application pursuant to s26 of the Act for the matter to be referred to adjudication.
- 1.5 I was assigned the role of adjudicator pursuant to s27 of the Act.
- 1.6 A preliminary conference was held on 26 September 2005 by teleconference. The preliminary conference set down the procedures for the adjudication process and timetabling.
- 1.7 An updated Assessors Report was requested in February 2006. Mr Marlow was no longer available and Mr Bruce Glennie was employed to produce an updated report which was provided dated 18 March 2006.
- 1.8 Settlement discussions were held and mediation was attempted during the period of the interlocutory proceedings but settlement of the claim was not achieved.
- 1.9 By Procedural Order No. 4 dated 11 April 2006 the Fifth Respondent was joined to the adjudication proceedings.
- 1.10 A further conference was held on 6 June 2006 by teleconference.
- 1.11 By facsimile dated 28 June 2006 'Notice of Withdrawal of Adjudication Claim by Consent' was given by Counsel for the Claimant to WHRS. The Notices were for the claims against the Second and Third Respondent and were signed by Counsel for the Claimant and Counsel for the respective respondents. The Notices of Withdrawal referred to withdrawal in accordance with section 30(1)(b) of the WHRS Act. The Notices also advised that

\* correction made 26.9.2006

pursuant to section 42(5) of the Act, the parties confirm that a final settlement has been reached between the Claimant and the respective respondents.

1.12 Procedural Order No 6 dated 3 July 2006 advised that *“the Second and Third Respondents remain parties to the adjudication claim but no claims will be pursued by the Claimant at the hearing. The remaining respondents shall make any claim against the Second or Third Respondents backed up with written submissions and evidence for the claim.”*

1.13 A hearing was conducted before me which commenced at 10.00am on 6 July 2006. The hearing was held at the Fiordland Hotel, Luxmore Drive, Te Anau.

1.14 An inspection was made of the property at 4.00pm on 5 July 2006. Attending at the inspection were the Adjudicator and those that were to attend at the hearing.

1.15 The parties that were present or represented from the outset of the hearing were:

- Marlene Black, on behalf of the Claimant Lyn Black
- Kelvin Gutsell, the First Respondent
- Andrew Wood, Counsel for the First Respondent
- Neville Excell, The Fourth Respondent
- A M Wilson, Counsel for the Fourth Respondent
- Keith Ivey, for the Fifth Respondent

1.16 Persons that appeared as witnesses and gave evidence under oath or affirmation were:

- Marlene Black – for the Claimant
- Tony Brand – for the Claimant
- Kelvin Gutsell – for the First Respondent
- Neville Excell – the Fourth Respondent

- Keith Ivey –for the Fifth Respondent

1.17 Parties that appeared as expert witnesses or were called by me to assist the tribunal were:

- Bruce Glennie – WHRS appointed Assessor

1.18 At the commencement of the hearing I outlined my powers under the Act and advised I would endeavour to relax the rules of evidence and assist the parties in presenting the facts and allow them to question the other parties in an informal way. I would however be maintaining the principles of natural justice.

1.19 During the hearing I advised that the Responses to the Notice of Adjudication and the replies to the responses were a matter of record and I would refer to them if required.

1.20 All parties who attended the hearing were given the opportunity to present their submissions and evidence and to cross examine all of the witnesses.

1.21 Closing submissions were made by all parties and written submissions were provided by Mr Wilson for the Fourth Respondent.

## **2.0 THE PROPERTY**

2.1 The dwellinghouse is one of a 2-unit townhouse block situated at 5A Kepler Place, Te Anau, and is owned by the Lyn Black Family Trust and is occupied by Lyn Black.

2.2 Construction was from early 1996 to October 1996 with occupation October 1996.

2.3 A Code of Compliance was issued dated 3 June 1997.

\* correction made 26.9.2006

2.4 Neville and Peter Excell were engaged by the Claimant to build the two townhouses and Neville Excell is the Fourth Respondent. KW & KR Gutsell Ltd were the subcontractor for the EIFS exterior cladding and that company is the First Respondent. Calder Stewart Industries were the subcontractor for the roofing and that company is the Fifth Respondent.

2.5 The construction of the house is concrete slab foundations, light timber framing, EIFS exterior cladding system, aluminium exterior joinery, long run Colorsteel corrugated roofing and generally plasterboard interior linings.

### **3. THE CLAIM**

3.1 The claim is based on the Assessors reports.

3.2 The Faris-Marlow report lists as Cause(s)

#### **“5.1. Cause(s)**

*The three areas that have known water damage are addressed as follows:*

a) *As the water damage to the kitchen wall to ceiling junction is located immediately below the access hatch situated in the southern gable wall, it has been identified that this access hatch has been poorly fitted. It has also been established that the framework and panel have not been flashed or sealed into position to prevent moisture penetration at this point.*

*On this basis, it is our opinion that water is penetrating both through the access hatch and to the perimeter. Refer photograph 9.*

b) *Damage to the bathroom wall surface and floor junction is confined to the section of wall located immediately below the rainwater head identified in photograph 16.*

*It was also identified that cracking to the cladding system is occurring above the rainwater head. On this basis it is suggested that the combination of cracking to the wall cladding and the penetration of the rainwater head into the cladding system are the causes for water penetration to the ensuite area.*

- c) *With regard to the interior deterioration of the wall cladding system adjacent to the garage door, it has been identified that cracking of the exterior coating system is occurring at the junction between the timber framed wall panel and the concrete masonry dividing wall between the two garages.*

*On this basis, it is suggested that water penetration is occurring at this point and is causing the continued deterioration to the internal wall surfaces.”*

- 3.3 The Bruce Glennie Building Consultancy Limited Assessors report (“Glennie report”) lists as Cause(s) under the heading ‘Internal’ the same causes as mentioned in the Faris-Marlow report and further lists:

*“External*

*A visual examination of the exterior of the dwellinghouse identified the following areas where cracking and potential water leakage and moisture entry points were evident:*

- 1. Cracking to window sills, the jamb to sill junctions, and at the jambs was evident as typically shown below (three photographs)*
- 2. Rainwater head mounting and piping through the parapets provide water entry locations (three photographs)*
- 3. Bottom ends of the sloping parapets clearly show cracking and water entry locations. Water from the parapet runs down the upper surface of the*

\* correction made 26.9.2006

*parapet and enters the behind the plaster finish through the cracking. Water flowing of (sic) the parapet capping down the side gets caught in the small channel and runs down the bottom where it drops onto the unprotected and unfinished polystyrene and enters the dwelling. High moisture content was recorded at these locations. (three photographs)*

- 4. Cracking at the EIFS to block wall junction to the dividing wall to the garage at parapet level above the water damaged area of the garage (two photographs)*
- 5. Cracking to upper surfaces of the parapets (one photograph)*
- 6. Cracking along the bottom edge of the junction between the parapet cappings and EIFS below, and embedded rainwater head over ensuite leak area.(one photograph)*
- 7. Cracking around poorly fitted roof space access hatch installed into the south facing wall of the kitchen area over area of leak. And ceiling/wall damage (three photographs)*
- 8. Garden and paving too close to or touching the bottom edge of the EIFS cladding (two photographs)*
- 9. Cracking beneath the fascias where the EIFS cladding abuts all faces. (one photograph)*
- 10. Fascia and spouting ends finishing within the EIFS cladding system (two photographs)*

Items 7,8,9 and 10 are also as mentioned in the Faris-Marlow report.

- 3.4 Summarising the Causes listed above to identify the various areas I will use the headings in this determination as follows:

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1. Leak at Access Hatch above kitchen
2. Leaks above ensuite bathroom
3. Leaks at Garage Wall junction
4. Exterior cladding system
5. Parapet ends/wall junctions, upper surfaces of parapets and parapet capping junctions (later confined to Parapet ends/wall junctions)
6. RWH's and spoutings
7. Garden and paving levels

3.5 The Faris-Marlow report outlines the nature and extent of the damage to the interior of the building as a result of the causes of leaks at areas 1,2 and 3. The Glennie report mentions that the damage at areas 2 and 3 is now more extensive than when the Faris-Marlow report was completed. The Glennie report mentions that invasive test holes were drilled to the faces of the nib walls under ends of parapets (part of area 5), that water dribbled out of the holes and a high moisture content reading of 48.3% was recorded.

3.6 The Faris-Marlow report outlines in considerable detail the repairs required for the damage at the interior for areas 1, the kitchen; 2, the ensuite; and 3, the garage. For area 1 externally the repair work outlined is the replacement of the access hatch and with a full flashing system. For areas 2 and 3 externally repair work outlined is removal of the RWH's, making good to the cladding system and refix the RWH's with appropriate flashings. At area 3 an appropriate seal at the junction of clad wall and block wall is recommended. As well as the detailed repair work to the areas 1,2 and 3 the Faris-Marlow report states:

*“d) As cracking to the exterior coating system has allowed moisture to penetrate through to the interior, it has been identified that cracking to the*

\* correction made 26.9.2006

*coating system will be allowing moisture penetrate, however at the time of the inspection, this was not manifesting itself on the internal wall surfaces. On the basis, it is recommended that cracking be addressed and repaired as follows.*

*Where cracking exists to the plasterwork, the cracks should be raked out to allow a good keying bond to be formed. Apply a sealant acceptable to the coating system manufacturer to fully bond into the prepared cracking points and flush to make fully flush with the surface to be concealed after a new coating application is applied. The sealant should be suitable for the application to which it is being utilised and should be applied in accordance with the manufacturers recommendations.*

*Upon satisfactory repair of all cracks to the exterior coating system, apply a full flexible coating system over the entire surface. The coating system shall be Resene Ex200 or similar approved and this shall be verified to establish compatibility with the original coating system manufacturer.*

- e) *As a further recommendation, anomalies were identified with regard to the proximity of the finished floor level to either garden plots or finished paving around the dwelling. Whilst at the time of the inspection this issue was not causing damage or leakage, it is therefore a recommendation only that consideration be given to lowering the ground and paving lines where located immediately below wall cladding points abutting the building.”*

Item d) relates to Glennie report areas 4,6, and 9 and also encompasses remedial work associated with areas 1,2 and 3. Item e) relates to area 8.

### 3.7 The Glennie report outlines repairs as:

#### **“Repairs**

*The extent of work necessary to make the dwelling watertight remains generally as detailed in the original report, with the addition of the following areas of work to the exterior of the dwelling:*

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- *Remove the spouting and fascias to the east and west faces of the dwelling and shorten so as to no longer extend into the wall cladding, make good the plaster system at the holes left by the fascia and spouting removal, extend the plaster up behind the fascialine for the full length of the walls, and refix the fascias and spouting.*
- *Remove the parapet cappings to the pitched roof lines and install new colorsteel cappings to match the roof with turn downs at the lower end of the cappings over the EIFS finish on the nib walls. Extend the apron flashings out beyond the EIFS cladding and refit diverter to channel all water into the gutter. Ensure that there are no fixings through the tops of the parapet cappings*
- *Remove the parapet cappings to the horizontal parapets and install new colorsteel cappings with a 5 degree slope to the top surface and carry down over the EIFS system to the walls below. Lap seal and rivet all joints.*
- *Form new rectangular gutter outlets to both ends of the butyl gutter, and carry the butyl rubber through the rectangular openings and seal over into the rain water head, after cutting a matching rectangular opening in the rain water head.*
- *Cut away the EIFS wall cladding to the east and west nib walls under the end of the sloping parapets, remove and replace any damaged framing and reclad with a matching EIFS finish.”*

3.8 The Faris-Marlow report included an estimated cost for reinstatement work as identified in that report. The Glennie report was prepared for the purpose of updating the extent of the water damage and updating the estimated cost of the repairs. Therefore it is more applicable to the current position and I will use the estimated cost as included in the Glennie report as the basis for this determination. Mr Brand gave some evidence as to cost but it was not of a nature such that I could have taken that into account in any cost assessments.

3.9 The claim by the Claimant against the First Respondent KW & KR Gutsell Building Ltd, the applicator of the external EIFS Rockcote cladding, relies on the

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assessors reports and is outlined in 'Submission in reply to the First Respondent to the adjudication claim' by the Claimant dated 23 February 2006. The cause of action is in tort as there was no contract in existence between the Claimant and the First Respondent. A précis of the basis of the claim is; a) that the First Respondent was reliant on sub-trade installations/building which could impact on the integrity of the Rockcote system and the First respondent had a duty to notify the main contractor of changes/improvements that needed to be made to sub-trade installations/building in order for the First Respondent to carry out his work to the high specifications required for Rockcote standards; and b) the Claimant was never advised of the Rockcote specifications and was not aware of the maintenance requirements and it's the Claimants' belief that the First Respondent is at fault because they should have provided the maintenance information to the Claimant. The Claimant holds the First Respondent liable because it claims the First Respondent breached the obligations as stated at a) and b).

3.10 The claim by the Claimant against the Second and Third Respondents was withdrawn prior to the hearing.

3.11 The First Respondent by 'Response by First Respondent to Procedural Order No 6' states:

*"2. However should the Tribunal attribute liability to the First Respondent the First Respondent wishes to be able to claim contributions from the Second and Third Respondent depending on the Tribunal finding.*

*It is impossible to be more specific without Tribunal findings but for example if the Second Respondent's product is found to be unsuitable for the job or it is found that the Third Respondent should have foreseen or prevented problems. Those findings should be taken into account in the final award to the Claimant."*

3.12 The claim by the Claimant against the Fourth Respondent Neville Excell, the builder of the dwellinghouse, relies on the assessors reports and is outlined in 'Submission in reply to the Fourth Respondent to the adjudication claim' by the

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Claimant dated 23 February 2006. There are many references to Peter Excell in the submissions but the Fourth Respondent is Neville Excell. Neville and Peter Excell were engaged to erect the dwellinghouse. Neville Excell is retired and the construction work was carried out by his son Peter Excell. For the purposes of this claim I have treated references to Peter Excell as being attributed to Neville Excell. The cause of action is in tort. A précis of the basis of the claim is; a) that the Fourth Respondent is liable through negligence in construction of the hatch; b) shoddy workmanship by the Fourth respondent; c) the Fourth Respondent is responsible for all work carried out by his tradespeople and subcontractors and has failed as main contractor to carry out obligations by not recognising that the First Respondent had not completed its job to the standard requirements and that other subcontractors had not completed their work to the required standard; and d) no communication regarding maintenance was made with the Claimant.

3.13 The claim by the Claimant against the Fifth Respondent Calder Stewart Industries Limited, the roofing subcontractor, relies on the Glennie report and the letter from Tony Brand Building dated February 15 2006. The claim is outlined in 'Notice of Submission of Response on behalf of Claimant to the Fifth Respondent' by the Claimant dated 1 June 2006. The cause of action is in tort. The basis of the claim is that the Fifth Respondent is liable for breach of responsibilities for not carrying their work out professionally and in a good workmanship manner.

#### **4.0 LEAKS AND DAMAGE**

4.1 I have to review the facts as presented in the evidence to answer the following questions:

- Does the building leak?
- What is the probable cause of the leak?
- What damage has been caused by the leak?
- What remedial work is required
- At what cost?

\* correction made 26.9.2006

4.2 The cause of the leaks and the resulting damage and consequential remedial work are listed in preceding paragraphs 3.2 to 3.7 and I will answer the questions in relation to the various items as listed in paragraph 3.4. I will deal with the cost under a separate section.

### **1. Leak at Access Hatch above kitchen**

4.2.1.1 The evidence of Marlene Black and the text and photographs in both assessors' reports and the inspection clearly establish that there have been leaks which have resulted in water damage to the kitchen wall. I am convinced by the evidence and from the inspection that the opinion of both of the assessors that the source of the leaks is around the access hatch which results in a leaky building and damage has resulted from the leaks.

4.2.1.2 The Faris-Marlow report states the cause as the hatch being poorly fitted the framework mitres had opened and that the framework and panel have not been flashed or sealed. The evidence confirmed this.

4.2.1.3 The damage to the wall lining and wallpaper is shown in photographs in both assessors reports and was evident at the inspection.

4.2.1.4 The remedial work required is complete replacement of the hatch and with a full flashing system. The resulting remedial work to the exterior cladding will be incorporated with the general remedial work to the cladding. The interior remedial work requires the removal and replacement of damaged wall lining and ceiling trim and consequential redecoration.

### **2. Leaks above ensuite bathroom**

4.2.2.1 The text and photographs in both assessors' reports and the inspection clearly establish that there have been leaks which have resulted in water damage to the ensuite wall and ceiling. I am convinced by the

\* correction made 26.9.2006

evidence and from the inspection that the opinion of both of the assessors that the source of the leaks is around the RWH which results in a leaky building and damage has resulted from the leaks.

- 4.2.2.2 The damage to the wall lining, wallpaper, trim and the ceiling is shown in photographs in both assessors reports and was evident at the inspection. Indications are that the external wall insulation and framing will be affected by moisture.
- 4.2.2.3 The remedial work required internally requires the removal and replacement of damaged wall lining and ceiling trim and ceiling lining and consequential redecoration. To effect the remedial work it will be necessary to remove some plumbing and electrical fittings and the window blind and refix. The Glennie report recommends that the shower unit be removed and refixed . Having examined the room I am not convinced that the damage as a result of the leak above this area is such that it requires the shower unit to be removed to carry out the remedial work. The removal and refixing of the RWH and remedial work to the exterior cladding will be incorporated with the general remedial work to the cladding.

### **3. Leaks at Garage Wall junction**

- 4.2.3.1 The text and photographs in both assessors' reports and the inspection clearly establish that there have been leaks which have resulted in water damage to the garage wall. I am convinced by the evidence and from the inspection that the opinion of both of the assessors that the source of the leaks is the junction between the cladding system and the block wall which results in a leaky building and damage has resulted from the leaks.
- 4.2.3.2 The damage is to the wall framing, linings, trim and decoration

\* correction made 26.9.2006

4.2.3.3 The remedial work required is the removal and replacement of damaged wall lining and trim, the replacement of damaged framing and consequential redecoration. The cladding/block wall junction requires a seal joint suitable for the joint of materials with different expansion characteristics and approved by the cladding system supplier. The removal and refixing of the RWH and remedial work to the exterior cladding will be incorporated with the general remedial work to the cladding.

#### **4. Exterior Cladding System**

4.2.4.1 The building exterior cladding has defects including; cracking has occurred at the window sill lines and head junctions and at other window positions; vertical cracking is evident over the bay window and at entry beam junction to the main wall; cracking is continuous at the bottom and ends of the fascia boards; and there is cracking around the RWH's and ends of the spoutings..

4.2.4.2 The Faris-Marlow report states that readings from a capacitance meter in the locally affected areas were noted as being slightly raised, however the extent of elevation was not of concern. The report also noted that the weather conditions at the time of inspection were after an extended period without rain and that readings would have been lower than would otherwise have been encountered in wet weather conditions.

4.2.4.3 The general cladding cracking may not be damage as a consequence of a leaky building but I am satisfied from the evidence that the cracking is such that water has penetrated the outermost building element designed to prevent water ingress. There is evidence from moisture testing that there were isolated areas of higher than normal moisture levels. I am satisfied that there are cracks in the cladding system that are allowing water penetration to the polystyrene cladding and partially to the framework and that constitutes a leaky building.

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- 4.2.4.4 The damage is the moisture penetration at the cracks which affects the polystyrene backing and at some areas allows the moisture to penetrate under the polystyrene and affect the building wrap and timber framing.
- 4.2.4.5 The remedial work required is to carry out repairs to the cladding system as outlined in the Faris-Marlow report and the Glennie report estimate, and apply a hi build flexible paint finish to the cladding.

## **5. Parapet/wall junctions, upper surfaces of parapets and parapet capping junctions**

- 4.2.5.1 The Faris-Marlow report identified on page 10 that *“The coating system had been taken up across the face of the capping and terminated flush with the upper edge. A crack was forming at this junction and it is anticipated that moisture could penetrate down through the junction between the coating system and any polystyrene facing. This was not substantiated at the time of the inspection and no destructive testing was undertaken to establish if leakage was occurring. Checks with a capacitance meter did not have raised readings. Refer photograph 10.”* And a later paragraph states: *“Cappings to parapet lines were flat, however these had been formed using metal cappings which appeared to be adequately fixed.”* The Glennie report, which was prepared some 20 months later, shows at photograph 5 *“Cracking to upper surfaces of the parapets”* and the cracking has increased. From the site inspection it can be seen that the exterior coating is delaminating from the metal parapet cappings especially at the inside edge of the parapets and this is likely to continue to deteriorate. The Glennie report states under the heading ‘External’ *“3. Bottom ends of the sloping parapets clearly show cracking and water entry locations. Water from the parapet runs down the upper surface of the parapet and enters the behind the plaster finish through the cracking. Water flowing of (sic) the parapet capping down the side gets caught in the small channel and runs down the*

\* correction made 26.9.2006

*bottom where it drops onto the unprotected and unfinished polystyrene and enters the dwelling. High moisture content was recorded at these locations.”* And under the heading ‘Damage’ *“Faces of nib walls under ends of roof parapets. High Capacitance meter readings were measured to the faces of these nib walls to the east face. When invasive test holes were drilled through the EIFS plaster finish to the south east corner water dribbled out of the holes and a high moisture content reading of 48.3% was recorded.”* Evidence was given as to the adequacy of the parapet cappings and as to the likely ingress of moisture at the parapet cappings. There was evidence that the cappings may be nailed through the top for their entire lengths. Site inspection showed that there was a nail through the top of the cappings at the end of the sloping parapets. I am satisfied that the metal parapet cappings are performing their function and that the cracking to the coating, whilst unsightly, is not allowing moisture to penetrate at the parapet cappings generally but is localised only at the ends of the parapets. I find that the deterioration of the external cladding finish at the parapet cappings is not a cause of leaks. The detailing, poor workmanship and inadequate flashing and sealing at the ends of the sloping parapets as shown in photographs on pages 9 and 10 of the Glennie report and as observed during inspection do allow water to penetrate into the building and damage has occurred to the cladding and framing at those points.

- 4.2.5.2 The Faris-Marlow report did not include any remedial work to the parapets, other than the repairs to cracks and the re-coating of the total cladding. The Glennie report under the heading ‘Repairs’ includes the items for removing all parapet cappings and installing new colorsteel cappings. As I have found that the parapet cappings as such are not a source of leaks then I do not consider that the cappings need to be replaced. It may be that the deteriorating coating is removed and cappings modified during repairs being carried out but the replacement of cappings should not be part of the claim. Modifications to the ends of

the parapets and to the ends of the roof flashings are a legitimate part of the claim.

- 4.2.5.3 Evidence was given concerning the apron flashings and the small channel at the bottom of the apron flashing which could be channelling water into the area at the end of the parapets. I am satisfied that the small channel is in position as the bottom edge of the coating which has now delaminated and been removed. I will deal with the flashings issues later in the Determination.

## **6. RWH's and spoutings**

- 4.2.6.1 The spoutings are extended into the cladding system and the RWH's are also embedded into the cladding system which is causing a breakdown of the cladding system at those points and those points are not adequately sealed to prevent moisture penetration.
- 4.2.6.2 To carry out the remedial work to the areas at the ends of parapets as outlined in preceding paragraphs and at the ends of the spoutings it is necessary to remove the spoutings and possibly shorten and then to refix. To repair the cracks around the RWH's it is necessary to remove the RWH's and then refix when remedial work is completed to the exterior cladding.

## **7. Garden and paving levels**

- 4.2.7.1 The Faris Marlow mentions on page 10 that garden lines were raised to within 50mm of underside of the cladding and that paving at the rear entrance was in close proximity of the base line and states that the floor level and associated ground and paving clearances do not meet the Building Code clause E2.2 External Moisture. Under the section '5.3 Repairs' at paragraph e) it is recommended that consideration be given to lowering the ground and paving lines. The estimated repair costs did not include any allowance for lowering the garden and paving

\* correction made 26.9.2006

levels. The Glennie report at page 18 under the heading '8, Garden and paving too close to or touching the bottom edge of the EIFS cladding' and there are two photographs showing this. The 'Repairs' and 'Estimate of Cost' sections of the Glennie report do not include any allowance for lowering of garden and paving levels.

4.2.7.2 There was no evidence that the garden or paving levels are allowing moisture to penetrate the dwelling therefore I will give this possible cause for leaking no further consideration.

## **5.0 REMEDIAL WORK AND COST**

5.1 The Faris-Marlow report included an estimated reinstatement cost of \$11,657.00 excluding GST and this was subsequently updated to \$13,505.30 excluding GST, still based on the extent of work in the original report. The Glennie report includes an estimated cost for the entire remedial works of \$37,123.88 including GST. The estimate is fully detailed and set out in a priced schedule. The scope of the remedial work covered by the Glennie report was more extensive than the Faris-Marlow Report and was prepared at a later time. I have used the Glennie estimate as the basis for the cost of remedial work for the damage resulting from and the rectification of the various areas identified as the cause of the leaks. Towards the end of the hearing I requested Mr Glennie to further sub-divide his estimate; as a result of the evidence I was aware by that time that it may be necessary, depending on my considered conclusions, to exclude some of the work included in the estimate.

5.2 The summary of the break-down of the Glennie estimated cost of remedial work is:

1.	Leak at Access Hatch to Southern Gable above kitchen	2,149.55
2.	Wall Cladding & RWH leaks above ensuite bathroom	7,701.08

\* correction made 26.9.2006

3.	Leaks at Garage Wall Junction	1,759.73
4.	Exterior Cladding System	8,358.51
	Spoutings	2,189.14
	Timber fascias	2,683.68
	Wall nibs at Parapet ends	3,018.26
	Parapet Cappings & Apron flashings	<u>9,263.93</u>
		\$37,123.88

I will use these figures later and amend the amounts and groupings to suit the items that I determine are part of the claim and to suit the various areas of liability.

5.3 The Respondents did not put forward any alternative cost information in their evidence.

5.4 I have determined that the poor fitting and construction of the access hatch and the possible lack of flashings at the hatch are the cause of leaks and that the damage to the kitchen area is as a result of that. I accept the estimated cost of the replacement of the hatch and the remedial work to the kitchen is as the Glennie report and that is \$2,149.55.

5.5 I have determined that the penetration of the RWH into the exterior cladding and the crack above are the cause of the leaks in the en-suite and the resulting damage. The Glennie report and the evidence of Mr Glennie were that the shower unit would have to be removed and replaced. Having inspected the damage I consider that the shower will not be required to be removed and I have therefore reduced the estimated cost of remedial work to take that into account.

\* correction made 26.9.2006

The Glennie estimate includes for removing the RWH and modifying and refixing. From the evidence of Mr Ivey and as a result of inspection I do not consider that the RWH needs modification as the two pipe outlet system as explained by Mr Ivey is in accordance with good trade practice and would not leak. The RWH will still be required to be removed and refixed and I have allowed for that elsewhere. I have reduced the estimated cost of this section for the RWH work being elsewhere. The amount of the remedial work for this area is set at \$5,477.61.

- 5.6 I have determined that the badly formed and sealed junction between the exterior cladding system and the block wall at the garage is the cause of the leak in the garage and the damage to the garage wall framing, lining and trim. I accept the estimated cost of the replacement of the remedial work to the garage is as the Glennie report and that is \$1,759.73.
- 5.7 I have determined that the exterior cladding system may have water penetration and at localised areas and at the parapet ends and the RWH and spouting ends embedded in the cladding there is ample evidence of water penetration. The estimated cost of the repairs to the cracks to the cladding and applying a coat of hi-build flexible paint system to the complete exterior is \$8,358.51. The cost of remedial work to the minor parts of the cladding in connection with the other areas that have been determined to be part of the claim for a leaky building have been included with those items.
- 5.8 I have determined that the construction of the parapet ends at the parapet top and end face junctions and the finishing of the flashings and spouting ends embedded into the cladding system are a cause of leaks and damage to the cladding, substrate and framing at those positions. I have determined that the parapet cappings are not the cause of leaks into the dwelling. I have also determined that the embedding of the RWH's into the cladding system has caused cracking such that leaks and localised damage has occurred to the substrate and framing. The Glennie estimated costings have been prepared such that I have to extrapolate the items that I consider relevant and allow for flashings to the ends of the parapets and at the ends of the roof apron flashings. I have estimated the cost of the remedial work at the ends of the parapets to be

\* correction made 26.9.2006

\$5,632.70. I have estimated the cost of removing the spoutings and rainwater heads, modifying and refixing so that they are no longer embedded in the cladding to be \$2,769.62.

5.9 A summary of the total cost of the remedial work that I have concluded is part of the claim for a leaky building and resulting damage is:

Leak at access above kitchen	2,149.55
Leaks above ensuite bathroom	5,477.61
Leaks at Garage Wall junction	1,759.73
Exterior cladding system	8,358.51
Parapet ends/wall junctions	5,632.70
RWH's and spoutings	<u>2,769.62</u>
	\$26,147.72

5.10 The Claimant should not benefit twice from part settlement and I have taken into account the settlement agreement between the Claimant and the Second and Third Respondents when setting the values for any liability of the respondents.

5.11 The amount of the settlement between the Claimant and the Third\* Respondent is \$1,700.00. There is no information as to how this amount has been calculated or whether it relates to any particular part of the claim. I can only take the amount into account by deducting it from the amounts awarded as a proportion of the value on a percentage basis. The amount represents 6.501% of the total cost of the remedial work.

5.12 The Settlement Agreement between the Claimant and the Second Respondent provides:

*"1.1 Rockcote will provide the Trust with Rockcote product and Resene paint ("Product") to remedy the issues referred to at paragraphs 10,27,43,51,55,57,59,60,63,69,78,79,81 and 82 of Appendix A of the report of Bruce Glennie Building Consultancy Limited dated 18 March 2006.*

\* correction made 26.9.2006

1.2 *Immediately upon the Trust discontinuing its claim against Rockcote as set out below, Rockcote will set up an account to the value of \$7089 (excluding GST) for the use of the person remedying the issues set out at paragraph 1.1 above (“Account”). For the avoidance of doubt the parties agree that:*

(a) *the person overseeing the remedying of the issues set out at paragraph 1.1 above shall be Kevin McCann (alternatively any other licensed applicator of Rockcote product); and*

(b) *if the value of the Product required to remedy the issues set out at paragraph 1.1 above is less than \$7089 (excluding GST, the remainder of the account will not be used.”*

5.13 The value of this settlement is primarily related to the Exterior Cladding System although a small amount will be used at the remedial work at the access hatch, parapet ends and around the RWH’s and spouting ends. I have to make a deduction to those items for the value of the product that will be supplied with allowances for margin and GST. I have assessed those values as:

Leak at access hatch to Southern Gable above kitchen (Appendix A item 10)	61.88
Leaks above Ensuite bathroom (appendix A items 27,43)	99.00
Leaks at Garage Wall Junction (Appendix A items 51,55,57,59)	174.49
Exterior cladding system (Appendix A items 69,81)	2,815.30
Parapet ends/wall junctions (Appendix A items 60,63)	509.85
RWH’s and spoutings	<u>0.00</u>
	\$3,660.52

## 6.0 LIABILITY

6.1 The existence of a duty of care of those involved in building has been clearly established in New Zealand. No legal case authorities were put to me but I am

\* correction made 26.9.2006



considering the claim on the basis that there was a duty of care in tort owed to the Claimant to take reasonable care to build the house in accordance with the building consent and relevant Acts, regulations and territorial by-laws at the time. The NZ Building Code clause E2.2 External Moisture requires

“buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from outside.”

## 6.2 The First Respondent, KW & KR Gutsell Building Ltd

6.2.1 The claim against the First Respondent is a claim in tort for a breach of duty of care in carrying out the exterior Rockcote cladding to the dwelling.

6.2.2 The First Respondent denies any liability on the grounds that are set out in ‘Notice of Response to Claim on Behalf of First Respondent’ dated 24 February 2006 and 26 May 2006 which are summarised and further précised by me as follows:

- 1) *The First Respondent was subcontracted by the Fourth Respondent to install Rockcote cladding to the property.*
- 2) *The First Respondent applied the cladding in a proper workmanlike manner.*
- 3) *Damage to the cladding is likely to have been caused by movement either as a result of building design/building quality or movement – issues outside the control and responsibility of the First Respondent. While there was one well documented earthquake in 2003 there are likely to have been other earthquakes in the Te Anau area before and since that event.*
- 4) *The First Respondent has no responsibility for any damage caused by building design or by build quality or by any work carried out by subcontractors other than the application of the Rockcote cladding.*

\* correction made 26.9.2006

*The First Respondent has no responsibility for any deterioration caused by lack of maintenance or deterioration caused by un-notified damage.*

*The First Respondent has no responsibility for damage caused by gardens/soil being too close to the dwelling.*

5) *At the completion of the installation of the cladding the guarantee, cleaning and maintenance documents were left with the builder. The First Respondent no longer has the Rockcote franchise and accordingly no longer has copies of the guarantee or cleaning or maintenance information.*

6) *No problems were raised by the Claimant with the First Respondent until the First Respondent was served with notice of the claim late in 2005.*

*Had there been any problems the First Respondent would have expected to hear about them from the earlier than late 2005.*

*Accordingly the First Respondent was given no opportunity to remedy any problems until they had been left to deteriorate for possibly years.*

6.2.3 The First Respondent maintained that the work was carried out in a proper workmanlike manner. The Claimant relies on the Assessors reports that show cracking around the windows, at fascia boards, at RWH's, at ends of spoutings and at other localised areas as reason for allegations of poor workmanship. Mr Wood established during cross examination of Mr Glennie that the First Respondent should have been able to rely on the design of the building, the integrity of the builder that his and the work of other subcontractors was not going allow movement of the frame or substrate, and that the Council had issued a building consent for the building. There is no significant cracking in large areas. It is for the Claimant on the balance of probabilities to show that the problem is with

\* correction made 26.9.2006

the application and not due to other factors. As Mr Glennie pointed out under cross examination once a builder or subcontractor undertook their work then they became responsible for it. If the contractor or subcontractor had concerns about the risks then that should be sorted before undertaking the work. The Claimant also relied upon the evidence of Mr Brand that the cracking to all window sills and corners of windows and doors is work of poor quality. The evidence of Mr Brand regarding the cladding added nothing more to the Assessors reports and the observations during inspection.

6.2.4 I have concluded that in a general sense the standard of the exterior cladding is such that had the surface cracks been the only defects in the cladding system then the First Respondent may not have been considered to have been negligent in carrying out the cladding. I have already referred to the result of the testing outlined in the Faris-Marlow report as showing no abnormally raised moisture readings and Mr Rand acknowledged under cross examination by Mr Wood that the cladding could absorb moisture. However, there are the areas at the embedded RWH's and spouting ends and at the ends of the parapets that are unacceptable, and a competent subcontractor should not have carried out the work even if directed to by the main contractor, and are of such a poor standard that the First Respondent has breached the duty of care in carrying out the work such that it is a cause of the leaks at those points. The First Respondent therefore must have some liability for the failure of the cladding. This liability should be shared with the main contractor, the Fourth Respondent.

6.2.5 The First Respondent maintains that earthquakes may have been responsible for the cracking. It may be a possibility that earthquakes have had an effect on the movement of the building framework and cladding. However, no evidence was put to me that the damage to the cladding is of a type that may be attributable to earthquakes and I reject that defense to the claim.

- 6.2.6 I have taken into account any possible design faults and work carried out by others which is not the responsibility of the First Respondent. The parapet construction is not as shown on the drawings. The drawings show Insulclad over the parapets. The parapet construction comprises a metal capping over the timber framed parapet with a Hardie product attached to the top of the parapet and the Rockcote finish carried over from the wall over the top of the parapet and down the inside of the parapet finishing at the bottom edge to a metal channel which is fixed over the roof apron flashing. It appears from the evidence that this design was at the instruction of the main contractor. The evidence was that the roofing and flashings and the external plumbing had been completed before the external cladding was completed although the polystyrene may have been fitted before the RWH's were fitted. The onus then was on the main contractor and the subcontractor to ensure that the cladding was weathertight. It clearly is not around the ends of the parapets and where the RWH's and spouting ends are embedded in the cladding. The First Respondent and the main contractor must share the liability for the leaks.
- 6.2.7 The First Respondent maintains that it has no responsibility for any deterioration caused by lack of maintenance or deterioration caused by unnotified damage. Mr Gutsell in his evidence confirmed that the maintenance guide and the guarantee were left at the site. The First Respondent did not have an obligation to hand the maintenance guide or the guarantee to the Owner, that was an obligation of the main contractor who had all communication with the Owner. Mr Gutsell gave evidence that had he been informed of the cracking when it became apparent the cracking could have been remedied for much less money than is now claimed as if rectified at an early stage it would have stopped the deterioration. Mr Wood in his closing submissions concurred with the submissions of Mr Wilson concerning lack of mitigation of damage and contributory negligence. I will deal with that issue later in the determination.

### 6.3 The Second Respondent Rockcote Architectural Coatings NZ Limited

6.3.1 The claim by the Claimant against the Second Respondent was withdrawn prior to the hearing as settlement was made between the Claimant and the Second Respondent. Details of the Settlement Agreement were provided prior to the hearing.

6.3.2 Counsel for the Second Respondent commented when providing the copy of the settlement Agreement :

*“Although there is some objection to Rockcote’s release, I note that:*

*(a) there has never been any criticism of Rockcote in any assessor report;*

*(b) no party other than the claimant has ever made any claim against Rockcote.”*

6.3.3 It is correct that there is no criticism of the materials supplied by Rockcote in the Assessor’s reports. No claim was made against Rockcote by any of the respondents and no evidence was offered at the hearing by any of the respondents as to alleged liability of Rockcote. The Second Respondent has no liability for the claim.

### 6.4 The Third Respondent, Southland District Council

6.4.1 The claim by the Claimant against the Third Respondent was withdrawn prior to the hearing as settlement was made between the Claimant and the Third Respondent. Details of the Settlement Agreement were not provided prior to the hearing although Counsel for the Third Respondent advised the quantum of the settlement. I was advised by WHRS that Counsel also advised that *“In the event that any other respondent rejoins the Council as a respondent our client is required to indemnify the council but only to the extent of the amount paid to our client”*

\* correction made 26.9.2006

6.4.2 Counsel for the First Respondent advised that “ *should the Tribunal attribute liability to the First Respondent the First Respondent wishes to be able to claim contributions from the Second and Third Respondent depending on the tribunal finding*”. Counsel for the Fourth Respondent and the Fifth Respondent in response to the notice of the withdrawal of the claim stated that “*I consider the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have liability in this claim.*”

6.4.3 I have attributed liability to the First Respondent. However, the First Respondent can not reserve their position, as to making a claim for contribution from another respondent, until after the determination is issued. Procedural Order No 6 issued on 3 July 2006 directed:

3.2 The remaining respondents shall make any claim against the Second or Third Respondents backed up with written submissions and evidence for the claim on or before 5.00pm 4<sup>th</sup> July 2006.

Although the claim against the Second and Third Respondents was withdrawn the remaining respondents were aware of the claim that had been made by the Claimant against the Second and Third Respondents. Procedural Order No 6 directed that any claim should be made by 4<sup>th</sup> July 2006. The time for the remaining respondents to make a claim was short and the opportunity was given at the hearing for the remaining respondents to advance a claim against the Second and Third Respondents. If the remaining respondents considered that a claim was sustainable against the Second or Third Respondent and the Second or Third Respondent should share in the liability then such a claim should have been made during the hearing and evidence adduced in support of a claim.

6.4.4 Although Counsel for the First, Fourth and Fifth Respondents had advised prior to the hearing that they considered the Second and Third Respondents had liability for the claim no claim was made against Southland District Council or any evidence advanced by any of the

\* correction made 26.9.2006

respondents as to liability There is no evidence in the Assessor's reports that I could find that suggests that the Southland District Council breached a duty of care. I find that the Second Respondent has no liability for the claim.

## 6.5 The Fourth Respondent, Neville Excell

6.5.1 The claim against the Fourth Respondent is a claim in tort for a breach of duty of care in carrying out the building work for the dwelling.

6.5.2 The Fourth Respondent denies any liability on the grounds that are set out in 'Notice of Response to Claim on Behalf of Fourth Respondent' dated 16 February 2006 which are summarised and further précised by me as follows:

*"2.1 The Fourth Respondent denies any liability or negligence in the construction of the access hatch ---*

*2.2 (i) The Access hatch was not shown on the original drawing ---*

*(ii) ---The sills, PVC mouldings and the sealing of the exterior coating system around the access hatch was the responsibility of the First Respondent.*

*(iii) No maintenance has been carried out on the exterior coating system during the years up to the time the claim was filed.*

*(iv) The Te Anau area during these years has experienced a number of severe earthquakes that may have resulted in ground movement, causing movement to the walls of the dwelling resulting in cracking.*

*3.1 The Fourth Respondent denies responsibility in respect to the other causes of action due to the fact they remain the responsibility of the party that completed installation of the exterior coating system*

4.1 *As a result of no specifications or details included in the original design plans on the architectural drawings, our client denies liability and further denies negligence when they were required at a later stage to install an access hatch.”*

6.5.3 In his closing submissions Counsel re-iterated the denial of liability and further elaborated on the grounds for such denial of responsibility.

6.5.4 With regard to the access hatch Mr Excell confirmed that the Excells were responsible for instructing Mc Millan Design Ltd and not the Claimant. It was a design-build type situation by the contractor. The access hatch was incorporated into the building and as it was not shown on the drawings then it was a variation to the works. It is normal for contracts to allow for variations and the fact that the work was done would indicate that the contractor accepted that it was a variation as there was no refusal to do the work. It is not a defense to claim that as it was an afterthought there is no liability. In response to my questions Mr Excell verified that as far as he was aware the hatch was flashed in the same manner as the windows and the leaks were from the bottom corners of the mitres of the timber. In his closing submissions Counsel states at paragraph 8.5 *“Peter Excell has accepted responsibility for the contribution of the hatch door. --“* This responsibility also extends to the damage as a result of the leaking at the hatch. I am satisfied that the construction and installation of the access hatch was of such a poor standard that the duty of care was breached.

6.5.5 Responsibility for the cause of the leak(s) which are the cause of the damage to the walls at the ensuite bathroom are denied on the grounds that the cause is the cracking in the cladding system and that is not the responsibility of the Fourth Respondent. The Fourth Respondent was the main contractor and was responsible for the construction to completion of the dwelling. This responsibility included the engagement and supervision of subcontractors as decided upon by the Fourth Respondent. The engagement of a subcontractor does not absolve a contractor for responsibility for the work subcontracted. It may be that the contractor is

\* correction made 26.9.2006



able to in turn pass on responsibility to a subcontractor for defective work but the ultimate responsibility is with the contractor. It has been determined that the cause of the leak is the cracking around and above the RWH which is on the wall outside the en-suite. A major contributor to the cracking is the embedding of the RWH in the cladding. The embedding of the RWH's and spouting ends is dealt with later but the conclusion is that it is poor workmanship to a degree that it is negligent. The Fourth Respondent was, at the least, partially responsible for the RWH being embedded as the contractor was responsible for the sequence of the work and for directing and supervising the subcontractors. The Fourth Respondent shares liability with the First Respondent for the situation and being in charge must bear the greater share which I set at 66%.

6.5.6 Responsibility for the cause of the leak which is the cause of the damage to the garage wall is denied on the grounds that the cause is cracking in the cladding system and that is not the responsibility of the Fourth Respondent. This is similar to the situation just outlined in the preceding paragraph, however in this situation I do not consider that the First Respondent contributed to the defect. The Fourth Respondent was responsible for the design and construction. The design was subcontracted as was much of the work but the Fourth Respondent was still responsible to provide a weathertight dwelling. It patently failed at this position and it was the responsibility of the contractor to form a joint between the cladding system and the concrete masonry wall. If it was not specifically called up in the drawings or specified then it was the responsibility of the contractor to have it designed if the contractor did not have the knowledge. The joint as carried out by the contractor, the Fourth Respondent, was not adequate and the Fourth Respondent is liable for providing a joint that is weathertight and for the remedial work.

6.5.7 The Fourth Respondent in the 'Notice of Response' and in Counsels closing submissions mentions three causes which set out in the Faris-Marlow report and those are the three areas I have dealt with in the preceding paragraphs. The Faris-Marlow report also included at page 11

\* correction made 26.9.2006

at paragraph 5.3 d) an item for general cracking to the exterior coating system and paragraph 5.4 d) dealt with an estimated reinstatement cost for Repair exterior wall cracking and recoat exterior cladding for an amount of \$6,453.00 excluding GST at July 204. The Glennie report also includes an item for this work. I addressed this when addressing the liability of the First Respondent and concluded that the First Respondent had breached the duty of care and had a liability for the repair of the cracking and recoating of the exterior cladding. The primary reason for me deciding that the First Respondent had a responsibility was the problems with the cladding at particular areas and not the general cladding. The Fourth Respondent was in charge of the First Respondent and directed and supervised that work. The Fourth Respondent was primarily responsible for the problems that have arisen at the localised areas. I determine that the First and Fourth Respondents should share in the liability for the exterior cladding on a 50/50 basis.

6.5.8 The Fourth Respondent maintains that the issues with parapets, spouting and fascia systems, cappings and the application of the cladding systems identified by the Glennie report are the responsibility of the First and Fifth Respondents.

6.5.9 I have determined that the parapet cappings are not the cause of leaks and therefore should not be considered in this claim.

6.5.10 The cracking at bottoms and ends of the fascia boards will be remedied when the cracking to the cladding is addressed. Having inspected the dwelling and considered the evidence I do not consider that the fascia boards are the cause of any leaks therefore the removal and replacement of the fascia boards I would consider not to be required and that item should not be considered in this claim.

6.5.11 The parapet ends/wall junctions I have already determined are a cause of leaks. This comes under the allegations by the Claimant as listed under b) and c) in paragraph 3.11 of this determination. The Fourth Respondent

\* correction made 26.9.2006

was responsible for the changes to the design of the parapets. The Fourth Respondent as main contractor had the RWH's and spoutings in place before the cladding was completed. The details at the ends of the parapets must be the responsibility of the main contractor. It was the responsibility of the main contractor to ensure that the total detailing and the work at this area was weathertight. It clearly is not and the combination of the flashings being fractionally short, the channel bottom edge for the Rockcote being short, the cladding at the inside face of the parapet being exposed under the flashing all contribute to water penetration. The main contractor is primarily responsible for the building being weathertight and the sorry state of the ends of the parapets as clearly shown in photographs 9 and 10 of the Glennie report is poor workmanship such that the contractor has breached the duty of care. The Fourth Respondent is liable.

6.5.12 The RWH's and spoutings were fixed before the exterior cladding was completed. The evidence was that the spoutings were fixed with a gap at the ends so that the cladding could be completed behind the ends. The evidence was inconclusive as to when the RWH's were fixed but the inspection shows that the Rockcote is finished around them and they must have been fixed before the Rockcote finish was applied. The result is that there is cracking around the RWH's that should not be there if the work had been done properly. The finish around the ends of the spoutings is also unsatisfactory and is the cause of cracking. I determined when considering liability of the First Respondent that the First Respondent had breached its duty of care by carrying out the work around the RWH's and ends of spoutings and must have some liability for these faults. I also stated then that this liability should be shared with the main contractor as the work had been sanctioned by the main contractor and the existence of the RWH's and the spoutings was the main contractor's responsibilities. I determine that the First and Fourth respondents should share the responsibility equally.

6.5.13 The Fourth Respondent also claims betterment and contributory negligence and I will deal with that aspect later in this determination.

\* correction made 26.9.2006

## 6.6 The Fifth Respondent, Calder Stewart Industries Limited

- 6.6.1 The claim against the Fifth Respondent is a claim in tort for breach of duty of care in carrying out the roofing work. The specific items of alleged poor workmanship are outlined in the Glennie report and relate to the apron flashings to the sloping roofs, the Butynol gutter outlets and the parapet cappings. The Tony Brand letter also makes reference to the parapet cappings, flashings in general and the box gutters and outlets which are alleged to be too small and installed inadequately. I have determined that the parapet cappings, apart from the ends, are not part of this claim.
- 6.6.2 The evidence was that the apron flashings were fixed at the same time as the roofing as were the parapet cappings which were only temporarily fixed so that they could be removed and refixed once the external cladding was in place.
- 6.6.3 The Glennie report suggests that the piping from the Butyl rubber gutters through to the RWH's provide a water entry location and there is a suggestion that the roof apron flashings were too short. The Glennie report also states that the parapet cappings should be replaced. I have determined that the parapet cappings should not be replaced as part of this claim. In any event the evidence was that the cappings were tacked on by the roofer and any problems with the parapet cappings would have been as a result of work by others which was not the responsibility of the roofer. The polystyrene of the exterior cladding at the inside face of the parapets is exposed beyond the end of the apron flashings but this would have happened after the apron flashings were installed. As Mr Ivey stated in his evidence the polystyrene cladding was the responsibility of the Rockcote and/or the builder and it appears that nothing was done by them or mentioned to others that this could potentially be a problem. Mr Brand was insistent that the Butynol gutters were not adequately completed because they retained water at the ends his evidence did not convince me that the gutters or outlets were installed inadequately. Mr Brand

\* correction made 26.9.2006

acknowledged that he had no experience in laying Butynol and was not familiar with the techniques. Mr Brand did accept that the two pipe system of forming the outlets to the RWH's as explained by Mr Ivey was adequate and that the size was sufficient for the areas being drained. I much preferred the evidence of Mr Ivey that the Butynol system is a membrane tanking system and the gutters and outlets were formed adequately. The Faris-Marlow report at page 5 states "*General metal roof construction and Butynol roofing appeared to be in reasonable condition with no major areas of deterioration being apparent.*" There was much evidence given about the Butynol gutters and outlets and the metal flashings and cappings but it did not convince me that the Fifth Respondent had carried out the roofing work other than was required. I find no liability by the Fifth Respondent for any negligence in connection with the roofing.

6.6.4 The Fifth Respondent was the subcontractor for the RWH's and spoutings. The evidence was that the RWH's and spouting was installed when they were at the request of the builder and that the spoutings were shortened so that the exterior cladding could be installed. What subsequently occurred can not be the responsibility of the Fifth Respondent as their work had been completed in a proper manner to the instructions of the builder. The Fifth Respondent is not liable for the cause of the leaks around the RWH's and at the ends of the spoutings.

## 7.0 CONTRIBUTORY NEGLIGENCE

7.1 The Fourth and First Respondents have alleged there has been contributory negligence by the Claimant. This defence relies upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1).

7.2 The Respondents state the grounds for the defence are the Claimant:

1. since occupying the premises has not carried out any maintenance work

\* correction made 26.9.2006

2. has not carried out any remedial work once hairline cracks were identified in the plaster system
3. has not informed the parties of continuing problems or asked them to carry out remedial work.
4. has not taken reasonable steps to mitigate the losses from the time of observing the hairline cracks and from the time of filing the initial application to the subsequent report by Bruce Glennie.
5. the First Respondent was given no opportunity to remedy any problems until they had been left to deteriorate for possibly years.

7.3 The Fourth Respondent submits that *“The owner should bear a substantial contribution to the damages. The remedial work increased by between 25% and 50% due to failure to take steps to prevent ongoing damage. Clear duty of owner to prevent ongoing leaks/damage.”*

7.4 It is submitted that by failing to carry out maintenance, the Claimant has contributed to the damage, in that a lack of maintenance has contributed to the cost of repairs. Annual maintenance of the exterior by cleaning washing down and repairing any minor damage is recommended by the Rockote maintenance guide.

7.5 The evidence of The Claimant was that no maintenance guides or guarantees were given to the owner until they appeared as part of these proceedings. Marlene Black gave evidence that Lyn Black regularly hosed down the exterior to keep it clean and Lyn Black was told that she would not need to do anything to the cladding for 15 years. I accept that evidence. The First Respondent gave evidence that the maintenance guide and guarantee documents were handed over but they were probably handed to the builder, the Fourth Respondent. I accept that evidence. It is quite reasonable that a lay person could accept that a finish such as Insulclad as specified or Rockcote as used would be durable and

last for a long period. The Claimant had no idea there was a Chemwash system for cleaning down. I find that the defence concerning lack of maintenance fails.

7.6 Some of the submissions of the Fourth Respondent are:

*“6.3 When the first report was completed in March 2003 by Faris-Marlow (The Faris–Marlow report states ‘Date of Completion of Report 2 July 2004’) remedial work carried out at that stage would have substantially reduced damage.*

*6.4 It is clear that the dwelling problems from 2003 until completion of the second report by Bruce Glennie in March 2006 have increased. None of the parties were informed of the continuing problems or were asked to carry out remedial work.*

*6.5 During the period between the reports the Claimant was aware the cracks were appearing in the exterior of the cladding system and they continued to get worse. No remedial steps were taken.*

*7.2 It is submitted that the owner has some responsibility and was in a position to take some steps to prevent the ongoing problem.*

*7.3 By notifying the original applicator or other parties remedial work could have substantially prevented any further damage.*

*7.4 The Claimant first noticed cracks in plaster in June 1999 and to date no remedial work has been undertaken.”*

7.7 I have to consider whether the Claimant has not taken reasonable steps to mitigate the loss. It is submitted that the cracks were first noticed in June 1999. The evidence showed that at that time it was just small cracks and there was no indication that the building was leaking or would leak in the future. Marlene Black in her closing submissions stated

\* correction made 26.9.2006

*“We tried to get things moving once we found the hairline cracks and no remedial work was undertaken because we had no idea that this adjudication process would come five years later after lodging the WHRS complaint ....we had no idea it was going to be such a drawn out affair.... Maintenance wise there was not a hell of a lot Lyn could have done with the ceiling and the parapets, she is not a builder but a lay person....”*

It must have been difficult for the Claimant to make a decision about remedial work and when and how to undertake remedial work. The general cracking would not have alerted a lay person to a leaky building but the Claimant did contact the builder the Fourth Respondent, once these cracks were noticed. The leaks that occurred at the kitchen, ensuite and garage were sufficient to alert the Claimant that there was a significant problem. A ‘Timeline’ was included as part of the brief of evidence of Marlene Black. The Timeline includes entries:

- |            |  |
|------------|--|
| Sept 2001  | Water leakage becomes apparent to Claimant<br>→ Calls to 4 <sup>th</sup> respondent<br>4 <sup>th</sup> respondent finally calls in roofing contractors<br>and attempts to seal leakages. |
| 9 Jan 2003 | Claim lodged with WHRS (dwelling now 5yrs & 5 months old)  |

Marlene Black gave evidence of the efforts made to get the leaks rectified. Everyone was dealing through Peter and Neville Excell and when noticed the cracks rang the Excells. When questioned as to making contact with Rockcote or Mr Gutsells building company Marlene Black advised that in 2001 *“they went straight to Excells because they were our main contractors and they subcontracted out to your client and therefore they had the responsibility.”* Marlene Black also stated during cross examination that the Excells were difficult to contact, repairs were attempted in 2001, the claim was lodged in January 2003 and it has taken until now to have a hearing, mediation was unsuccessful, been trying to get it fixed. In response to the questioning regarding lack of contact with Mr Gutsell it was explained that contact was with the Excells as they were the contractor and it was Excells job to contact their subcontractors . *“We were totally hands off this building, the Excells took on this building from start to finish and we*

\* correction made 26.9.2006



*had nothing to do with any contractors anything like that” “ We have been trying so hard to get it dealt with I can’t believe today that we have made it here...”* In response to cross examination by Mr Wilson about not carrying out remedial work Marlene Black responded *“My mother tried many times to call and get Neville Excell around and it was very difficult to get hold of him as he was in Nightcaps.”* I can understand how the remedial work has not been carried out. The Claimant, apart from the assessors reports, would not have the knowledge to direct what remedial work was required. Attempts were made to get the builder to remedy the problems but that was to no avail. Once the WHRS process was underway it is understandable that the Claimant looked to that process to resolve the problems. I am not persuaded by the respondents’ evidence relating to this claim that the Claimant was negligent so the defence of contributory negligence fails. It is more appropriate on the facts of this claim that an adjustment be made for betterment.

## **7.8 BETTERMENT**

7.8.1 The First Respondent in the ‘Notice of Response to Claim’ states:

*“4.1 If any upgrading is carried out the claim should be reduced to reflect the failure to carry out maintenance in the past.*

*4.2 If any upgrading is carried out the claim should be reduced to reflect the increase in value of the property caused by upgrading.”*

7.8.2 Marlene Black on behalf of the Claimant submitted that the work that is required is not upgrading but is remedial work and the property would be diminished in value rather than increased. I agree with those submissions and do not allow for betterment on the grounds stated by the First Respondent.

7.8.3 The closing submissions from the Fourth Respondent include the paragraph

*“7.5 As the owner has not carried out any maintenance work on the dwelling or taken reasonable steps to mitigate the loss, in making a determination the owner should be liable for a contribution to the damages and loss.”*

\* correction made 26.9.2006

This is more of a submission in support of a defence of contributory negligence but it also touches on the issue of betterment.

7.8.4 The 'Notice of Response To Claim' by the Fourth Respondent included the paragraph

*“4.2 If any remedial work is required to be carried out, the claim should be reduced to reflect the failure to carry out expenditure for general maintenance in the past.”*

This is not a claim for betterment as such but it pleads for the Claimant to contribute as expenditure has not been made for maintenance that should have been carried out had the Claimant been aware of the maintenance requirements, thus the claimant has not incurred the expenditure.

7.8.5 During the hearing Counsel for the First and Fourth Respondents submitted that the recommendations for maintenance of Rockcote include that a full repaint should be carried out after 7-10 years. The building is now over 7 years old and a repaint is due whether or not remedial work has to be carried out therefore the Claimant is gaining some benefit from having the repaint paid for as part of the claim.

7.8.6 I have some sympathy with the submissions that at least the repainting of the cladding should not be the responsibility of the respondents. We will never know what the state of the building would now be had the maintenance been carried out as recommended and had remedial work been carried out at an earlier stage. There is no doubt that when the remedial work is carried out the exterior of the dwelling will be as new but the building is 9 years old. However the Claimant has suffered a deficient building for years and has suffered as a consequence and I must balance these conflicting situations.

7.8.7 I have concluded that there will be an element of betterment when the remedial work is carried out. The dwelling will have a new exterior coat of paint so I set the

\* correction made 26.9.2006

value of the betterment at 50% of the value of the repainting of the exterior. The Glennie report sets a value of \$5,308.88, inclusive of GST, for Resene X200 paint finish to exterior walls of dwelling. The value for betterment is therefore \$2,654.44.

## **8.0 CONTRIBUTION BETWEEN RESPONDENTS**

8.1 I must now turn to the consideration of the liability between respondents.

8.2 The law allows one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

Where damage is suffered by any person as a result of a tort ... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is ... liable for the same damage, whether as joint tortfeasor or otherwise ...

8.3 The approach to be taken in assessing a claim for contribution is provided in s.17(2) of the Law Reform Act 1936. It says in essence that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage. What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.

8.4 I will use the same headings as previously.

### **Leak at access hatch above kitchen**

8.5 I have determined that the cause of the leak to this area is the access hatch and its poor design/construction. The access hatch was designed and constructed and fitted by the builder the Fourth Respondent. The entire responsibility for this leak and damage lies with the Fourth Respondent.

8.6 The cost of the remedial work relating to the access hatch and kitchen will be paid by the Fourth Respondent to the Claimant. The cost is set at

Cost of remedial work	2,149.55
Less allowance for 'product' as settlement	
With Second Respondent	61.88
Less proportion of settlement with Third Respondent	<u>139.75</u>
	<u>201.63</u>
	<u>\$1,947.92</u>

**Leaks above ensuite bathroom**

8.7 I have determined that the Fourth Respondent should be held primarily responsible for the leaks and damage at this position and set that at 66% The First Respondent also must share some responsibility and must pay the balance of 34%. The cost will be paid by the respondents to the Claimant as follows:

Cost of remedial work	5,477.61
Less allowance for 'product' as settlement	
With Second Respondent	99.00
Less proportion of settlement with Third Respondent	<u>356.13</u>
	<u>455.13</u>
	<u>\$5,022.48</u>

Neville Excell, Fourth Respondent	66%	3,314.84
KW & KR Gutsell Building Ltd, First Respondent	34%	<u>1,707.64</u>
		<u>\$5,022.48</u>

**Leaks at Garage Wall Junction**

8.8 I have determined that the cause of the leak to this area is the junction between the dissimilar materials and its inadequate design/construction. The builder was responsible for the design and construction. The entire responsibility for this leak and damage lies with the Fourth Respondent.

\* correction made 26.9.2006

8.9 The cost of the remedial work relating to the garage leak will be paid by the Fourth Respondent to the Claimant. The cost is set at:

Cost of remedial work	1,759.73
Less allowance for 'product' as settlement	
With Second Respondent	174.49
Less proportion of settlement with Third Respondent	<u>114.40</u>
	<u>288.89</u>
	<u>\$1,470.84</u>

**Exterior cladding system**

8.10 I have determined that the Fourth and First Respondents should be responsible for the cracks and resulting leaks and damage to the exterior cladding and I determine that the allocation of responsibility should be the same as for the leaks above the ensuite bathroom. The aspect of betterment has to be taken into account for this work. The cost will be paid by the respondents to the Claimant as follows:

Cost of remedial work	8,358.51
Less contribution from Owners as betterment	<u>2,554.44</u>
	\$5,804.07
Less 50% of allowance for 'product' as settlement with Second Respondent (50% as 50% of painting already deducted as betterment) 50% of \$2,815.30 = 1,407.65	
Less proportion of settlement with Third Respondent	<u>543.44</u>
	<u>1,951.09</u>
	<u>\$3,852.98</u>
Neville Excell, Fourth Respondent	50% 1,926.49
KW & KR Gutsell Building Ltd, First Respondent	50% <u>1,926.49</u>
	<u>\$3,852.98</u>

\* correction made 26.9.2006

**Parapet ends/wall junctions**

8.11 I have determined that the cause of the leaks are partly poor design, which the Fourth Respondent must take responsibility for, and the poor workmanship and finishing around the RWH's and ends of the spoutings, which I have determined is a shared responsibility of the First and Fourth Respondents. The cost will be paid by the respondents to the Claimant as follows:

Cost of remedial work		5,632.70
Less allowance for 'product' as settlement		
With Second Respondent	509.85	
Less proportion of settlement with Third Respondent	<u>366.21</u>	
		<u>876.06</u>
		<u>\$4,756.64</u>
Neville Excell, Fourth Respondent	66%	3,139.38
KW & KR Gutsell Building Ltd, First Respondent	34%	<u>1,617.26</u>
		<u>\$4,756.64</u>

**RWH's and spoutings**

8.12 The RWH's and spoutings need to be removed, modified and refixed to enable the remedial work to be carried out. And the Fourth and First Respondents share the responsibility as for the Exterior Cladding and Parapet Ends. The cost will be paid by the respondents to the Claimant as follows:

Cost of remedial work		2,769.62
Less proportion of settlement with Third Respondent		<u>180.07</u>
		<u>\$2,589.55</u>
Neville Excell, Fourth Respondent	50%	1,294.77
KW & KR Gutsell Building Ltd, First Respondent	50%	<u>1,294.78</u>
		<u>\$2,589.55</u>

\* correction made 26.9.2006

## Summary

8.13 In the event that all of the respondents meet their obligations as ordered in this determination, then the amounts that they will pay to the Claimant will be:

### Neville Excell, Fourth Respondent

Leak at access hatch to Southern Gable above kitchen	1,947.92
Leak above ensuite bathroom	3,314.84
Leaks at Garage Wall Junction	1,470.84
Exterior cladding system	1,926.49
Parapet ends/wall junctions	3139.38
RWH's and spoutings	<u>1,294.77</u>
	<u>\$13,094.24</u>

### KW & KR Gutsell Building Ltd

Leak above ensuite bathroom	1,707.64
Exterior cladding system	1,926.49
Parapet ends/wall junctions	1,617.26
RWH's and spoutings	<u>1,294.78</u>
	<u>\$6,546.17</u>

## 9.0. COSTS

9.1 It is normal in adjudication proceedings under the WHRS Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s.43(1) of the WHRS Act, an adjudicator may make a costs order under certain circumstances. Section 43 reads:

- (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by
  - 
  - (a) bad faith on the part of that party; or
  - (b) allegations or objections by that party that are without substantial merit.

\* correction made 26.9.2006

- (2) If the adjudicator does not make a determination under sub-section (1), the parties to the adjudication must meet their own costs and expenses.

9.2 The 'Notice of Response to Claim on Behalf of First Respondent' at paragraph 8.1 states:

*"Although the First Respondent denies liability a reasonable settlement offer was made, declined by the Claimant and withdrawn.*

*Accordingly the First Respondent submits that the Claimant should be responsible for the costs of arbitration (sic)."*

The 'Notice of Response to Claim on Behalf of Fourth Respondent' at paragraph 4.4 states:

*"The First Respondent believes that the settlement offer made was fair and reasonable and that accordingly additional costs of this arbitration (sic) should be met by the Claimant."*

There is no evidence of bad faith or lack of substantial merit in the claim that would justify an award of costs. Therefore I will make no orders as to costs.

## **10.0 ORDERS**

10.1 For the reasons set out in this determination, I make the following orders:

10.2 Neville Excell is ordered to pay to the Claimant the amount of \$19,640.41. Neville Excell is entitled to recover a contribution of up to \$6,546.17 from KW & KR Gutsell Building Ltd for any amount that he has paid in excess of \$13,094.24 to the Claimant.

10.3 KW & KR Gutsell Building Ltd is ordered to pay to the Claimant the amount of \$19,640.41. KW & KS Gutsell Building Ltd is entitled to recover a contribution of up to \$13,094.24 from Neville Excell, for any amount that he has paid in excess of \$6,546.17 to the Claimant.

\* correction made 26.9.2006



10.4 No other orders are made and no orders for costs are made.

**NOTICE**

Pursuant to s.41(1)(b)(iii) of the WHRS Act 2002 the statement is made that if an application to enforce this determination by entry as a judgment is made and any party takes no steps in relation thereto, the consequences are that it is likely that judgment will be entered for the amount for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

This Determination is dated this 14<sup>th</sup> September 2006.

**G D DOUGLAS**  
Adjudicator