Claim No: 1505

Under	the Weathertight Homes Resolution Services Act 2002
In the matter	of an adjudication claim
And	**Peter Bruce Frederick Atkins**, **Peter Bruce Frederick Atkins** and **John Richard Muller** as trustees of **The Bruce Family Trust** Claimants
And	**North Shore City Council** First respondent
And	**Grant Williams** Second respondent
And	**Jason Williams** Third respondent
And	**Grant Williams** and **Jason Williams** and **Desmond Sarjant Williams** as trustees of **Aladdin Trust** Fourth respondents
And	**Anthony G Smits** trading as **The Home Design Company** Fifth respondent
And	**Francis John Murphy** Sixth respondent
And	**Philip Murphy** Seventh respondent
And	**Plaster Systems Limited** Eighth Respondent

Determination
2 October 2006

1. Index

1. Index 2
2. Summary 3
3. Adjudication Claim 5
4. The Dwelling 10
5. The Claimants and the Claim 13
   Maintenance Costs 21
   Consultants' Costs 22
   Rental Losses 22
   Interest on Repair Costs 23
   General Damages 24
6. Causation of Leaks and Damage 27
   Parapet Tops and Detail 28
   Joinery Flashings 32
   Cladding to Ground 39
   Failure of Flashings at Central Internal Gutter 41
   Contributory Negligence 42
   Cladding Hard to Paved Decks/Glass Penetration Flat Tops of Balustrades/Failure of Intersection Solid Balustrades and External House Wall 44
   Failure of Waterproofing System: Masonry Retaining Wall 46
7. Liability: Jason Thomas Williams – Builder – Third Respondent 47
   Parapet Tops 50
   Sill and Jamb Flashings 51
   Gutter Flashings 52
   Cladding to Paved Decks/Glass Penetration of Balustrades/Saddle Flashings Between Solid Balustrades and External Wall 52
   Failure of Waterproofing System: Masonry Retaining Wall 52
   Conclusion 53
8. Liability: Aladdin Trust Trustees – Owners - Fourth Respondents 53
9. Liability: Grant Williams – Second Respondent 57
10. Liability: Anthony G Smits – Fifth Respondent 57
11. Liability: F J Murphy and P Murphy – Sixth and Seventh Respondents 60
    Is there a Duty of Care in this Case? 66
    Application of Duty 70
    Cladding to Paved Decks and Ground Level 72
    Liability Outcome 72
12. Liability – Eighth Respondent – Plaster Systems Limited – Duraplast Supplier 74
13. Liability – North Shore City Council – First Respondent – Territorial Authority 78
    Duty of Care 79
    Relevance of Building Act 1991 81
    Economic Loss 82
    Impact of Subsequent Cases 85

	Three Meade Street	85
	Woolcock Street Investments Pty Ltd v CDG Pty Ltd	89
	Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd	92
	Principles – Duty of Care - Conclusion	93
	Code Compliance Certificate	95
14.	Council Liability: Specific Issues	99
	Issue of Building Consent	99
	Inspections	102
	Code Compliance Certificate	102
	Inadequate Waterproofing to Parapet Tops	103
	Window and Door Joinery Flashing Installation	106
	Cladding Below Ground and Floor Level and Cladding Hard Down to Paved Decks	108
	Internal Gutter Flashings	110
	Glass Penetration to Flat Tops of Balustrades	112
15.	Result – Council Liability	114
16.	Contribution	115
17.	Costs	123
18.	Result	123

2. **Summary**

2.1 The claimants as owners of 18B Manu Place, Albany, claimed varying sums against the respondents in respect of leaks to the dwelling causing damage.

2.2 The claimants had been owners of a one half share in the property and purchased the other half share from Mr Peter Atkins in February 2005 at a price reduced by $75,000.00 to reflect one half of the then expected repair costs for damage from leaks; and took an assignment of all claims he may have in respect of that reduction, $75,000.00. The claim was eventually for one half of the cost of repairs and recovery of that sum of $75,000.00 plus other relief. The claim is allowed to be made in that form; the claimants are entitled to make those claims and that the assignment was valid.

2.3 The claim for consultants' costs is disallowed as these were costs in the adjudication. The claim is discounted by one half of the cost of certain

maintenance items for repainting and new carpet which were opposed. One half of a claimed loss of rental is allowed. A claim for interest on repair costs is disallowed as is a claim for general damages.

2.4 It was claimed there should be reduction for contributory negligence and an allowance is made of **10%** reduction in total claims to reflect the contributory negligence found against the claimants.

2.5 The builder, the third respondent, Jason Williams, is liable to the claimants for his negligent breach of the duty of care that he owed to them as subsequent purchasers and for his failure to achieve the performance standards of the Building Code and is ordered to pay the claimants the sum of $199,093.50.

2.6 The fourth respondents as owners and developers of the site are liable to the claimants for negligent breach of their duties of care and is ordered to pay the claimants the sum of $199,093.50, disregarding the fact that they may have been trustees and finding that they each have a personal liability.

2.7 The fifth respondent, Anthony G Smits, is liable to the claimants in respect of certain design issues arising from the construction not only on the evidence presented but also by inference from his failure to participate in this adjudication and ordered to pay the sum of $77,741.25.

2.8 The sixth and seventh respondents, Francis John Murphy and Philip Murphy, have been negligent in the discharge of their duties of care to the claimants as subsequent purchasers in relation to certain plastering aspects of the dwelling especially plastering over parapet tops when it would have been apparent that there could be water ingress issues and secondly their plastering around window and door joinery when this had not been fixed according to manufacturer's specification or good trade

practice and was neither face fixed nor recessed and are ordered to pay the claimants the sum of $143,357.25.

2.9 The eighth respondent, Plaster Systems Limited, owed a duty of care to the claimants in respect of its employee who attended on site during construction and gave advice to the sixth and seventh respondents as plasterers particularly in relation to the installation of the joinery and appropriate plastering and weather protection for that during application of the Duraplast system and is ordered to pay the claimants the sum of $133,792.50.

2.10 The first respondent, the North Shore City Council, owed a duty of care to the claimants as subsequent purchasers. That duty extended in relation first to its processing of the application for building consent and secondly the inspections that it undertook. It has a liability in respect of the Code Compliance Certificate **only** if it was negligent in the issue of that certificate and did not have belief on reasonable grounds that the requirements of the Building Code were met. Negligence is found against the Council in relation to various aspects of the construction and its inspection during construction and it is ordered to pay to the claimants the sum of $145,817.44.

2.11 Contribution between the various respondents is ordered as to stated percentages based on assessment of their contribution to the causation of leaks, damage and loss.

2.12 No order for costs is made in favour of or against any party.

3. Adjudication Claim

3.1 The claimants are owners of 18B Manu Place, Albany, and gave Notice of Adjudication dated 10 October 2005 under the Weathertight Homes

Resolution Services Act 2002 (**the WHRS Act**) naming certain of the above respondents. There were amended Notices of Adjudication including one dated 13 April 2006 which was further amended at the hearing and then another Amended Notice of Adjudication dated 15 May 2006 at the conclusion of the first day of the hearing.

3.2 By then there had been further respondents joined pursuant to s33 of the WHRS Act. The claim in the final amended claim was for variable amounts against the respective respondents namely:

First respondent – North Shore City Council (**the Council**)	251,692.00
Second, third and fourth respondents – Grant Hearle Williams (**G Williams**), Jason Thomas Williams (**J T Williams**) and Desmond Sarjant Williams (**D Williams**)	256,201.00
Fifth respondent – Anthony G Smits (**A Smits**)	251,692.00
Sixth respondent – Francis John Murphy (**F Murphy**) and seventh respondent – Philip Murphy (**P Murphy**)	252,585.00
Eighth respondent – Plaster Systems Ltd (**Plaster Systems**) (and further amended on 17/5/06)	183,242.00

3.3 I was assigned as the adjudicator to this claim along with claim 2109 which relates to unit A, 18 Manu Place, Albany. For convenience, and because many of the respondents were the same and the issues affected both claims, they were dealt with simultaneously both at preliminary conferences I held and at the final conference/hearing which commenced on 15 May 2006.

3.4 That hearing on 15 May 2006 was attended by:

3.4.1 Mr G Lewis, counsel for the claimants, accompanied by Mr Peter Atkins (and his wife Mrs Susan Atkins);

3.4.2 Ms S Thodey and Ms A Fistonich, counsel for the first respondent (**the Council**), accompanied by Messrs Gunson and Flay, Council officers;

3.4.3 Mr J T Williams, the third respondent (**J T Williams**);

3.4.4 Mr D Williams and Mr J T Williams as trustees of the fourth respondent (**Aladdin Trust**);

3.4.5 Mr S Piggin, counsel for the sixth and seventh respondents (**F Murphy** and **P Murphy**);

3.4.6 Mr R Knol, the business manager, and Mr D Hesketh, the area manager, of the eighth respondent (**Plaster Systems**).

3.5 Also at the hearing was Mr G Bianca, a respondent to claim 2109, and the WHRS assessor, Mr W Hursthouse.

3.6 Evidence at the hearing was called:

3.6.1 for the claimants from Mr Peter Atkins. The claimants also relied on the report from the WHRS assessor, Mr Hursthouse, who was examined by all parties (and there was evidence given in support of claim 2109 by Mr Andre De Wet and Mrs Annette De Wet and Mr Bianca which I take into account in the present claim only to the extent that it is relevant);

3.6.2 for the first respondent, the Council, from Morris Ballantine Jones and Alec James Roxburgh;

3.6.3 for the third respondent, Mr J T Williams, from Jason Williams;

3.6.4 for the sixth and seventh respondents, from Francis John Murphy, Philip Murphy, Phillip Wayne Grigg and Jason Thomas Williams (the third respondent) (who had, of course, given evidence on his own behalf).

3.6.5 for the eighth respondent, Plaster Systems, from Robert William Knol.

3.7 The hearing continued on 16 May 2006 and Mr J T Williams was not present from then on; and 17 May 2006, then resumed on 19 May 2006 (and Mr Desmond Sarjant Williams was not present then, neither was Mr Hesketh of Plaster Systems).

3.8 I requested that there be a technical meeting of experts on technical questions chaired by the WHRS assessor, Mr Hursthouse, and that occurred on 15 May 2006 in which there participated Mr Hursthouse, Mr Earley, Mr Roxburgh, Mr Ewen, and Mr Grigg. The purpose was to explore areas where those persons were in agreement or those areas where they were in disagreement. Mr Hursthouse reported back to the conference/hearing later that day that it had been agreed as follows (although there was some departure from this in the evidence that ensued):

3.8.1 That targeted repairs were not appropriate and both units needed to be fully reclad. (In fact in respect of unit B the unit had been fully demolished and rebuilt).

3.8.2 The waterproofing to the block wall of unit B had failed. It was agreed the Council would not have inspected this issue and that none of those experts expected the Council would have inspected.

3.8.3 The caps to the parapets had failed and there was inadequate waterproofing protection to the parapets. One way to achieve waterproofing was a metal capping which had not been installed in accordance with the consent drawings. The capping should have been continuous. The parapets had failed because of inadequate waterproofing. This was a workmanship rather than a design issue.

3.8.4 With respect to the internal guttering there were cap flashings missing and they lacked a suitable overflow which could have been contributing factors.

3.8.5 Where the cladding was in contact with the ground this could cause wicking damage and damage from wicking had been observed although this was significantly less than damage caused by other defects.

3.8.6 With respect to the balustrades:

3.8.6.1 the glass barriers penetrated into the balustrades and this was the most significant defect;

3.8.6.2 the tops of the balustrades lacked waterproofing and no 18B had a flat top. This was the second most significant defect.

3.8.7 With respect to the decks:

3.8.7.1 the cladding was in contact with the deck tiles;

3.8.7.2 there was no significant difference between the floor level and the deck level.

3.8.8 With respect to window installation:

3.8.8.1 this failed because the sealant failed;

3.8.8.2 the 1994 installation detail from Plaster Systems should have been used (and this was challenged later by Mr Hesketh on behalf of Plaster Systems, he not having been a party to that conference).

3.8.9 As to the importance and weighting of issues, the two most significant causes were the parapets issues and the window installation issues mentioned.

3.9 The parties agreed to accept those findings except that Mr Knol on behalf of Plaster Systems indicated there had been no water testing of joinery weatherproof issues and Mr Hesketh for Plaster Systems questioned the suggestion the 1994 Plaster System installation details should have been followed (and I refer to this later). Mr Hursthouse indicated that the Council pre-line inspection was 17 March 2005 and, in his view, there had been insufficient time to bring in the 2005 detail. [I note from Council records that the pre-line for unit B was 5 July 1995 but Mr Hursthouse did not comment on this].

4. The Dwelling

4.1 The two units at 18 Manu Place, Albany, were built between 1994 and 1996. The building consent for the two units was issued on 30 November 1994. At the time the fourth respondents were not the owners of the property, it having been transferred to them on 27 July 1995. I was not given evidence about ownership before that date but it seems uncontentious that the fourth respondents, perhaps in their capacity as trustees of the Aladdin Trust but in any event in their name, were the owners of, or had appropriate equitable interests in the property during the time of construction. Both units were built by the third respondent, J T Williams, at the same time (although unit A was apparently commenced first and proceeded ahead of unit B) using drawings and specifications created by the fifth respondent, Anthony G Smits, trading as The Home Design Co.

4.2 The design of both was substantially the same although there were upper floor interior layout differences and also unit B was higher on site than unit

A. Exterior cladding was a system named Duraplast provided by Plaster Systems (the eighth respondent) and this was applied as to unit A by Mr G Bianca, the tenth respondent in claim 2109, and as to unit B by the sixth and seventh respondents, F J Murphy and P Murphy.

4.3 The application for building consent was made to the territorial authority, the first respondent, the North Shore City Council, and building consent number BG5328 was given on 30 November 1994. There were various inspections during construction by officers of the Council and Field Memoranda and Producer Statements issued. The Code Compliance Certificate for both units was issued by the Council on 29 April 1996.

4.4 The title to unit B shows that it was transferred to A W & L A Godfrey registered 12 January 1996 and then to the claimants registered 9 February 1998. Mr Atkins' evidence was that the agreement for purchase was entered into in December 1997; and that the transfer was as to Mr Atkins as to a one half share and the remaining one half share by the trustees of the Bruce Family Trust (the claimants) (and I shall mention that further below).

4.5 Mr Atkins and his wife lived in the property from July 1998 to July 2002. In 2001 he noticed small brown stains on the kickboards and carpets in the corners of the downstairs bedroom and the outer corner of the upstairs bedroom and lounge. During 2001 his neighbour at 18A told him of flooding to the bottom floors of 18A but Mr & Mrs Atkins did not experience the same problem. Cracking was noticed during a cleaning in 2001 which Mr Atkins sealed.

4.6 Mr & Mrs Atkins moved to San Diego, USA, in January 2002 but in preparing for the move noticed rotting moulding to the carpet under the bookcase in one of the downstairs bedrooms which he thought was due to high humidity.

4.7 The dwelling has been tenanted during Mr & Mrs Atkins' absence from New Zealand and Mr Atkins said that he had maintenance work carried out on an annual basis including the clearing of gutters. He said that when he became suspicious of leaks he made application to the WHRS in October 2003 and that by mid 2004 the tenants were complaining of a musty smell in one of the downstairs bedrooms which was so bad that it could not be occupied; and a concessionary reduction in rental was made.

4.8 The WHRS assessor, Mr Hursthouse, attended the dwelling in June and July 2004 and completed a report dated 31 July 2004 (along with a report of the same date in respect of unit A).

4.9 Mr Atkins explored repair options and obtained assessment and advice from Mr Regan Bycroft of Bycroft Builders Limited as a consequence of which the decision was made to demolish and rebuild unit B. Demolition commenced in May 2005 and photographs were taken by Mr Bycroft which formed part of the material presented to me. Mr Atkins said that the final cost of demolition and rebuild would be "in the order of $350,000.00" as construction had not been completed at the time he gave evidence. The claim is, however, limited to the accurate cost of repairs.

4.10 The assessor, Mr Hursthouse, in his July 2004 report assessed the repairs that he considered were necessary for damage caused and to prevent future damage and obtained a Quantity Surveyor's estimate for the cost of this from Hauraki Marketing Limited at $146,637.65 plus GST. The claimants have themselves commissioned independent costing from CoveKinloch and Rider Hunt Terotech at $210,100.00. Adding documentation costs, project management fees and building consent fees, the total repair costs is claimed by them to be $275,671.50 plus GST.

5. The Claimants and the Claim

5.1 The adjudication claim was, as I have said, brought in the names "Peter Bruce Frederick Atkins, Peter Bruce Frederick Atkins and John Richard Muller as Trustees of The Bruce Family Trust". Clearly that intended that Mr P B F Atkins was a claimant as a trustee and in his own right. The transfer on purchase of 18B Manu Place appears to have been in favour of Mr P B F Atkins as to a one half share and Mr P B F Atkins and Mr J R Muller as to the other half share. The Notice of Adjudication is signed in that manner. It is dated 10 October 2005.

5.2 There was produced to me an agreement for sale and purchase dated 28 February 2005 under which Mr P B F Atkins agreed to sell to P B F Atkins and J R Muller as trustees of "The Bruce Trust" for $137,500.00 the property described as 18B Manu Place, Pinehill, Auckland "as to a half share" with a clause 17 acknowledging that the property required major remedial work costing approximately $150,000.00 and the reduction of the price by $75,000.00; and a resolution of the same day, 28 February 2005, of the trustees of "the Bruce Trust" referring to the Quotable Value valuation of the property at $425,000.00, the requirement for major remedial works estimated to cost $150,000.00 and the resolution of the trustees to purchase the one half share of Mr Atkins for $137,500.00. If the dating of those documents is correct then that had already occurred before the Notice of Adjudication was signed on 10 October 2005.

5.3 Mr Atkins gave evidence that in "early 2005" he instructed solicitors to assist in transferring his half share of the property to the Trust as "purely an estate planning mechanism".

5.4 On 30 March 2006 there was an Amended Notice of Adjudication showing Mr Atkins again as claimant in both his personal capacity and as a trustee

of the Family Trust in which various claims against various respondents were made including:

"Cost of repairs (as if repaired, not demolished and rebuilt) $267,078.00"

5.5 Then when the hearing commenced on 15 May 2006 I was advised there was to be another amendment and at 5.10pm that day was handed an Amended Notice of Adjudication (full details below) which included:

"Loss on sale (assigned)	$75,000.00
Cost of repairs (Trust claim) (after reduction for betterment)	128,634.00 "

5.6 The closing submissions of counsel for the Council referred to the claim as it had been in the 30 March 2006 Amended Notice of Adjudication submitting that the claimants as homeowners could only recover one half of the cost of repairs at maximum, $133,500.39, on the ground that at the time it purchased the one half share of the property it was aware of the weathertightness issues and accepted a $75,000.00 discount to reflect one half of the cost of future repairs.

5.7 It was perhaps in anticipation of that submission that on 11 May 2006 Mr Atkins and the trustees of the Trust signed a deed under which they recorded the claims being made in this adjudication and the terms of the 28 February 2005 agreement and for the consideration of $1.00 paid to him Mr Atkins assigned to the trustees of the Trust all his "rights and remedies in respect of all defects and resultant damage to the dwelling …".

5.8 The end result for the claimants is that the claim is by the trustees of the Family Trust **only** and is for both the one half of repair costs to unit B after allowing for any betterment and the $75,000.00 discount which it says Mr Atkins lost at the time of the sale in February 2005 of his half share in the

home to the Trust because of weathertightness issues and in respect of which the trustees claim they have had a valid assignment.

5.9 Mr Atkins gave evidence quite frankly that these matters affecting the Trust were all part of an estate plan concerning which he and his wife had had legal advice. He frankly considered the dwellinghouse as still his house with all his cash with the cost having initially been provided by him to the Trust acknowledged by the normal Acknowledgement of Debt. He acknowledged that the Deed of Assignment dated only four days earlier had been prepared by the solicitors acting in the weathertight homes claim and not his normal solicitors acting in trust matters. He acknowledged that in February 2005 when the agreement was concluded the price for purchase of Mr Atkins' personal half share was reduced by $75,000.00 to reflect one half of the then expected cost of repairs to the dwelling.

5.10 The Trust's claims are first for its half share of the estimated cost of repairs but also the loss that Mr Atkins suffered personally on the transfer in February 2005 of the half share of which it, the Trust, claims it has effectively taken an assignment. To that extent this claim is different from the normal claim where the owner of the dwelling is claiming the expected cost of repairs (as indeed is the case in relation to unit 18A). Already there has been a reduction in the claim. Whereas the repairs were claimed in March 2006 at $267,078.00, there is now claimed sums totalling approximately $203,634.00 (and that too is variable depending on the individual respondent). Notwithstanding that reduction the Council submits that the claim must be limited to the one half estimated cost of repair because the assignment of $75,000.00 is an assignment of rights to sue rather than rights to receive proceeds consequent upon a decision. It relies on the general principle of law (*Todd, Law of Torts in New Zealand,* 4th ed, para 24.12) that:

> "… a purported assignment of a bare cause of action in tort to a person without any other interest in the subject-matter is without effect."

5.11 As Todd makes clear there are exceptions because the rule:

> "… is aimed at preventing litigation being used as a commodity which can be bought and sold [and] has its roots in the torts of maintenance and champerty …".

5.12 There were no submissions in reply from the claimants and the matter was not fully explored by counsel. My view is that under the WHRS Act a claim can only be made by an "owner" which in this case is, and has been since February 2005, the trustees of the Trust. Mr Atkins has, for estate planning reasons and with legal advice, divested himself of personal ownership and he has taken a reduction in the price that he might otherwise have sold his half share in the property to the Trust for. There were repairs required to the dwellinghouse. The trustees have decided to demolish and rebuild. Their claim against the respondents is for economic loss (and I refer to this in greater detail below). They have taken an assignment of the loss which the former owner, Mr Atkins personally, has suffered and that further loss, $75,000.00, is a loss which the trustees of the Trust are now carrying. Their claim is for a sum which is less than the true cost of repairs. The circumstances in which that has arisen are because of the estate planning steps taken by Mr & Mrs Atkins. The respondents are to benefit from that by facing a lesser claim. In all the circumstances my view is that the claim as presented appropriately includes the $75,000.00 loss which Mr Atkins personally incurred in February 2005 and the benefit of which he has now assigned to the trustees. Mr Atkins could have initiated proceedings in the Court against the respective respondents as defendants claiming that $75,000.00 and, in my view, in the circumstances that pertain and in the context of the process provided by the WHRS Act it is in order for him to have assigned that loss to the present owners, the trustees of the Trust (which does include him as well), and for them to claim that sum.

5.13 The Council also submitted that the assignment was invalid. In reliance on *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1994] 3 NZLR 136 and *M C Quinn & Anor v North Shore City Council & Ors* (Auckland High Court, CP 359/96, 17/5/00, Nicholson J) the Council submitted that there needed to be evidence of an intention to assign rights to recovery of all losses from Mr Atkins to the Trust and that that is not established here because the parties have not so provided in the written agreement they entered into which does not indicate any intention to assign rights to sue. My interpretation of the facts is that in February 2005 for personal reasons Mr Atkins sold his half share in the property to the trustees of the Trust and the parties acknowledged that there was a reduction in the price by $75,000.00 to reflect the necessity for major remedial work. That left Mr Atkins $75,000.00 short on what he might otherwise have expected to receive from that sale (although, of course, it seems the transaction was not at arm's length). He could then have brought proceedings for recovery of that loss against defendants which could have included the present respondents. The assignment dated 11 May 2006 assigned all his rights in respect of the defects and damage to the dwelling including any cause of action against the respondents. It is not a case of considering an assignment by the Trust to Mr Atkins of rights of suit, it is a case of the assignment of such rights of suit as Mr Atkins had in February 2005 when he sold his interest in the property to the Trust at what is effectively a loss.

5.14 Accordingly I allow the claim to include the $75,000.00 mentioned.

5.15 The respective claims in the Amended Notice of Adjudication dated 15 May 2006 do include variable amounts against different respondents and I set these out now:

5.15.1 Against the North Shore City Council and Anthony G Smits (the first and fifth respondents):

Loss on sale (assigned)	$75,000.00
Cost of repairs (Trust claim) (after reduction for betterment)	128,634.00
Consultant's costs	6,735.00
Reduction in rental	4,160.00
Loss of rental during repairs	5,160.00
Interest on $75,000.00 (441 days @ 6.25%)	5,662.00
Interest on $128,634.00 (288 days @ 6.25%)	6,341.00
General damages for distress, anxiety and inconvenience	20,000.00
Total	$251,692.00

5.15.2 Against J Williams (third respondent) and G Williams, J Williams and D Williams (fourth respondents):

Cost of repairs (Trust claim) (after reduction for betterment)	$132,930.00
Loss on sale (assigned)	75,000.00
Consultant's costs	6,735.00
Reduction in rental	4,160.00
Loss of rental during repairs	5,160.00
Interest on $75,000.00 (441 days @ 6.25%)	5,662.00
Interest on $132,930.00 (288 days @ 6.25%)	6,554.00
General damages for distress, anxiety and inconvenience	20,000.00
Total	$256,201.00

5.15.3 Against F J and P Murphy (sixth and seventh respondents):

Cost of repairs (as if repaired, not demolished and rebuilt)	$129,478.00
Loss on sale (assigned)	75,000.00
Consultant's costs	6,735.00
Reduction in rental	4,160.00

Loss of rental during repairs	5,160.00
Interest on $75,000.00 (441 days @ 6.25%)	5,662.00
Interest on $129,634.00 (288 days @ 6.25%)	6,390.00
General damages for distress, anxiety and inconvenience	20,000.00
Total	$252,585.00

5.15.4 Against Plaster Systems Limited (eighth respondent) (further amended on 17 May 2006):

Cost of repairs (as if repaired, not demolished and rebuilt)	82,629.00
Loss on sale (assigned)	75,000.00
Consultant's costs	6,735.00
Reduction in rental	4,160.00
Loss of rental during repairs	5,160.00
Interest on $75,000.00 (441 days @ 6.25%)	5,662.00
Interest on $79,020.00 (288 days @ 6.25%)	3,896.00
General damages for distress, anxiety and inconvenience	20,000.00
Total	$183,242.00

5.15.5 It will be seen that there are not only differences in detail between these claims but also some inconsistencies in the interest claims made and indeed in the total of the claim against Plaster Systems Limited which should have been $203,242.00.

5.16 The claim includes schedules of the eight major defects alleged and the amounts claimed by the claimants against various respondents for each of the eight defects alleged. There is in that process significant duplication because it is claimed that each of those respondents has an individual liability for some or all of the eight items.

5.17 Largely these quantum of claims is not contested by the respondents but the Council specifically raised these issues:

5.17.1 That there should be disallowed the following items on the grounds that these were costs that would have been incurred for maintenance in any event:

Cost of repainting exterior of house	9,300.00
Cost of repainting interior of house	6,614.00
Cost associated with new carpet	3,219.00
Total	$19,133.00

5.17.2 The CoveKinloch Consultants account of 30/6/05, $6,735.00, are costs in preparation for the adjudication.

5.17.3 The claim for the assigned losses of $75,000.00 (if I found that there was a valid assignment) on the ground that this was not included in the Notice of Adjudication. I disallow that objection. The amendment to the Notice of Adjudication was made on 15 May 2006 before the claimants' case was finished. That sum seems to fairly represent one half of the estimated repair costs as at the time of transfer in February 2005.

5.17.4 The reduction in rental claim on the basis that there was no evidence this was suffered by the Trust rather than Mr Atkins personally.

5.17.5 Loss of rental during repairs, $5,160.00, again on the basis that there was no evidence this was suffered by the Trust rather than Mr Atkins personally.

5.17.6 Interest on repair, $13,170.00, on the grounds that Mr Atkins funded the cost of demolition and rebuilding himself.

5.17.7 The general damages claims on the grounds that the claim is only by the trustees as owners of the dwellinghouse and any distress, anxiety or inconvenience was suffered by Mr and/or Mrs Atkins personally.

Maintenance Costs

5.18 The claims are relatively theoretical. First the Trust is not claiming actual repair costs because it has demolished and rebuilt. It is in fact claiming estimated repair costs which were updated to rates current at March 2006. Secondly the claims are now not for the total of those estimated repair costs but one half of them plus the $75,000.00 loss assigned. The painting reduction appears to be conceded because the claimants advised in opening that there was a deduction of $9,810.00 for saving on repaint (inclusive of GST). That is a different figure from the sum mentioned by counsel but is a higher figure and has been deducted. Concerning the remaining deductions suggested (repainting interior and new carpet) totalling $9,833.00, I think that only one half of that sum should be taken because it is only one half that is now claimed, namely **$4,916.50**.

5.19 Certainly a dwelling needs regular maintenance. This dwelling would have been now constructed for some 11 years and in the normal course would have required interior repainting and carpeting at the cost of the owners.

5.20 Accordingly I allow from the Council's proposed deduction the sum of **$4,916.50**.

Consultants' Costs

5.21 The CoveKinloch account of 30 June 2005 for $6,735.00 (net after allowance for costs associated with the mediation) is stated to be for reviewing the report and QS costs and preparation and attendance at the mediation. Although the CoveKinloch letter of 29 March 2006 breaks down "from historical data" the amount for investigating and reporting as against preparation and mediation attendance, there is nothing to suggest that the investigation and reporting is anything other than preparation for the presentation of the claimants' case in this matter which includes the adjudication.

5.22 My view is that costs for that consultation are costs in relation to the adjudication and should be dealt with, and are in fact dealt with below, under s43 of the WHRS Act.

Rental Losses

5.23 The reduction in rental claim, $4,160.00, is for $130.00 per week being the difference between $430.00 per week and $300.00 per week which the Trust agreed with the then tenant as a reduction in the rent for the mustiness and unusability of the downstairs bedrooms from August 2004 to March 2005. This is an actual loss suffered by the Trust because the reduction was made and the tenants were there for that period at that reduced rental. In my view, assuming liability to be found, this is a loss for which damages are properly payable. However the Council secondly refers to the fact that at that time Mr Atkins owned a one half interest in the property and it therefore follows that the loss to the Trust is only one half of that sum and therefore I allow the sum of **$2,080.00**.

5.24 The loss of rental during repairs at $5,160.00 is a theoretical claim based on what the Trust would have lost had it carried out repairs rather than its greater losses from the time taken for demolition and reconstruction and

the claim is for 12 weeks. Although the Council's objection includes that this is not proven to be a loss of the Trust, in my view the facts do not support that for the reasons given above – it was a Trust owned property and the Trust would have suffered loss. However there was no real evidence given to me that the property would have been otherwise tenanted between May and August 2005. Although there had earlier been tenants (and latterly at a reduced rental) it does not automatically follow that there would have been tenanting for that whole period if at all. Accordingly I disallow that claim.

Interest on Repair Costs

5.25 The claim is for $13,170.00 for a 288 day period from 1 August 2005 (being the estimated completion date after 12 weeks of completion commencing May 2005) to 15 May 2006 (the date for hearing). The interest rate claimed is 6.25% being the interest on **Mr Atkins**' term deposits. Mr Atkins produced **his and his wife's** bank statements showing rates payable on term investments which exceeded 6.25%. Again this is a significantly theoretical claim because there was no demolition and reconstruction, there was no expenditure of repair costs as such, and the interest evidence does not relate to the Trust's bank position.

5.26 The power to award interest in a claim under the WHRS Act is contained in Clause 15 to the Schedule and that permits discretionary inclusion of interest at a rate not exceeding the 90-day bill rate plus 2%. There have been awarded in other adjudications interest pursuant to that clause but normally this arises only where there has in fact been expenditure on repairs and the interest is to reimburse interest on borrowing for that expenditure or interest that would have been otherwise earned on the monies spent on repairs.

5.27 The Council's objection is that the funding of actual work (demolition and reconstruction) was by Mr Atkins personally and that the Trust therefore has not incurred expenditure or suffered loss. Again I think that the boundaries between Mr Atkins personally and his Trust have been significantly blurred. The law must take into account the correct legal position concerning Trusts and I am sure that Mr Atkins (and probably every other person who has a family trust) would want to take advantage of the legal differences where appropriate. That has the downside that there must be proper accounting between individuals and family trusts and there must be proper application of legal principles. I am left with the distinct impression that Mr Atkins has not kept the distinction between his personal position and that of his family trust as distinct as he might have. The inclusion of his personal bank statements as evidence of interest entitlement is but one example. His evidence was clearly along the lines that he had done what he was advised to do to achieve a trust but there does not seem to have been ongoing maintenance of the distinct records and entities. I accept the Council's position that there is insufficient evidence that the Trust has incurred the cost of demolition and reconstruction. I exercise my discretion under clause 15 Schedule WHRS Act to disallow the claim for interest.

General Damages

5.28 The claim for general damages of $20,000.00 for "distress, anxiety and inconvenience" was not made in the original Notice of Adjudication but was included in the 30 March 2006 Amended Notice of Adjudication signed by Mr Atkins apparently personally but naming him and the trustees of the Family Trust as claimants. That was, of course, after Mr Atkins had transferred his half interest for a reduced sum to the Family Trust trustees. The 15 May 2006 Amended Notice of Adjudication (also purporting to be signed by Mr Atkins personally) continued that claim for the same amount.

5.29 The submissions from the Council included submissions in respect of the claim for unit 18A, claim 2109, where the Council had expressly acknowledged that it accepted that it may be appropriate to award those claimants a sum for general damages. The submissions included reference to a significant number of cases on the subject of general damages and acknowledge that:

> "… there has been an increase in the level of general damages awards over the last 5 – 10 years".

Those submissions do include, however, that:

> "… academic writers comment that awards are generally on the low side and as [Law of Torts in New Zealand, 4th edition – Todd] has said, awards of $20,000.00 - $25,000.00 must therefore be seen at the top end of the scale"

referring to that text.

5.30 The Council also submitted on the basis of the authorities that when an award of general damages is made it must be made in respect of the individual respondents based on the measure of the effect that events have caused to that particular claimant by that particular respondent and not an award which is the subject of concurrent tortfeasorship rules.

5.31 In respect of this claim the Council submits that Mr Atkins could not confirm whether the claim for general damages was made by him personally or by him as a trustee or was a claim by the Trust. It submitted that Mr Atkins could not claim personally as he was no longer the owner and prior to the transfer of his ownership he did not live in the house after the time when water ingress issues became apparent.

5.32 The sixth and seventh respondents submitted that the property was operated as a rental investment property and that Mr Atkins no longer lived

there. On general principles, they submitted, damages are not recoverable in respect of "commercial type ventures".

5.33 The basis for the claim is the evidence from Mr Atkins that he has "lost a lot of sleep ever since the WHRS report came out" and still loses sleep "worrying about it all". He referred to the stress and disappointment of owning a leaky building, the huge financial cost and attending to resolution issues particularly at a distance.

5.34 The authorities were extensively considered in *Chase v De Groot* [1994] 1 NZLR 613 and *Attorney-General v Niania* [1994] 3 NZLR 106. In *Waitakere City Council v Sean Smith* (District Court; CIV 2004-090-1757; 28/1/05; Judge McElrea) it was affirmed that the purpose and intent of the WHRS Act enhances the power to award general damages and in *Maureen Young and Porirua City Council v Dennis and Jane McQuad & Ors* (District Court; CIV 2003-392-2004; Judge Barber) the Court followed that principle and increased the amount awarded by the Weathertight Homes adjudicator.

5.35 In addition to the authorities cited by the Council there are also the decisions of adjudicators in adjudications under the WHRS Act. These have ranged between $2,000.00 and $18,000.00.

5.36 Those cases all concerned owner/residents who have had the personal and direct trauma of living in the leaky home and the significant disruption to their lifestyle there with associated issues of health risk or suffering and the unsightliness of a home in a state of deterioration pending completion of processing of their claims, recovery of monies and repairs. That is not the case here. Although the tenants may have suffered inconvenience which occasioned the reduction in rental (and I have allowed that to the proper extent above) this has been otherwise a commercial investment for the Trust. The rental from the investment should have been received by it

and processed by it and it should have been the Trust which has funded in an appropriate way the demolition and repair costs. Mr & Mrs Atkins have not been in the home at any time during the presence of leaks or damage nor have they personally suffered any of the normal trauma that I have mentioned above. Certainly issues concerning construction defects are stressful as is the required process of having these repaired. I do not, however, consider in this case that that is sufficient basis for an award of general damages and I disallow that claim.

5.37 Accordingly the claims to be considered are:

Half cost of repairs to various building elements	varied
Less deduction half remedial costs	4,916.50
Plus assigned losses from P Atkins	75,000.00
Plus reduction in rental	2,080.00
Total	varied

5.38 I will consider individual respondents' liability to those damages as I deal with each respondent.

6. Causation of Leaks and Damage

6.1 The claim refers to eight defects causing water entry and damage and requiring repair at the costs mentioned above, namely:

6.1.1 cladding taken below ground and floor to external ground levels inadequate;

6.1.2 inadequate waterproofing detail to parapet tops to front gable and side elevations;

6.1.3 inadequate sill and jamb flashings to aluminium window and door joinery;

6.1.4 failure of flashings at either end of central internal gutter;

6.1.5 cladding taken hard down onto paved decks;

6.1.6 glass penetrating flat tops of balustrades on front decks;

6.1.7 failure of intersection between solid balustrades and external house wall;

6.1.8 failure of waterproofing system rear masonry retaining wall.

6.2 It is claimed that the builder, Mr Jason Williams, has a liability for the damage caused by each of those defects, that the Council and Mr Smits have a liability in respect of items 1 to 7, and that the plasterers, F & P Murphy, have a liability in respect of items 1, 3 and 5.

Parapet Tops and Detail

6.3 The technical meeting of experts referred to at paragraph 3.8 above identified the parapets issues and the window installation issues as the most significant causes of water entry and damage, that is items 2 and 3 in paragraph 6.1 above.

6.4 Mr Earley's evidence was that the parapets are at the side, north-east and south-west elevations and had been constructed flat with the fibre cement backer nailed directly to the timber and plastered over. To the front and rear elevations there were a pair of raking parapet gables constructed and on the front south-east elevation the raking parapet had a metal capping which terminated behind the plaster instead of more appropriately over the

top. Moisture has been penetrating the side parapet tops through nail fixing penetrations made worse by the flat surface. Moisture was, Mr Earley said, also penetrating the raking junction between the cladding and the parapet capping.

6.5 The WHRS assessor said in his report that the March 1995 Duraplast specifications of Plaster Systems Limited showed two alternatives, one of which was on the consented plans, namely a metal capping, but that three different systems had been used and only one of these was in accordance with manufacturer's details. He said that the four sloping parapets at the rear were clad with four metal cappings which were working but the sloping parapets at the front were almost completely covered with metal flashings which turned down over the Hardiflex in front of the plaster coating allowing water to soak into the plaster coating and into the Hardibacker.

6.6 Mr Grigg, called as a witness for the plasterers Mr Francis Murphy and Mr Philip Murphy, largely confirmed Mr Earley's evidence as to the construction. He referred at some length to design issues. The drawings provided for H1 framing "clad in Hardibacker & plaster prefinished steel capping to flashtop". The specification called for the roofing contractor to:

> "… adequately and neatly secure all ridgings, cappings and overflashings wherever needed to make and keep **roof** watertight" (emphasis added)

and in respect of the plumber that the inclusion of flashings meant that these should:

> "… be of the quality expected of work customarily done by plumbers"

(and that does not of itself in my opinion impose flashing obligations on the plumber).

As to flashings, the Plumber section also provided:

> "Wherever possible use flashings that are readily available, purpose-made by the roof cladding manufacturer to suit the roofing material and profile selected. Otherwise provide flashings as recommended but not supplied by cladding manufacturer and adequately secure. Flash wherever needed to making and keeping roof watertight …"

6.7 Mr Grigg said that the drawings made it clear that there was to be a metal cap flashing to be installed and that, "following normal trade practice", flashing would be undertaken by the roofer, plumber or main builder after the plasterers had finished.

6.8 As with Mr Earley, Mr Grigg referred to the designer having used the first of the March 1995 Duraplast detail sheets with rigid metal flashing. In respect of the builder he said this had been done "to some extent". As to the gable flashings at the rear, the builder installed full metal flashings. On the front of the house the metal flashings extended half way across the gable parapets; and on the side parapets the builder has substituted butynol underneath the Hardibacker on the parapet tops, an express departure from the specification.

6.9 Mr Roxburgh of the Council gave evidence which primarily addressed Council's inspection obligations and did not appear to disagree with the design and construction issues mentioned by other witnesses except that he expressed the view that water ingress at the level in question will also have been contributed to by the failure of gutter linings and waterproofing details (item 4 in the defects list) and he said that it was:

> "… highly likely that water ingressed significantly in and around the gutters through lack of maintenance."

6.10 These respective views were canvassed at the technical meeting mentioned and, as I have said at paragraph 3.8.3 above, it was agreed by those present that the caps to the parapets had failed and there was inadequate waterproofing protection to the parapets. A metal capping had

not been installed in accordance with the consent drawings and any capping should have been continuous. It had been agreed that the parapets had failed because of inadequate waterproofing. It was also agreed that this was a workmanship rather than a design issue.

6.11 The builder, Mr Jason Williams, in written statements dated 23 April 2006 which he affirmed at the hearing said in relation to the front gable flashings that these were installed by the roofing contractor, John Watts (not a respondent to this claim), who he said was "solely responsible for this procedure and paid in full by the Aladdin Trust [the fourth respondents] for material and labour". As to the side elevations, he said they were waterproofed and inspected by the plasterers, Mr Philip Murphy and Mr Francis Murphy, but essentially does not deny the evidence referred to as to leaks causation or damage.

6.12 Likewise the response and evidence from Plaster Systems Limited, while denying liability for reasons I shall mention, did not offer any alternative opinion on water entry or damage.

6.13 Accordingly I find that there were leaks in respect of parapet tops which arose from faulty construction methods. I shall deal with the respective liabilities of the parties below.

6.14 As to the cost of that remedial work, this was put by Mr Earley and not effectively disputed by other parties as follows:

Repair Detail and Location	**Repair Cost**
Reclad side elevations and rebuild internal gutters parapets:	
North-east elevation	44,094.00
South-west elevation	49,410.00
Parapets	14,700.00
Total (excluding GST)	$108,204.00
Total (including GST)	**$121,729.50**

Joinery Flashings

6.15 This was the second issue identified at the technical conference as one of the most significant causes of water entry and damage.

6.16 A measure of agreement was reached between the technical experts at their meeting and, as I have said at paragraph 3.8.8:

6.16.1 the window installation failed because the sealant failed;

6.16.2 the 1994 installation detail from Plaster Systems should have been used (and again this was challenged by Mr Hesketh).

6.17 Different considerations apply in respect of 18B Manu Place where the plasterers were the sixth and seventh respondents, Mr Francis Murphy and Mr Philip Murphy, from those that apply in respect of 18A where the plasterer was the tenth respondent in claim 2109, Mr Bianca.

6.18 The window installation and associated Duraplast system application required to follow the appropriate Duraplast specifications and manuals and required to comply with good trade practice.

6.19 The Duraplast system details provided for fixed face installation of windows or recessed and there were two versions of those system details discussed, one dated July 1994 and the other March 1995.

6.20 Mr Earley produced an "As Built" detail which at first referred to 18A but which he then corrected as referring to 18B (that is, as implicated in the plastering work of Messrs Murphy).

6.21 Mr Earley said in his evidence that the cladding to window joinery construction for unit 18B was a departure from the manufacturer's installation requirements and had failed. He said that the construction followed neither option in the Duraplast details (face fixed or recessed) but more closely resembled the face fixed detail. He produced an "As Built" sketch showing a flange which had been used by the plasterers on unit 18B in an attempt to deal with the situation of the windows being neither face fixed nor recessed. He said there was an absence of head flashing to the garage door framing which was a departure from the Acceptable Solution of the Building Code and which was allowing moisture penetration.

6.22 Mr Roxburgh for the Council said that the more relevant Duraplast details were those of March 1995 and that:

> "… the plasterer has made a closer attempt to follow these than the 1994 details but still failed to execute the detail correctly."

It is quite unclear from that whether he was referring to unit 18A or unit 18B.

6.23 Mr Grigg, the witness for the Murphys, was unable to inspect 18B where they were implicated because it had by then (16 June 2005) been removed but he did inspect the site at no 18 Manu Place. He assumed that the detail for 18A was the same as shown in photographs in the WHRS assessor's report for unit B (claim 1505). He said that the fitted window joinery was closer to the 1994 Duraplast recessed window option rather than the face fixed option. The recessed window option had two alternative UPVC flashing options in the March 1995 detail, an "L" shape and a "Z" shape.

6.24 With reference to the As Built detail from Mr Earley for no 18B, Mr Grigg said that this would produce a far better waterproofing option than the then

current Duraplast specification. The As Built detail showed the "L" flashing across the top of the polystyrene screed guide which Mr Grigg said would direct moisture away from the Hardibacker board to the outside face of the cladding system where the Duraplast plaster mixture is located. By contrast, the July 1994 Duraplast system detail showed the "L" flashing as being **behind** the Hardibacker in respect of recessed window, but in respect of the fixed face joinery did not show a flange at all but merely the outside of the joinery being separated from the Hardibacker by sealant. In respect of 18B, Mr Grigg said that the As Built detail was faithful to the Plaster System's Duraplast specification.

6.25 In reply Mr Earley said, in relation to similar evidence concerning no 18A, that in his opinion it was:

> "… clear from the positioning of the window that the intention was for a face fixed option for windows [and they] have been incorrectly placed to achieve a face fixed installation and it is apparent that the plasterer has adapted the plaster installation to suit. As the installation is different than that specified by the plaster manufacturer and the windows have subsequently failed, responsibility for the defect should be attributed to the plasterer as opposed to Plaster Systems (unless the construction was confirmed on site by a plaster systems representative, as recently alleged by the Builder)."

6.26 Mr Grigg also said that another point of water egress "**can** occur" (emphasis added) on the mitre corners of the windows but he had been unable to ascertain in respect of either unit whether there were any inbuilt drainholes for the windows and gave speculative evidence about the possibility of mitre joints splitting.

6.27 The assessor in his original report had referred to the July 1994 faced fixed joinery Duraplast detail (with the joinery outside the Hardibacker and sealed with sealant) and photographs of 18B that he had taken which showed the window embedded in the plaster and concluded that:

> "By embedding the joinery, surface water is diverted into the lightweight plaster soaking sideways and reaching the framing."

In his supplementary report the assessor had seen the recessed window detail and concluded that:

> "The flashings installed to the side and sill … so closely resemble a Plaster System installation detail which was current at the time that in [his] opinion the installers can be said to have followed it faithfully."

6.28 There was some evidence and discussion about the time for application of the March 1995 Plaster Systems Duraplast system detail. Mr Grigg had been unable to find it amongst his firm's library resources. Plaster Systems were unable to give clear evidence as to when the detail was distributed or would have been available to the respective plasterers at 18 Manu Place. The approval from BRANZ to the 1995 Duraplast detail is dated May 1995 but I do not think that is significant. The detail was available earlier than that and I was told that the relevant flanges would have been available earlier too.

6.29 In my view if the 1994 detail had been deficient to such an extent that this justified correction in the 1995 detail it was incumbent on Plaster Systems to make sure that its contractors and applicators were well aware of the changes and had their attention specifically drawn to the changes that had occurred. In this case a Plaster Systems representative, Mr Bakker, attended the site from time to time and, if the necessity to change the flange detail from the 1994 detail had been an issue then it was for him, in my view, to make this quite clear to the respective plasterers. There was no evidence that he did so. In fact Mr Bianca's evidence in respect of unit 18A was to the contrary, namely that he worked on the basis of advice from Mr Bakker who was the on-site training manager and technical adviser and his job on site:

> "… was to ensure that the standard of work that we carried out was up to Plaster Systems Ltd standards. If there were any problems with the work

> that we done [sic] it was the responsibility of the builder to approach us, so that we may fix the problem within the guarantee period, the builder did not approach us and Plaster Systems Ltd approved the standard work without question."

Mr Philip Murphy also referred to a representative from Plaster Systems having visited the site "three or four times" and said that he:

> "… came to check whether the job was going OK and to look at the job because it was a new product at the time. He was not there to take orders for materials …".

My view is that in those circumstances it was quite in order for the plasterers in each case to follow the July 1994 detail.

6.30 At the expert technical meeting mentioned it was agreed between those participating, as I have said at paragraph 3.8 above, that the 1994 installation detail should have been used and, as I have said, I accept that.

6.31 It was also agreed that the window installation failed because the sealant failed. Mr Grigg was a party to that meeting and a witness on behalf of Messrs Murphy.

6.32 Mr Grigg said in evidence (and his evidence at the time was addressed to both units because Mr Philip Murphy was then a respondent in respect of unit 18A) that the Hardibacker solid plaster system required that windows be sealed with:

> "… a good quality polyurethane sealant such as Sikaflex II FC".

He said that a polyurethane sealant works if there are only two surfaces to be sealed but is not usually adequate for three surfaces where there is required to be a bond breaker. I was referred to the Sikaflex construction detail which read:

> "If the joint has a solid, formed base it is essential to apply a bondbreaker tape to this surface in order to prevent back adhesion. This will then allow the sealant unrestrained movement throughout the depth of the joint."

Mr Grigg, in reference to unit 18B, said that the photographs showed the three surfaces to be waterproofed and therefore the need for a bond breaker. Mr Grigg said that it appeared that the sealant in a photograph to unit 18B looked similar to the requirement of the detail in the Duraplast system 1994 detail but that detail does not show a bond breaker and should have done to comply with the Sikaflex requirements.

6.33 Having considered all these issues I have come to these conclusions. First, different considerations may apply to unit 18A from those to unit 18B. It seems that unit 18B was constructed **after** unit 18A and there may have been experiences learned from unit 18A by the respective participants. There was the different plasterer involved in unit A (Mr Bianca) from unit B (Messrs Murphy). In respect of both units the applicable Duraplast system was the 1994 detail. That detail in respect of the recessed window required an L flashing and in respect of face fixed joinery required the joinery to abut the Harditex or the polystyrene screed but with an adequate sealant. The construction of both units was unclear as to whether there were recessed or face fixed joinery used and the plasterers in each case had to adapt the application of the Duraplast system to cope with the specific As Built detail. In respect of unit 18B, the plasterers (Messrs Murphy) have used an L shaped flange which has been as effective, if not more so, than the Duraplast system drawings in having drawn the water away from and over the Hardibacker surface. Where a bond breaker was required in respect of three surfaces this has not been provided as required by the Sikaflex specification.

6.34 I do not find there has been evidence of other causation of leaks in respect of the joinery, particularly as to the suggestion of the mitred corners being

defective or having been driven out of shape. Although there was some evidence of that possibility, in my view that evidence is not sufficiently compelling and I have the view of the technical experts that the primary cause of leaks in this area was sealant failure. Accordingly my view is that the cause of damage in respect of this aspect of the work was in respect of unit 18A the absence of any adequate flange, the absence of a bond breaker where required and inadequate application of sealant. In respect of unit 18B the cause of leaks was the absence of a bond breaker where required and inadequate application of sealant, although this was relieved to a degree by the use of an operative flange.

6.35 The moisture entry in the garage door area is from the absence of flashing which Mr Philip Murphy said was not his responsibility and which was not contested in evidence by Mr Jason Williams.

6.36 As to the cost of remedial work from this cause, Mr Earley has given evidence that there has been extensive decay to the cantilevered joists on the north-east elevation and raised moisture readings below the windows on the remaining elevations and that repairs totalling $149,200.00 plus GST are required made up as follows:

North-west elevation	18,055.00
South-east elevation	28,241.00
South-west elevation	49,410.00
North-east elevation	44,094.00
Rear deck	1,500.00
Repairs to lounge floor	7,900.00
Total (excluding GST)	$149,200.00
Total (including GST)	**$167,850.00**

Cladding to Ground

6.37 Having regard to the technical expert discussion on primary causes of leaking and damage and to the schedule of repair costs outlined by Mr Earley in respect of each category of claimed damage, this is a relatively minor matter. The amounts he attributes to the total cost of repairs where cladding to the ground may be an issue, a total of $131,145.00 plus GST, comprises:

South-east elevation	28,241.00
South-west elevation	49,410.00
North-east elevation	44,094.00
Nib wall	9,400.00
Total (excluding GST)	$131,145.00
Total (including GST)	**$147,538.13**

6.38 It will be seen that there is duplication in some of this repair detail with items already mentioned and with items still to be mentioned. Those issues are taken into account in respect of individual liability and then contribution in due course.

6.39 The assessor referred to the causes of water entering the dwellinghouse as including:

> "… buried cladding, outside finished levels high relative to the inside floor level".

His report referred to the required break between the bottom of the sheet for Duraplast and the finished ground level.

6.40 Mr Earley spoke of the cladding having been taken down to the ground level at the front (south-east) elevation and the side (north-east and south-west) elevations. He referred to the wicking of moisture having occurred and the moisture meter readings taken by the assessor. He referred to the

Acceptable Solution under the Building Code no E2/AS1 requiring a floor to ground separation of 150mm to paved ground and 225mm to unpaved. He also referred, as did the assessor, to Performance Clause E2.3.3 of the Building Code.

6.41 Mr Roxburgh confirmed that cladding in contact with the concrete around the house is contrary to the requirements of NZS3604:1990 – Light Timber Framed Buildings. He opined that:

> "[t]he problem of plaster in contact with the ground was not considered to be of high risk **at the time**. There are a lot of houses that were built without such a break between the plaster and the ground." (emphasis added)

Mr Earley disagreed with this given the specific reference to it in clause E2.3.3 of the Building Code. Mr Grigg referred to the requirement of the James Hardie December 1994 Technical Detail for Hardibacker sheets for a 50mm overhang below the bottom plate and the concrete floor. He also referred to the need for Hardibacker to be covered with plaster and concluded that:

> "… the builder sets the base level of the Hardibacker sheets and the plasterers would have plastered up to that edge."

6.42 Mr Jones for the Council said that it would only be areas not under cover which would have been considered at risk.

6.43 There seems to be unanimity (and there was no evidence from other parties to the contrary) that there was inadequate ground clearance between the ground and the cladding surface and, in my view, that has been a contributing factor to the entry of water and damage, although a relatively minor one by comparison to other issues raised.

Failure of Flashings at Central Internal Gutter

6.44 There is decayed wall framing below the gutter ends. The assessor has described that, of the three full length internal gutters, the two outside gutters each have one 65mm outlet properly installed, but the single outlet should have been fitted with a comfortable safety margin in terms of coping with volume to comply with clause E1 4.2.1 Table 5 of the Building Code but there was no overflow fitted to either side. He said that the design and execution of the gutter have allowed water to enter soaking the wall. As to the central gutter he said that this had a good overflow facility at the rear but that terminated in a large galvanised sheet metal rainhead which was rusting and allowing water to enter the wall cavity below.

6.45 Mr Earley described that the central parapet to the gutter ends has been inadequately flashed and linked in with the raking parapets of the gables with the effect that the raking parapets are channelling water toward to the vulnerable junction. He said moisture is then entering the wall framing below with decay as highlighted by the assessor's report. He said the photographs showed a "poorly formed and weatherproofed central gutter parapet detail".

6.46 Mr Roxburgh disagreed that the construction was not in accordance with the plans because he could find no reference on the plans or in the specifications to flashings at the end of this internal gutter. He said the gutters were adequately flashed with a butyl rubber flashing that has subsequently failed and his opinion was that this was a major cause of water ingress and one that contributed greatly to the need to demolish. That was an opinion expressed at the time of his brief of evidence but was, I take it, superseded by the discussion of technical experts referred to at paragraph 3.8 where it had been agreed by persons including Mr Roxburgh that the two most significant causes were the parapets issues and the window installation issues mentioned earlier.

6.47 Mr Grigg did not give evidence expressly relating to this issue except to the extent that it was part of the flashings-to-parapets issue mentioned earlier.

6.48 This matter was discussed by the technical experts where they agreed that the internal guttering lacked cap flashings and a suitable overflow and these could have been contributing factors.

6.49 Having considered the evidence carefully I have formed the conclusion that entry of water at this point was a factor and has contributed to the damage caused in the relevant areas. This has been poorly designed to cope with the water flow and has not been manufactured to deal with the adequate disposal of stormwater to an internal guttering such as this.

6.50 The amount of repair costs have been itemised by Mr Earley as follows:

North-west elevation	18,055.00
`South-east elevation	28,241.00
Rear deck	1,500.00
Total (excluding GST)	$47,796.00
Total (including GST)	**$53,770.50**

Contributory Negligence

6.51 Claims were made by the respondents that the claimants have contributed to the damage from this cause by their own negligence in failing adequately to maintain the gutters and allowing debris and other material to collect.

6.52 Under the Contributory Negligence Act 1947 s3 provides:

> "Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person

> suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility of the damage."

6.53 The Council's submissions were that the evidence that the gutters had not been regularly cleaned "would impact upon the extent of water damage" and the submissions for Messrs Murphy were that "lack of maintenance was a contributing factor".

6.54 The WHRS assessor in his report certainly referred to the internal gutters having been:

> "… found to be all blocked with vegetation"

and photographs that he took at the time showed this; although he also said that it was:

> "… hard to know what effect this may have had in terms of water damage to the framing."

6.55 Other witnesses had not seen unit 18B before it was demolished and had to rely on photographs. Mr Earley said that there was a large pine tree on an adjoining property which dropped pine needles on his property and that he had the gutters cleaned out on a six monthly basis which he undertook personally but I am not sure that this continued after the move to San Diego in January 2002 and certainly the WHRS photographs show a significant build-up of debris as mentioned by the assessor.

6.56 The authorities all indicate that an assessment must be made in terms of s3 of the Contributory Negligence Act 1947 having regard to the factual matrix and the respective contribution of the negligence to the damage. I have formed the view that the claim should be reduced in this case pursuant to s3 because I think there is sufficient evidence of a negligent failure to maintain the gutters which has contributed to the damage

resulting. Having regard to the evidence which I have I have fixed that at **15%**.

6.57 Accordingly the claimed repair costs for these items total $53,770.50 including GST. However the repair items in this category are all items of repair from other causes and I have formed the view that, having regard to all those factors, the proper course is to make a reduction in the amount claimed of **$6,000.00** to reflect the contribution that that lack of maintenance has made to the total damage.

Cladding Hard to Paved Decks/Glass Penetration Flat Tops of Balustrades/Failure of Intersection Solid Balustrades and External House Wall

6.58 I have considered these three matters together although they were discussed separately in the evidence. This is first because that proportion of the repair costs attributed by Mr Earley is the same for each, that is that he has said that those repair costs are occasioned by one or other or both of those causes. The second is that they do relate to the same general areas of the dwellinghouse.

6.59 The amount Mr Earley has attributed from repair costs to remedial work in respect of this issue for rebuilding the deck balustrades, replacing the deck joists, decking membrane, tiling etc and recladding the front elevation totals $57,403.00 made up of:

South-east elevation	28,241.00
Front decks	23,500.00
Internal repairs to master bedroom	5,662.00
Total (excluding GST)	$57,403.00
Total (including GST)	**$64,578.38**

6.60 Again the technical experts agreed that the cladding was in contact with the deck tiles. There was no evidence to the contrary and that is common ground.

6.61 As to the glass barriers penetration into the balustrades, it was agreed that this was the most significant defect in this area and that the tops of the balustrades lacked waterproofing (and in the case of unit 18B had a flat top).

6.62 The assessor's report refers to this item as a situation where the cladding has come down onto the two cantilevered decks at the front of the house but there has been no capillary break between the cladding and the deck tiles and that is quite apparent from the photograph. He refers also to the outer barrier to each of those decks as a combination of glass and plastered wooden framing where the glass has been recessed into the top of the plastered walls and again this is shown in the photographs. There is advanced decay with high water meter readings.

6.63 Mr Earley has also referred to this defect and its non-compliance with Performance Clause E2.3.3 of the Building Code and by reference to the 1994 Duraplast Technical Details.

6.64 Greater damage is caused by gravity induced moisture than moisture from wicking and the evidence confirmed that.

6.65 Mr Earley in his evidence described the glass penetration into the top of the balustrade walls and its being held in place by a rubber gasket. This allowed moisture to run down the face of the glass and enter at the glass-to-plaster junction through gaps in the gaskets, penetration of the timber and damage. The requirements of Performance Clause E2.3.2 of the Building Code are:

> "Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements."

6.66 As to the junction between the balustrades and the external wall, he described this as "high risk … if it is not properly flashed".

6.67 Although Mr Roxburgh said there was no guidance at the time regarding installation and weatherproofing of penetrations and that the plastered balustrades sloped away from the glass at a greater slope than shown in the Plaster Systems March 1995 detail sheet, he did not comment further on whether this was a cause of penetration of water. As to the balustrades/house wall intersection he said that this is often referred to as "a lack of saddle flashings" [which] is a common defect …".

6.68 Mr Grigg's evidence addressed responsibility issues but did not expressly address the glass penetration issue. He referred to a trough drain installed at the junction of the external wall and the deck which indicated consideration by someone of the issue of drainage from the deck.

6.69 In my view there has been water penetration in this area caused mainly by the design and construction of the glass penetrations to the balustrades and the absence of saddle flashings but also to a degree by the wicking effect of the cladding being hard to the deck.

Failure of Waterproofing System: Masonry Retaining Wall

6.70 Mr Earley's evidence was that the rear elevation wall to two bedrooms was of masonry construction retaining ground to the rear of the property to the full height of the wall. By reference to the WHRS assessor's report and photographs he said that there had been a failure of the waterproof membrane along the length of the wall with resultant moisture entry and damage. He said that the design was in accordance with the Building Code but that there had been a failure by the builder to achieve the

performance standards of the Building Code in respect of External Moisture (refer below). It is only in respect of the builder that this claim for $7,638.00 plus GST, **$8,592.75**, is made.

6.71 I turn now to the individual respondents and claimed liability.

7. Liability: Jason Thomas Williams – Builder – Third Respondent

7.1 It is claimed that, on the authority of *Chase v De Groot* mentioned above, the builder owes a duty of care to future owners to take reasonable care to build the house in accordance with the building consent and the relevant Building Code and Bylaws; and on the authority of *Bowen v Paramount Buildings (Hamilton) Ltd* [1971] 1 NZLR 394 that a builder is liable to subsequent homeowners for reasonably foreseeable damage caused by his work. It was submitted that the builder has ultimate responsibility for construction of the dwelling even if work was done by other contractors or subcontractors and reliance was placed on the Weathertight Homes decisions in claims 1917 (*Hay v Dodds*) and 2601 (*Nikora & Ors v Whakatane District Council & Ors*) and also *Cashfield House Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452.

7.2 The evidence to support that claim comes from Mr Earley who said in respect of each of the eight aspects of defect that, in his view, Mr J T Williams had failed in his responsibilities. He said the same in respect of plastering by Mr Philip Murphy and objection was taken on Mr Murphy's behalf on the grounds that that was the ultimate question for the adjudication to decide. I think that objection also extends to Mr J T Williams although he did not personally raise it. It is not for a witness to decide whether a party has failed a responsibility but rather for the adjudication to decide that. I therefore limit my acceptance of the evidence from Mr Earley in this regard to it being evidence from him that, in his view, Mr J T Williams had an obligation as builder in each particular aspect.

7.3 In his response, which he affirmed in evidence, Mr Williams said that he was 25 years of age at the time and was employed by the Aladdin Trust to construct the house. The trustees of the Aladdin Trust are, of course, the fourth respondents and include Mr Williams. He said that he was fully qualified but had limited experience in site management and control of subcontractors and was employed on a labour-only contract with his brother, Grant Williams. Grant Williams did not participate in the hearing or indeed in the claim at all. Mr Jason Williams said at the hearing that he was essentially the project manager. Mr Jason Williams said he:

> "… put full trust in the contractors who were employed by Aladdin Trust to do a quality job in their areas of expertise ie Roofers, plumbers, butynol, electricians, plasterers etc; and relied on their professional skills."

However no contracts were produced. The contract between Jason Williams and the trustees of the Aladdin Trust was oral and nothing in writing but apparently contractors were paid direct by Aladdin Trust.

7.4 Mr Jason Williams said that the house was built in accordance with the Building Code and that:

> "… the market dictated the quality of materials used, the quality and practicality of the materials were compromised in favor of aesthetics. Building codes were relaxed …"

In Mr Williams' opinion the Council should hold full legal responsibility for inspections, advice given, rechecks and issue of Code Compliance.

7.5 He said in respect of unit 18A that Mr Bianca had done a "substandard job of the plastering". He referred to there being no control joints and other issues concerning the plastering. In his response concerning unit 18B he did not elaborate in detail except to say that the plasterer was Philip

Murphy. I do not know if he is alleging that Mr Murphy did "a substandard job" or not. Certainly there was no evidence from him to that effect.

7.6 Mr Williams expressed the view that Plaster Systems Limited:

> "… sold an inferior product with limited information for the plasterers."

7.7 His response referred to the passage of time since construction and that there had been no complaint to him in that time. It referred also to there having been "much neglect".

7.8 Mr Jason Williams did not attend the hearing beyond the first day and did not hear or question further evidence that was given.

7.9 The requirement of s7(1) Building Act 1991 applicable at the time was:

> "(1) All building work shall comply with the building code to the extent required by [the Building Act], whether or not a building consent is required in respect of that work."

7.10 The scheme of the Act was to provide a performance based code. This is contained in the Building Regulations 1992. Clause E2.2 had as its Functional Requirement:

> "Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside."

Clause E2.3.2 as to Performance read:

> "Roofs and exterior walls shall prevent the penetration of water that cause undue dampness or damage to building elements."

7.11 Those requirements and the authority of the cases referred to above have led me to conclude that Mr Jason Williams was the builder in all respects of this dwellinghouse and he had the obligation to achieve those performance standards. He owed a duty of care to future owners,

including the claimants, to take reasonable care and he had a liability to subsequent owners for reasonably foreseeable damage caused by his work.

7.12 As to other contractors on site, I have formed this view. They may have been paid direct by the trustees of the Aladdin Trust but there is otherwise not sufficient evidence of the independence of their contractual relationship to negate the ultimate responsibility that Mr Jason Williams had for the construction of the dwelling. He was one of the trustees. Although he may have been a labour-only builder (and there was no real evidence about that from him) his close involvement in the whole project was such as to place on him the legal responsibility to achieve compliance with the performance requirements of the Building Code. I do not accept his statement that the house was built in accordance with that Code. The performance standard was simply not achieved. Although the "market" may have compromised quality as he says, that does not absolve him from the responsibility to achieve the performance requirements of the code.

7.13 He may have claims against other parties for contribution to his liability but that is another issue and I deal with it below.

7.14 I find that the builder, Mr Jason Thomas Williams, is liable to the claimants as builder, not only in respect of work that he did but in respect of work done by other trades.

7.15 In addition, I now consider the eight individual defects referred to above.

Parapet Tops

7.16 The assessor's view was that the sloping parapets had failed. The underlying metal flashing did not cover the full width of the parapet. Nail penetrations into the flat surface of parapet tops had allowed water to

enter. The flat surface of parapet tops did not allow effective dispersal of rainwater. The waterproof membrane had been penetrated by fixing.

7.17 Mr Williams does not deny any of that but simply says that flashings were installed by a roofing contractor named John Watts. No-one has sought to have him added as a respondent in this case. Mr Jason Williams must take responsibility for any work done by Mr Watts even if he were paid direct by the Trust.

Sill and Jamb Flashings

7.18 I have described this in detail above. Mr Williams' response is that as the builder he installed the joinery and head flashings but it was for the plasterers to install jamb and sill flashings. While that may be so, it is still my view that as head builder and project manager Mr Jason Williams had the responsibility to ensure that that was done properly. Mr Bianca said as to the plastering of unit 18A that during the whole of the work he only spoke with the builder during lunch breaks and that is simply not good enough supervision of the plasterer by the builder responsible for the project; and there is no evidence to suggest that there was any greater or less supervision of the plastering by Mr Jason Williams in respect of unit 18B. Mr Bianca and Mr Philip Murphy also referred to the representative from Plaster Systems Limited having been on site but again that does not mean that Mr Jason Williams as principal builder could simply ignore what was being done. In particular in relation to the windows there seems to have been an issue arise that the windows were not clearly recessed or clearly flat faced and therefore the compromise arrangement had to be made of the kind mentioned above. Mr Williams acknowledges he installed the joinery and he must take responsibility for that directly.

Gutter Flashings

7.19 Mr Williams does not appear in his response to have dealt with these expressly but the causes of leaks there that I have described are clearly matters which were, or should have been, under his control as building developer and he has a liability for those.

Cladding to Paved Decks/Glass Penetration of Balustrades/Saddle Flashings Between Solid Balustrades and External Wall

7.20 Mr Williams' response is that ground levels were acceptable to the Council at the time and the Council passed the deck inspection. The application of the cladding by him was directly in breach of the requirement for clearance and he must carry responsibility for that.

7.21 As to the glass barriers he refers to Winstone Glass Limited as the contractor which installed the glass barriers and he also refers to the stainless steel handrails being installed by Design Stainless NZ Limited. In neither case has any application been made to join those parties as respondents but in any event again the liability for their work lies with the overall builder, Mr Jason Williams.

7.22 There is no express evidence from him concerning the saddle flashings or the flashings above the garage door. The evidence from Mr Philip Murphy as to the latter was that that was the builder's responsibility. I have formed the view that Mr Jason Williams was primarily responsible for those saddle flashings.

Failure of Waterproofing System: Masonry Retaining Wall

7.23 As mentioned above, it is only in respect of this item that a claim against Mr Williams is made for the reasons mentioned namely a failure to obtain the performance standards of the Building Code referred to above in respect of the membrane to the retaining wall to bedrooms 1 and 2.

7.24 Having considered that evidence and there having been no substantive evidence from Mr Williams in reply I have formed the view that he is liable for that item too.

Conclusion

7.25 In respect of all eight defects to which this claim refers I find Mr Jason Thomas Williams to be liable to the claimants for the cost of repair and remediation work.

7.26 I also find him liable for the other losses claimed as set out above subject to the allowances and deductions I have made. The end result is:

Cost of repairs as claimed		$132,930.00
Loss on sale (assigned)		75,000.00
Reduction in rental (one half claimed)		2,080.00
Less reduction internal painting and carpets – para 5.18	4,916.50	
Less reduction contributory negligence - guttering	6,000.00	
Balance due	**199,093.50**	
	$210,010.00	$210,010.00

7.27 I accordingly **ORDER** that Jason Thomas Williams pay the sum of **$199,093.50** to **Peter Bruce Frederick Atkins** and **John Richard Muller** as trustees of the Bruce Family Trust.

8. Liability: Aladdin Trust Trustees – Owners - Fourth Respondents

8.1 The fourth respondents were owners of the property during construction although not at the time construction commenced. The application for building consent was made by Mr Grant Williams in November 1994 and construction commenced in December 1994.

8.2 It is claimed by the claimants that the fourth respondents were together the developers of the houses and that, on the authority of *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 and *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, they owed a non-delegable duty of care to subsequent purchasers including the claimants in the same way as a builder. It is claimed that their liability is not limited by the fact that they were trustees of a Trust. Council's submissions also are that the trustees undertook the development and that as developer they had a non-delegable responsibility for the performance of their contractor, Mr Jason Williams.

8.3 Mr Grant Williams did not attend the hearing but his response stated that he had no involvement in the construction and was working full-time as a coffee salesman. His family home was used as security to fund the project and he raises the question of lack of maintenance. In his response affirmed at the hearing Mr Jason Williams said that he was employed by the Trust to construct the house; that he was employed on a labour-only contract with his brother, Grant Williams; that Grant took care of the finances and paperwork while he ran the site; and that Grant Williams had little else to do with the house. He said that Mr Desmond Williams, who is father to Jason Williams and Grant Williams, had no financial involvement nor did he invest nor gain any monetary return. He was purely a trustee of the Trust on solicitor's advice.

8.4 Mr Desmond Williams did attend the hearing for part of the time but did not actively participate other than to affirm his written response of 8 February 2006 that stated that his whole involvement was in an advisory capacity which was never required; a third party signatory; and with no involvement in any part of the planning, building or execution of the work. He never invested monies in the Trust nor received monies from the Trust.

8.5 I am of the view that the fact that the fourth respondents were trustees of a Trust does not exonerate them from, or limit, any liability they may have in respect of the dwelling. The fact that they were trustees of a Trust is not noted on the title nor on any of the other documents. No party has in any way agreed in any contractual document that their liability should be in any way limited to the assets of the Trust. As is stated in *Brookers, Equity and Trusts in New Zealand* (2003) at para 5.2.4:

> "The question of the liability of trustees to third parties has arisen with the corresponding rise in family and trading trusts in recent times. **A Trust is not an independent entity with a separate legal personality in the way that a limited liability company is**. The Trust is constituted by the rights and obligations in relation to the Trust property attaching to the trustees in a personal capacity. Liabilities to third parties who are not beneficiaries can be incurred by the trustee because of the nature of the property the trustee holds." (emphasis added)

8.6 Both cases relied on by the claimants are relevant although *Morton* was as much a question of the liability of directors/employees as that of the "developer". In *Mt Albert Borough Council v Johnson* the owner of the site was Sydney Construction Limited. The development work of the block was carried out by a partnership working solely for Sydney Construction Limited and at a contract price. Sydney Construction sought, in the Court of Appeal, to rely on the independence of those contractors to exclude any liability on the part of Sydney Construction. The Court pointed to the evidence that led it to the conclusion that it was:

> "… not a case of a landowner engaging a firm of builders and leaving everything to them." (p240 l32)

Sydney Construction had described itself in the application for building permit as builder as well as owner. It had obtained the building permit and Mr Huljich of that company was constantly involved in discussions with the partners of the building partnership about details of the work.

The Court also discussed the liability of an employer for negligence of an independent contractor. It said (p240 l47):

> "In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes to the landscape. It is not a case of a landowner having a house built for his own occupation initially … There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor."

8.7 In this case the partnership owning the subject land included two persons who were engaged as builders, Mr Grant Williams and Mr Jason Williams. Mr Grant Williams was the applicant for building consent. Mr Jason Williams did work on the site but Mr Grant Williams was involved in payment to the Council and the like. Although Mr Desmond Williams may have had relatively little involvement, nevertheless he becomes a party because of his involvement as one of the owners of the property and one of the partners in the Trust which has developed the dwellings. Accordingly according to the principles enunciated above I find that each of the three fourth respondents, Mr Grant Williams, Mr Jason Williams and Mr Desmond Williams, have a liability to the claimants in their capacity as developers of the block and in addition to the liability that Mr Jason Williams has as I have found above in his capacity as builder.

8.8 The amounts claimed against them are the same as are claimed against Mr Jason Williams referred to above.

8.9 I accordingly **ORDER** that each of the fourth respondents, **Grant Hearle Williams, Jason Thomas Williams** and **Desmond Sarjant Williams**, pay the sum of **$199,093.50** to **Peter Bruce Frederick Atkins** and **John Richard Muller** as trustees of the Bruce Family Trust.

9. Liability: Grant Williams – Second Respondent

9.1 Mr Grant Williams was named individually as a separate respondent. He has taken no steps in the adjudication. No mention of a claim was made against him in the closing submissions for the claimants other than as one of the fourth respondents; and none of the submissions for other respondents refer to a cross-claim against him other than as one of the fourth respondents. It may be that he has a further liability insofar as it appears he was so closely involved with Mr Jason Williams in the construction of the dwelling as to amount in law to a partner with him. I do not need to decide that. There was certainly a significant overlap in roles between the two persons, Grant Williams and Jason Williams, as owners of the property, as applicant (in the case of Mr Grant Williams) for building consent, in the payment of accounts and employment of contractors and the like.

10. Liability: Anthony G Smits – Fifth Respondent

10.1 Mr Smits also has taken no steps in the adjudication claim, other than a letter dated 8 May 2006 from his solicitors stating that he would not be taking any steps in the proceeding as his "personal and financial circumstances prevent him from doing so" and confirming that he was aware that the matter would proceed in his absence and the adjudication would be "entitled to draw adverse inferences from his failure to respond".

10.2 Under s37 of the WHRS Act my powers as adjudicator to determine this claim are not affected by the failure of any respondent, including Mr Smits, to serve a response, make a submission, provide information, **comply with a call for a conference**, or do any other thing that I as adjudicator **request or direct**.

10.3 Under s38 of the WHRS Act I have the power if a respondent, including Mr Smits, fails to do any of the things mentioned in s37 to draw any inferences from that failure that I think fit and to determine the claim on the basis of information available.

10.4 In Procedural Order No 3 dated 25 January 2006 I requested the respondents, including Mr Smits, to file their formal responses by 26 April 2006. Mr Smits did not do so. I requested him to lodge any statements of evidence, expert reports and submissions by that date and, although he has no obligation to do so, he failed to do so. I told him that the hearing would commence on 15 May 2006 at 10.00am but he did not attend that hearing nor the telephone conference I convened on 24 January 2006.

10.5 In the schedule supplied by Mr Earley it is said that Mr Smits has a liability for the first seven categories of defect and for the total repair costs. In his evidence Mr Earley refers to the lack of detail in the design in respect of those seven categories of defect.

10.6 There is no evidence to refute those statements and there are design aspects alluded to by other witnesses.

10.7 I draw the inferences adversely to Mr Smits in relation to the claims made against him that I am entitled to do and I find that, on the evidence that has been supplied to me, there is evidence that he has been negligent in his design work in respect of this dwelling causing the claimants loss.

10.8 There is apparently evidence that he was adjudged bankrupt on 28 May 1992 and discharged on 28 May 2005. His bankruptcy in 1992 did not release him from debts other than those which were provable. His indebtedness to the claimants arose since he was adjudged bankrupt and he continues to have a liability for them.

10.9 Because of the agreement of the technical experts that capping and inadequate waterproofing to the parapets was a workmanship rather than a design issue (see para 3.8.3) Mr Smits has no liability for that cause of damage to the north-east elevation, the south-west elevation or the parapets. Furthermore I find there are no design issues in the cladding extending to the ground or the joinery issues and Mr Smits has no liability in respect of damage caused from those issues. That leaves remaining the four other issues where I find there is design factor (failure of internal gutter flashings, cladding hard down to paved decks, glass penetrations of balustrades and absence of saddle flashing).

10.10 The nature of the claim against Mr Smits (and other respondents) as now presented does not clearly differentiate how the respective repair costs alleged are reconciled with the claim for one half of repair costs and the loss on sale claim. The total claims against Mr Smits for which I have found he has a liability is $76,958.00 plus GST made up as follows:

North-west elevation	$18,055.00
South-east elevation	28,241.00
Rear deck	1,500.00
Front decks	23,500.00
Internal repairs master bedroom	5,662.00
Total	$76,958.00
Total ***including GST***	**$86,577.75**

10.11 The total liability of Mr Smits is therefore **$77,741.25** made up as:

Share repair costs as above	$86,577.75
One half reduction in rental	2,080.00
Less deduction items - para 5.18	4,916.50
Less deduction contributory negligence	6,000.00
	$77,741.25

10.12 I accordingly **ORDER** that the fifth respondent, **Anthony G Smits**, pay the sum of **$77,741.25** to **Peter Bruce Frederick Atkins** and **John Richard Muller** as trustees of the Bruce Family Trust.

11. Liability: F J Murphy and P Murphy – Sixth and Seventh Respondents

11.1 It is claimed that the plasterers, Francis and Philip Murphy, are liable for the first to fifth categories of damage and repair costs mentioned, namely cladding below ground and floor to external ground levels inadequate, inadequate waterproofing to parapet tops, inadequate sill and jamb flashings to joinery, failure of flashings at central gutter, and cladding hard down to paved decks.

11.2 The submissions refer to the duty of care claimed to be owed to subsequent owners with reliance on a Procedural Order No 4 in claim 465 *Simpson Family Trust v Wellington City Council & Ors* and *Construction Law in New Zealand,* T Kennedy-Grant, p533.

11.3 The claim for liability against the plasterers, Francis and Philip Murphy, is supported by the Council in the context of its claim that, if it has a liability to the claimants, there should be apportionment between respondents. It too has relied on *Simpson Family Trust v Wellington City Council* (claim 465).

11.4 There were extensive submissions to me by counsel on behalf of Francis Murphy and Philip Murphy.

11.5 The question of whether a subcontractor in a position such as Francis and Philip Murphy's is addressed at length by adjudicator Mr John Green in the *Simpson Family Trust v Wellington City Council* case. He has taken time, despite that being an interlocutory application for strike out of a respondent, to consider the principles and legal issues at length and I have read his Procedural Order No 4 dated 26 April 2006 carefully. In that

Procedural Order he analyses the issues affecting the question of whether a subcontractor owes a duty of care to the owner **of a dwellinghouse**. He does so by examining the case law in relation to builders and developers, Local Authorities and Building Certifiers, building professionals and subcontractors. He makes an analysis of, and comparison with, established case law and he considers issues of proximity, policy considerations and the fairness and reasonableness of imposing a duty of care.

11.6 I emphasise that that Procedural Order is in the context of the particular facts of that case and in the context of that order applying to an interlocutory application by a respondent (subcontractor) to be struck out and I apply his reasoning with those considerations in mind.

11.7 I adopt his statement of principles and I agree with the general conclusions he has reached.

11.8 In his comprehensive and helpful submissions for Messrs Murphy, Mr Stephen Piggin has started with *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 and the Procedural Order No 4 of adjudicator Mr Green mentioned in *Simpson Family Trust v Wellington City Council*.

11.9 He first submitted that the Procedural Order in *Simpson Family Trust* in its general terms went well beyond the narrow issue of potential liability that the fifth respondent in claim 465 was claimed to have, that respondent being there the supplier of window and door hardware to the builder; and that the finding of such a wide-ranging duty is against the gradual approach noted by the Court of Appeal in *Rolls-Royce*. I certainly accept that, as I have indicated above, the statements of general principle by the adjudicator in claim 465 must be read within the limited confines of the application with which, and the case with which, he was dealing. That is

not to say that the statements of general principle are **wrong** and, as I have said, I agree with those statements.

11.10 The submissions of counsel for the Murphys concentrate on issues raised by *Rolls-Royce* in the context they are interpreted in *Simpson Family Trust*.

11.11 The judgment in *Rolls-Royce* considers the test to be applied where claims are made of duty of care. This is expressed in paragraph 58 as follows:

> "The ultimate question when deciding whether a duty of care should be recognised in New Zealand is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed."

11.12 The judgment then goes on to consider the two broad fields of inquiry, the first being the degree of proximity or relationship and the second the other wider policy considerations. As to proximity, the judgment says that this is "more than a simple question of foreseeability [and] involves consideration of the degree of analogy with cases in which duties are already established" (para 59) (and it is the statement in the judgment that the Courts should only move gradually into new areas of liability that is relied on by Mr Piggin in his submissions).

11.13 The Court said that the proximity inquiry:

> "… can be seen as reflecting a balance of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from undue restrictions on its freedom of action and from an undue burden of legal responsibility." (para 60)

11.14 One consideration is the extent to which the plaintiff is vulnerable and, in an appropriate case, a consideration of whether a defendant with special skills has power over a vulnerable plaintiff (para 61). Relevant to this issue is the question of whether there are or could realistically have been other

remedies and, if so, this may point to an ability for a plaintiff to protect itself and to there being adequate deterrents for a defendant (para 62).

11.15 Also to be taken into account can be the nature of the loss and reference is made to the Courts' being less willing to impose a duty of care in cases of economic loss than where there is physical damage to property or, in jurisdictions other than New Zealand, physical injury (para 63).

11.16 The statutory and contractual background may also be relevant in defining the relationship which might also raise wider policy issues (para 64).

11.17 In the Court's discussion of the case law reference is made at paragraph 71 to the fact that:

> "[l]iability to subsequent owners of domestic dwellings for defects in such dwellings has … long been a feature of New Zealand case law"

and the reference to *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, although involving the liability of a Council, is said to have assumed that the liability of the builder would have been no less extensive. There is discussion about the apparent contrast between commercial construction cases and domestic buildings but the Court at para 74 said that:

> "… any distinction must have a more complex foundation than a mere distinction between commercial and domestic …"

11.18 The conclusion is reached at paragraph 90, after extensive discussion of overseas cases, that:

> "[i]t is therefore difficult … to escape the conclusion that something more is needed for there to be a liability than merely being a nominated skilled contractor."

11.19 In discussing assumption of responsibility the Court at para 100 did note:

> "… that assumption of responsibility for the task cannot be sufficient in itself, at least insofar as the negligent construction cases are concerned."

It referred to the outcome in *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791 (which the Court noted had been widely approved) and the outcome there that the subcontractor had not assumed responsibility to the plaintiffs in its supply of glass according to contractual specifications but had only assumed responsibility to the direct contracting party.

11.20 One of the policy considerations (indeed the "main policy factor") was expressed as the need for commercial certainty (para 118). The "main factor" pointing towards a duty in *Rolls-Royce* was said to be foreseeability which "largely derives from the contractual structure".

11.21 The facts in *Rolls-Royce* were that the respondent, Carter Holt Harvey Limited (**Carter Holt**) had contracted with the predecessor of Genesis Power Limited (**Genesis**) to procure the design, manufacture, construction, purchase and installation of a co-generation plant and that predecessor (**ECNZ**) contracted with Rolls Royce New Zealand Limited (**Rolls-Royce**) to design, construct and commission the plant. It was claimed by Carter Holt that the plant was defective and its claims included one against Rolls-Royce in negligence, there being an alleged breach of duty to perform contractual obligations. The judgment concerned an application to strike out that part of the claim which had been declined by the Master and the High Court Judge on review. Those judgments were reversed in the Court of Appeal which struck out the claim in negligence (with one exception). The Court should not interfere, it was held, in risk allocations negotiated and paid for by the parties, particularly in commercial contracts. The parties had chosen clearly to define their obligations by detailed contracts and there was no duty of care, it was held, owed by Rolls-Royce to Carter

Holt except to the extent that the duty rested on alleged negligent statements (which was the exception allowed).

11.22 As adjudicator Mr John Green said in *Simpson Family Trust* at para 152, and as I have mentioned above, a significant factor was the commercial sophistication of the parties and the complex contractual arrangements between them.

11.23 The judgment of Potter J in *Body Corporate No 114424 v Glossop Chan Partnership Architect Limited* (HC Auckland; Potter J; 22/9/97; CP 612/93) also involved parties of commercial sophistication. Although the apartments in question were for residence purposes the subcontract with Carter Holt Harvey Aluminium Limited (**Carter Holt Harvey**) had been for design fabrication and installation of aluminium framed windows and doors and was with the head contractor, Wilkins & Davies Construction Company Limited (**Wilkins and Davies**). The plaintiffs were subsequent purchasers of the apartments.

11.24 In *Body Corporate No 114424* Potter J distinguished what she described as "the only instance where a subsequent purchaser has been held to have a cause of action against a subcontractor" namely *Winnipeg Condominium Corporation No 36 v Bird Construction Co* (1995) 121 DLR(4th) 193 (SC) on the ground that that case involved claims concerning a "dangerously defective structure or part of a structure" while *Body Corporate No 114424* was a case "only of failure to provide weatherproofness". Her Honour did, however, in considering the two issues of degree of proximity and policy considerations, refer again to the requirement from *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282 for consideration of the facts in each case against the authorities and principles. She too made reference to the contractual terms of the subcontract as part of the policy

consideration and the care that should be taken not to impose on a subcontractor an obligation of which it had no knowledge.

Is there a Duty of Care in this Case?

11.25 The first critical fact is that in this case there was not a subcontract as such. The evidence is that there was a very casual contracting arrangement between the then owners, the fourth respondents, and Mr Jason Williams, the third respondent, for construction of the two units. The evidence from Mr Philip Murphy was that he and his father, Francis Murphy, do remember working on the dwelling at 18B Manu Place. He said:

> "The way we got the job was that we **would have** given Jason Williams a price. He **would have said** 'the job's yours, when can you start?'." (emphasis added)

From that I have taken it that Messrs Murphy cannot specifically recall the contractual arrangements but clearly they were casual and made reference to Jason Williams. It does not necessarily follow that that was with Mr Jason Williams in his capacity as contractor. I think it more likely that Jason Williams was simply representing the fourth respondents, the trustees of the Aladdin Trust, as owners of the property in getting the project completed and he arranged the plastering contract with Messrs Murphy. Mr Philip Murphy cannot remember any written contract or specification and said that the contract "was basically to cover the blue (Hardibacker) board with plaster" and that later he was asked to quote for painting the plaster but that never went ahead.

11.26 Apparently payment was made direct to Messrs Murphy by the Aladdin Trust (the fourth respondents). Accordingly therefore the strict question of whether Messrs Murphy owed a duty of care **as subcontractors** does not arise.

11.27 The critical question is whether, in the role that they did have, Messrs Murphy can in law be said to have owed a duty of care to subsequent purchasers of unit 18B including the claimants. My view is that they did. Because they were direct contractors to the then owners, the fourth respondents, they were in no different position from the principal builder, Mr Jason Williams. It would be quite wrong to impose an obligation on the principal contractor in tort but not to impose one on another contractor simply because that contractor had a narrower focus and responsibility for only one area of the dwelling. Of course the question of whether that second contractor, in this case Messrs Murphy, the plasterers, has discharged that duty must be limited to the responsibilities that he had but that is a different question. In my view as plastering contractors Messrs Murphy did have a duty of care to subsequent purchasers for their work just as Mr Jason Williams, the principal builder, had his. Mr John Green as adjudicator in *Simpson Family Trust* made the same point at para 172 where he said there was no reason to distinguish in principle between a subcontractor and a builder provided other factors are present.

11.28 In *Simpson Family Trust* in the context of proximity the adjudicator, Mr Green, said at para 162 that:

> "It has been common knowledge in New Zealand, at least since the early 1990's, that water penetration of a dwellinghouse leads to decay in timber and degradation of other materials to the extent that those materials will require repair and/or replacement to restore the dwellinghouse to an acceptable standard for safe and healthy habitation."

He said it was "almost trite" to say there was a clear and close nexus between the negligent acts of various contractors who have caused or contributed in some way to the creation of the defect and the degree of harm and loss to the owner and inevitable damage to the fabric and structure of the dwellinghouse; and that one of the strongest factors towards a finding of proximity is foreseeability. In that case he found that

in manufacturing (and to a limited extent installing) the windows, doors and roof glazing units to the dwellinghouse in question if the subcontractor failed to use reasonable care and compliance with appropriate standards there would be loss to the claimant. Economic loss is foreseeable because there would be major financial investment which would not be realised given the minimum requirement of 50 years for duration and structural soundness under the Building Code.

11.29 He emphasised the artificiality of imposing a different duty on building contractors from that on other persons contributing to the construction because of the process in residential building that has developed, particularly in the last 30 years, that:

> "… almost every singular aspect of the design, construction and inspection of any dwelling is undertaken by specialists (persons possessed specialist knowledge and skills) who often operate unsupervised and independently of the person(s) managing and co-ordinating the building works, for sound logistical and financial reasons … The builder *per se* has in the main become a mere project manager and co-ordinator of specialist contractors, including in many cases carpentry contractors and sub-specialists in that field. The concept of a builder being a person who constructs a dwelling with his or her own hands, skill and knowledge from concept to completion is therefore something that has, in this age of specialisation, largely been relegated to the history books." (paras 167 and 168)

11.30 He concluded at para 169 that:

> "[i]n the building industry in New Zealand there is little distinction to be drawn therefore between the responsibility assumed by the multi-skilled 'builder' of old (by virtue of possession of specialist skills and knowledge) and any of the plethora of present day specialist contractors."

11.31 I do not read in any of that any suggestion that the principal contractor is relieved of liability by virtue of the specialist responsibilities of other contractors on site whether these be subcontractors or not. That builder still has the overall responsibility for the total project and the duties of care to subsequent purchasers that I have referred to. What I understand Mr

Green to be saying is that **in addition** to that, there is the duty of care owed by the specialist contractor or subcontractor because of their specialist knowledge.

11.32 That applies in this case. Messrs Murphy were employed (whether this be by the owners or by the builder – and I have found that it was in this case the owners) to carry out the plastering work to unit 18B. They were the specialist plasterers. The Duraplast system was a sophisticated system requiring compliance with not only the instruction manuals from Plaster Systems Limited, the promoter and distributor of Duraplast, but also with known standards of workmanship and compliance with the performance requirements of the Building Code. Messrs Murphy had an obligation to ensure that the work that they did complied with those requirements and met those performance standards. In my opinion they had a duty of care to subsequent owners, including the claimants, to do that work without negligence.

11.33 As to policy considerations the starting point may be the emphasis that the Court of Appeal in *Rolls-Royce* placed on "the need for commercial certainty" (para 118) and the fact that in that case the parties were "sophisticated commercial parties capable of looking after their own interests" was a policy factor pointing strongly against there being a duty of care (para 123).

11.34 Mr Green as adjudicator in *Simpson Family Trust* referred also to the floodgates argument and said:

> "In leaky building claims, the risk in any particular case is limited to a claim by the owner of a dwellinghouse from time to time and the cost of repair or replacement, together with foreseeable consequential loss."

He also referred to the longstop limitation period in s91(2) of the Building Act 1991 (and there is its successor in s393 of the Building Act 2004) of 10

years in bringing civil proceedings relating to building work (para 173). He referred to the succession of cases over the last 30 years imposing a duty of care on those who build and inspect dwellings (para 174); and that:

> "… there is no morally just reason why a subcontractor whose primary fault caused damage and loss to the owner of a dwellinghouse should be immune from suit and thus liability to that owner (or any other person liable in respect of that same damage) merely because there is no contractual nexus, or because that nexus is broken by the insolvency of others in the contractual chain and about whose financial affairs an owner has no knowledge and is unable to protect himself/herself from the risk." (para 175)

He referred too to the need for commercial certainty as the main policy factor (para 177); but also to the:

> "… general lack of sophistication and the vulnerability of the owners of residential properties." (para 178)

11.35 Taking all those principles and factors into consideration I have formed the conclusion that it is, to use the primary test prescribed by *Rolls-Royce*, just and reasonable that a duty of care should be imposed on Messrs Murphy in this case **in respect of the work that they did**. That duty of care is limited to that work but it includes all aspects of that work.

Application of Duty

11.36 The question then is whether the work done by Messrs Murphy meets the necessary standards and discharges the duty of care they owed to the claimants as subsequent purchasers. There is also the question of supervision to which I shall refer.

11.37 The contract that Messrs Murphy had was as described earlier from the evidence of Mr Philip Murphy. The cladding to the dwelling had been fixed by Mr Jason Williams. The aluminium window and door joinery had been installed without achieving either the recessed or the face fixed option and

leaving the compromise required to be made. The cladding had been taken hard down onto the paved decks.

11.38 Messrs Murphy then proceeded with the plastering work at the appropriate time. They did so to the extent that they were able. They plastered over the surfaces that had been clad and concluded the Duraplast system work.

Sill and Jamb Flashings

11.39 Questions arise concerning the workmanship as to the aluminium joinery installations, the use of (or lack of) appropriate flashings and the application of sealant. I have referred to the detail of this above. It is my view that, faced with the outcome that the windows were not clearly face fixed or recessed, a compromise had to be reached between the two and appropriate steps taken to ensure that the plastering work was consistent with the Duraplast instructions and was going to be effective in achieving the performance standards of the Building Code concerning water penetration prevention. Messrs Murphy did their best and the evidence was that the "L" flashing they used appears to have been more effective than the then applicable Duraplast instructions. However the performance standards have not been met and water has ingressed where the plastering around this joinery has taken place. The principal cause of water leaking had been agreed between the technical experts at the meeting they had as sealant failure. Mr Grigg on behalf of Messrs Murphy was part of that discussion and a party to that agreement. I have come to the conclusion that sealant failure was a factor in relation to the failure of unit 18B in respect of the sill and jamb flashings to the aluminium window and joinery.

Parapet Tops to Front Gable and Side Elevations

11.40 When Messrs Murphy came to do the plaster work to these parapet tops in my view they should have noticed that the parapet tops did not have any

cap flashing and appeared to be nailed. In my view they should have questioned this with the builder and raised with him the prospect that nailing the cladding to the top of the parapets without a flashing would run a significant risk of water entry.

Gutter Flashings

11.41 I do not consider that Messrs Murphy have failed in their obligations in respect of the gutter flashings. As I interpret it, these were in place and they simply plastered over them and I do not think it was for them to inquire about the adequacy of water drainage from them.

Cladding to Paved Decks and Ground Level

11.42 I do not think it was for Messrs Murphy as the plasterers to do more than plaster the cladding that had been installed. They may have questioned to themselves or each other the adequacy of the clearance between the cladding and the ground level on the one hand and decks on the other but, in my view, it was appropriate that they would take it that this had been done in accordance with design and/or for good reason and that it was appropriate to proceed with the plastering. I reach that conclusion not in the context of today's standards and with hindsight but having regard to the evidence of, and my knowledge of, building standards at the time. Although Mr Earley has expressed the view that Messrs Murphy have failed to ensure adequate separation in these cases, in my view the primary responsibility for that lay with the builder and I do not consider, at the time this dwellinghouse was built, that Messrs Murphy had the responsibility to do more than plaster over the cladding that had been installed.

Liability Outcome

11.43 Accordingly I find that there has been a breach of standards and duty of care to the claimants by Messrs Murphy in respect of the first and second

items referred to above, namely the sill and jamb flashings issue and the inadequate waterproofing to parapet tops issue.

11.44 The amounts of repair costs included in the claim arising in respect of that item total $163,900.00 made up as follows:

North-west elevation	$18,055.00
South-east elevation	28,241.00
South-west elevation	49,410.00
Parapets	14,700.00
North-east elevation	44,094.00
Rear deck	1,500.00
Repairs to lounge floor	7,900.00
Total	$163,900.00
Total ***(including GST)***	**$184,387.50**

11.45 This differs from the amount claimed against Messrs Murphy as set out above where the claim is in the context of half the cost of repairs plus loss on sale (assigned). I think the proper course is to take one half of the claimed costs in respect of those items of repair and to add a proportion of the loss on sale claim, $75,000.00, in the same proportions as those repair costs bear to the total repair costs as follows:

Total claims against Messrs Murphy:	
South-east elevation	28,241.00
South-west elevation	49,410.00
North-east elevation	44,094.00
Nib wall	9,400.00
Parapets	14,700.00
North-west elevation	18,055.00
Rear deck	1,500.00
Lounge floor	7,900.00
Front decks	23,500.00
Master bedroom repairs	5,662.00
	202,462.00

Including GST	227,769.75	
Percentage of repair costs ordered/repair costs claimed (184,387.50 ÷ 227,769.75)		80%
Percentage of loss on sale (assigned) claim (75,000.00 x 80%)		60,000.00
Plus one half repair costs allowed (184,387.50 ÷ 2)		92,193.75
Total liability		152,193.75
Plus one half reduction in rental		2,080.00
Less deduction – para 5.18		4,916.50
Less deduction contributory negligence		6,000.00
Balance liability		$143,357.25

11.46 Accordingly I find that Francis John Murphy and Philip Murphy, the sixth and seventh respondents, are liable to the claimants, **Peter Bruce Frederick Atkins** and **John Richard Muller** as trustees of the Bruce Family Trust, in the sum of **$143,357.25** including GST and I **ORDER** that that sum be paid.

12. Liability – Eighth Respondent – Plaster Systems Limited – Duraplast Supplier

12.1 Plaster Systems was actively involved throughout the hearing and I was helped with evidence and submissions on its behalf.

12.2 In closing submissions dated 19 May 2006 there are some matters of fact contained which were not given as evidence but essentially those submissions concentrate on:

12.2.1 the extensive reputation that Plaster Systems has with the work that it has done;

12.2.2 the fact that Mr Jack Bakker retired from Plaster Systems four years ago and cannot recall what took place, although it is

speculated that because there were different sill flashings used at no 18B and none at all at 18A it is unlikely that Mr Bakker would have supervised either;

12.2.3 the March 1995 Duraplast system specifications would have been available in March 1995 and certainly once the second pre-line inspection no 1950 was made on 4 July 1995 when it is assumed the plastering would still not have commenced.

12.3 There was no claim made that the Duraplast system was itself at fault and liability is only claimed on the basis of Mr Bakker's involvement, it being claimed that this was an "advisory capacity" which gave rise to a duty of care in accordance with the principles in *Bowen & Ors v Paramount Builders (Hamilton) Ltd & Anor* op cit.

12.4 The evidence was that No 18A was done first and No 18B second although there may well have been some overlap. Mr Philip Murphy who did the plastering at 18B said that the Plaster Systems representative visited the site three or four times "to check whether the job was going OK and to look at the job because it was a new product at the time". He said at the hearing that he had advice from the Plaster Systems representative and he did query that the windows were neither face fixed nor recessed and that this was one of the reasons the Plaster Systems representative was on site. He said he would not have done what he did without advice.

12.5 There was no evidence called for Plaster Systems and indeed in its closing submissions it said that Mr Bakker had retired and had no recollection of what took place on site.

12.6 Having considered this evidence I have come to the conclusion that there was a measure of supervision and advice given to the plasterers by Mr Bakker. Duraplast was apparently a relatively new system at the time.

Materials were supplied by Plaster Systems Limited. There was the question that arose about the window and door joinery not being either face fixed or recessed and some compromise was required. The 18A job being done by Mr Bianca was the first of two and the issue had not yet arisen with Mr Philip Murphy at 18B. I am satisfied that Mr Bakker did give advice to Mr Bianca in respect of 18A and then in due course Mr Philip Murphy in respect of 18B – and indeed it may be that that advice, which included reference to the appropriate jamb and sill flashings, may have been as the result of experience learned at 18A. So far as the rest of the job is concerned I do not find any evidence that Mr Bakker's advice led to any of the problems which have since been identified and indeed I have dealt already with the extent to which the plasterers can be held responsible for those.

12.7 Accordingly I find that Plaster Systems Limited did owe a duty of care to the claimants as subsequent purchasers in respect of the participation in the construction by their agent, Mr Bakker. The advice that he gave which was relied on by the plasterers has led to the problems in respect of the sill and jamb flashings. The time to correct that would have been before the plaster went on so that the detail of the system could have been followed more thoroughly and the right result achieved.

12.8 I do not find any negligence on its part through its agent, Mr Bakker, in relation to any other aspects of the construction.

12.9 The claim against Plaster Systems is limited to the repairs resulting from the inadequate sill and jamb flashings (item 3 of the claims) which is for repairs to the following parts of the dwelling:

North-west elevation	18,055.00
South-east elevation	28,241.00
South-west elevation	49,410.00

North-east elevation	44,094.00
Rear deck	1,500.00
Repairs to lounge floor	7,900.00
Total	$149,200.00

12.10 The Amended Notice of Adjudication as finally presented on 15 May 2006 as set out above claims the sum of $82,629.00 (and this amendment was made on 17 May 2006) plus the loss on sale (assigned) of $75,000.00. Although the repair claim amount, $82,629.00, is less than one half of the total repair costs for item 3 above (and one half including GST would be $83,925.00) I have formed the view that I should allow only the amount claimed, $82,629.00. As to the loss on sale I have formed the view that I should apply the same formula as I have for the plasterers which yields the sum of $60,000.00. Taking the other matters of claim referred to above I find that Plaster Systems Limited, the eighth respondent, has a liability to the claimants in the sum of **$133,792.50** made up as follows:

Cost of repairs to item 3 matters as claimed	82,629.00
Share loss on sale (80% x $75,000.00)	60,000.00
One half reduction in rental	2,080.00
Less deduction – para 5.18	4,916.50
Less deduction – contributory negligence	6,000.00
Balance	**$133,792.50**

12.11 I **ORDER** that that sum, **$133,792.50**, be paid by the eighth respondent, **Plaster Systems Limited**, to the claimants, **Peter Bruce Frederick Atkins** and **John Richard Muller** as trustees of the Bruce Family Trust.

12.12 I deal with contributions between respondents below.

13. Liability – North Shore City Council – First Respondent – Territorial Authority

13.1 The claims against the Council are in respect of the issue of the building consent, inspections and the issue of the Code Compliance Certificate and the claimants rely on a long line of authorities including *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 and the summary of these duties by the adjudicator in claim 134 *Kellaway & Ors v Waitakere City Council & Ors*, namely:

- A Council inspector must act as a reasonably prudent Council inspector would act.
- The standard in relation to any inspection may depend on the magnitude of the consequences.
- A Council inspector is not a clerk of works.
- Council are obliged to ensure works are carried out in accordance with consent and code.
- The standard of care does not extend to identifying defects which require testing.
- Council are obliged to put in place proper inspection processes at appropriate intervals and stages during construction to maximise inspector's ability to ensure compliance with the Building Code.
- Council must undertake necessary research.

13.2 There have been lengthy submissions in reply from the Council raising these matters.

- Is there a duty of care owed?
- If so, has that been breached measured against standards and the statutory framework at the time?
- If there has been a breach is there a causal nexus between that and the claimants' losses?

- If there is a liability is this reduced by virtue of contributory negligence and/or a failure to mitigate the claimed losses? (and I have dealt with that above).
- Quantum which I have dealt with above.

Duty of Care

13.3 The introductory submissions for the Council are that:

> "[f]or the claimants to succeed they must bring themselves within the category of individuals afforded protection by the principles set down in the [C]ourt of [A]ppeal and Privy Council decisions in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) (**the *Hamlin* decisions**)"

It is the Council's submissions that the claimants do not fall within that category but also that the obtaining of the pre-purchase report and the issues in that report take them outside the protection afforded by the principles set out in the *Hamlin* decisions.

13.4 In the substantive submissions the Council goes further and, after an analysis of the *Hamlin* decisions the submission is made that three recent decisions in New Zealand and Australia proscribe the parameters within which the *Hamlin* decisions might be applied. Those decisions are *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 and *Rolls-Royce* (see above).

13.5 The primary issue in *Hamlin* was whether existing New Zealand common law principles should have been reconsidered in the light of the House of Lords decision in *Murphy v Brinkwood District Council* [1991] 1 AC 398. The Court of Appeal judgments recorded at length the development of the New Zealand common law on this topic and then addressed that question.

The Court of Appeal found that it was appropriate to remain with the New Zealand principles and not to follow *Murphy*. Cooke P at p522 said:

> "The upheavals in high level precedent in the United Kingdom [referring to *Murphy* and a number of other cases] have had no counterpart in New Zealand. The case law has been at least reasonably constant."

He referred to *Bowen v Paramount Builders (Hamilton) Ltd* (op cit) and that since then it had:

> "… been accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities …".

Richardson J at p524 referred to the "major question" of whether the Court of Appeal:

> "… should depart from what has been the settled law in this country for nearly 20 years in relation to the liability of local authorities for latent defects caused or contributed to by the careless acts and omissions of building inspectors in carrying out inspection of houses under construction."

He said at p525:

> "The bylaws and the question of whether it was just and equitable for the local authority to be under a duty of care to the owner (and successors in title) in discharging responsibilities in relation to the inspection of houses under construction, have to be considered against that background **which was special to New Zealand of the times**" (emphasis added) [having referred to six "distinctive and longstanding features of the New Zealand housing scene].

13.6 The principal outcome of the Privy Council judgment was to affirm that it was appropriate for the New Zealand Courts to continue the development of its distinctive common law on this issue and to diverge from the position in England as established by the House of Lords in *Murphy*.

The judgment emphasised first that a number of New Zealand cases had:

> "… extended the principle [that a local authority owed a duty of care] to cases where there was no physical damage as such nor any certainty that there would be";

secondly that those cases recognise the element of reliance in establishing a duty of care in economic loss cases; and thirdly that they mark the point where it had been properly said by Cooke P in *Brown v Heathcote County Council* [1986] 1 NZLR 76 that:

> "The lineaments of the contemporary New Zealand law of negligence in this and related fields are now … reasonably firmly established by a series of cases …"

The judgment considered developments in Canada and Australia and acknowledged that there were diversities between the jurisdictions and from the English situation.

Relevance of Building Act 1991

13.7 As to any argument that the facts of *Hamlin* predated the Building Act 1991 and therefore the principles enunciated in *Hamlin* are affected by the Building Act 1991, that statute was expressly referred to in the judgments of both the Court of Appeal and the Privy Council.

13.8 Richardson J in the Court of Appeal referred to the history behind the Building Act 1991 and said at p526:

> "The Building Act 1991 introduced a new perspective on building and planning controls. Section 6 states the governing purposes and principles and the statute contains provision for owners to engage approved certifiers to monitor and approve performance of building code requirements. Central features of the legislation are that all building work must comply with the code (s7); territorial authorities are charged with the responsibility of enforcing the Act (s24); consents for building work can only be issued by territorial authorities (ss32 and 33), which are entitled to inspect work for compliance with the Act (s76); the territorial authority issues the final code compliance certificate (s43); and even where a private certifier is used the territorial authority retains overriding control (s57 and reg 8 of the Building Regulations 1992 (SR1992/150)). The legislation is performance oriented. It is intended to promote greater

> efficiencies. Owners may have a degree of choice between territorial authorities and private certifiers with competitive charging by territorial authorities and private certifiers for their services. And territorial authorities have overriding responsibility for administering the new building control system.
>
> Importantly there is nothing in the legislation to preclude private damages claims in accordance with the existing New Zealand law for losses arising out of the negligent exercise of building control functions. On the contrary that may properly be regarded as part of the accountability at which the legislation is directed. More specifically s91, which imposes a longstop limitation period of civil proceedings, recognises that those involved in the building industry and in building controls, including territorial authorities, will be liable for carelessly created or carelessly overlooked latent building defects." (p526)

At p527 he said:

> "The point of all this is that over a period of ten years building controls were the subject of detailed consideration, quite dramatic changes in approach were taken reflecting a particular economic and philosophical perspective, but without questioning the duty of care which the New Zealand Courts have required of local authorities in this field. While it may be going too far to characterise the Building Act 1991 as a ringing legislative endorsement of the approach of the New Zealand Courts over the last 20 years, there is nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in this field."

In the Privy Council the joint judgment also referred to the provisions of ss.90 and 91 of the Building Act 1991 as indicating that:

> "… the Act clearly envisage [envisaged] that private law claims for damages against local authorities will continue to be made as before." (p522)

13.9 They also noted that there was nothing in the Building Act to abrogate or amend the existing common law in New Zealand so as to bring it into line with *Murphy*.

Economic Loss

13.10 There is certainly debate in the authorities about whether a claim such as is brought in this adjudication is for economic loss or not. In *Bowen v*

Paramount Builders (Hamilton) Ltd Cooke P at p423 found that the loss in that case was **not** purely economic. The building had undergone some damage and deterioration and the damages claimed were "merely the measure". He revisited that in *Hamlin* at p522 without expressly answering the question.

13.11 In *Bryan v Maloney* (1995) 182 CLR 609 the High Court of Australia categorised as economic loss the diminution in value of a house where the fabric of the building had cracked because the footings were inadequate.

13.12 In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (op cit) at paras 19 and 20 the majority judgment (Gleeson CJ, Gummow, Hayne and Heydon JJ) categorised the loss in that claim as economic but said:

> "Circumstances can be imagined in which, had the defects not been discovered, some damage to person or property might have resulted from those defects. But that is not what has happened. The defects have been identified. Steps have been taken to prevent damage to person or property."

They then debated the position that had pertained in England for a time where **physical** damage to a building was not a claim solely for economic loss but referred to the categorisation of such a claim as economic loss by the House of Lords in *Murphy*.

13.13 Despite that debate I have concluded that I must follow the predominant judicial viewpoint in this case that the claims made by the claimants are for economic loss. There is damage to their dwellinghouse from the leaks which have occurred but that is damage to their "financial wellbeing or prosperity" (as that expression is used in the Law of Torts in New Zealand, 3rd edition, Todd, para 1.2.2(e)) that is in question.

13.14 Accordingly, as the Privy Council recognised in *Hamlin*, the cases in New Zealand require an element of reliance to establish a duty of care in

economic loss cases. That appears to be affirmed in Australia where, in *Woolcock Street Investments* at para 24, the majority said:

> "In other cases of pure economic loss (*Bryan v Maloney* is an example) reference has been made to notions of assumption of responsibility and known reliance."

13.15 For the Council, it is submitted that the criteria identified by the Court of Appeal in *Hamlin*, especially the six "distinctive and longstanding features" referred to by Richardson J at pp524-525, may no longer be as applicable, and specifically in this case. The Council submits that the Hamlins' reliance was on the premise of community reliance in the context of the particular circumstances mentioned.

13.16 My view is that, although there may have been general changes in the housing scene since those described by Richardson J and there are in fact specific differences in this case, there is nevertheless reliance by the claimants, both in general and in specific terms, sufficient to create a duty of care.

13.17 The Building Act 1991 prescribed a performance based régime for building construction. It prohibited any building work except in accordance with the building consent issued by a territorial authority (s32). It required that an owner advise the territorial authority when building work was completed (s43(1)) and it required a territorial authority to issue a Code Compliance Certificate if satisfied on reasonable grounds that the building work complied with the Building Code (s43(3)); but that latter course could be achieved by a building certificate or Code Compliance Certificate issued by a building certifier (s43(2) and s56).

13.18 That very brief summary of the statutory régime established, in my opinion, an atmosphere of reliance. Those owners proposing to build relied on the processing of their application for building consent and they relied on the

proper assessment of the construction work to ensure that it complied with the Building Code sufficiently for a Code Compliance Certificate.

13.19 Once a Code Compliance Certificate was issued there is, in my opinion, general reliance by the public on the accuracy of that document and a reliance that the building did comply with the Building Code.

13.20 The submissions of counsel for the Council refer to *Three Meade Street* which I shall refer in due course but essentially my view is that that case is limited to issues concerning commercial construction on the one hand; and furthermore the limitations it expresses in relation to the obligations created by a Code Compliance Certificate are limitations arising, not from the certificate itself or the statutory régime, but rather from the absence of a pre-existing duty of care. I shall deal with that in detail later.

13.21 Suffice it at this stage to say that my view is that in relation to residential dwellings where there is an established duty of care on the part of the Council, that duty extends to the issue of a Code Compliance Certificate and the issue of a Code Compliance Certificate creates a general reliance on that certificate that the residential dwelling did comply at the time of issue of the certificate with the Building Code.

Impact of Subsequent Cases

13.22 The Council's submissions are that the decision in *Hamlin* first must be considered in its own context and secondly that the more recent decisions nominated may impact on the general statements of principle in *Hamlin* and militate against a "too wide an application of *the Hamlin decisions*".

Three Meade Street

13.22.1 The judgment of Venning J in *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 dealt with a claim by the

owner of a motel in Rotorua against the territorial authority. Although the company, Three Meade Street Ltd, had been the original owner of the land and the builder of the motel (through another company which was owned by the same shareholder), by the time the claim was made Three Meade Street Ltd was owned by other parties. The original shareholder had been one Mr Coervers and he was also the shareholder in Limberg Construction Ltd, the contracted builder of the motel. The work in fact was done by Mr Coervers. In due course there was a sale of the business which was effected by a sale of the shares in Three Meade Street Ltd. That company sued the territorial authority, the Rotorua District Council, alleging a duty of care owed to it, Three Meade Street Ltd.

13.22.2 It would be immediately seen that there was a significantly different set of circumstances. First, the owner of the land was the plaintiff in the claim. Mr Coervers, the then owner of the plaintiff, was the builder. The Court found it would not be just to hold the Council under a duty to recompense **a plaintiff** for economic loss sustained as a result of the shareholder's negligent work.

13.22.3 Secondly, the company as initial developer could have protected itself by contractual arrangements with builders, engineers and the like and its failure to do so should not be visited upon the Council.

13.22.4 Those two matters are in themselves significant distinguishing factors from the present claim. The present claim is by subsequent purchasers who had absolutely no control over the construction or the contract terms for construction.

13.22.5 Furthermore, *Three Meade Street* involved a commercial property and that was found to be a significant factor distinguishing it from the cases cited for the plaintiff which included *Bowen*, *Johnson* and *Hamlin*. Indeed counsel for the Council expressly submitted that *Hamlin* was not authority for the proposition that a Council owes a duty of care to a **commercial property owner** to protect them against financial loss (judgment para 22). In the present claim the submission is made that a finding by an adjudicator in another WHRS adjudication claim that *Three Meade Street* is incorrectly distinguished on the grounds that it relates to a commercial rather than a residential property flies directly in the face of not only the judgment in *Three Meade Street* but indeed the submissions of counsel for the Council in that case. It was submitted as a distinguishing factor. It was found to be a distinguishing factor. In the judgment at para 39 Venning J said:

> "The current position in New Zealand is this. *Hamlin* is authority for the proposition that a council owes a duty of care to houseowners and subsequent owners and will be liable to them for economic loss arising out of defects caused by a council's negligence in the course of the building process. However, in my judgment, because of the particular circumstances of the housing and building industry in New Zealand noted in *Hamlin* the principle does not automatically extend further so that a duty of care will inevitably be owed by councils to industrial and/or commercial property owners."

13.22.6 Finally, significant reference was made to the contractual relationship between *Three Meade Street Ltd* and its contracting parties and I shall refer to this below but at para 30 Venning J said:

> "Given the basis for the conclusion reached in *Hamlin*, there is a real issue whether the duty of care owed by councils to homeowners extends to the owners of commercial property where they sue for economic loss. In *Hamlin's* case itself Cooke

> P left the point open but observed at p520 that in a case of commercial or industrial construction:
>
> > '… the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded.' "

13.22.7 In considering policy issues His Honour referred to the "floodgates" argument of indeterminate liability and found that that was not a matter that had caused difficulty with the application of principle in *Hamlin's* case (para 46).

13.22.8 He then considered the statutory framework and the performance-based criteria to which the Building Act 1991 referred and the emphasis of that Act upon safety and sanitary requirements. At para 48 he said:

> "While in *Hamlin* Richardson J observed that there was nothing in the Building Act to preclude private damages claims in accordance with existing New Zealand law for losses arising out of a negligent exercise of building control functions, the existing New Zealand law referred to by Richardson J was the existing authority in relation to the obligations owed by councils and others involved in the building process to homeowners. There is no such existing authority for the extension of that obligation to commercial property owners."

13.22.9 In my opinion that is a significant distinction and any argument about the limits of reliance on the building consent and code compliance certification process that may pertain to **commercial** property issues do not pertain to **residential** property issues. Venning J has expressly made the distinction; and he continues to do so at para 50 where he refers again to the contractual matrix:

> "In expressing reservations as to whether the duty recognised in *Hamlin* would extend to commercial property Cooke P acknowledged the contractual relationships and the ability of a party to protect themselves from damage by means of those contractual obligations. In the first place the initial purchaser or

> developer of a commercial building can protect itself by contractual arrangements with the builders, engineers and architects involved in the project. In the present case the first plaintiff failed to do so. Why should its failure to do so be visited on a council which has a different role in the building process? Although the position of subsequent purchasers is not directly relevant in the present case, given the second plaintiff purchased the shares in the first plaintiff, it must be acknowledged that subsequent purchasers can also protect themselves by warranties. It is reasonable to expect a commercial building owner to look first to the builder, its engineers and architects and other parties involved in the construction project that it had a direct contractual relationship with in relation to the building because those parties provide professional services for which they will have charged professional fees as part of the construction process."

13.22.10 The judgment does refer to the relatively limited cost structure that a territorial authority may have by comparison to professional fees that may be charged (para 50) and it does have reference to the emphasis in the Building Act upon safety and sanitary requirements. In my opinion first those comments must be taken as having been made in the context of commercial property construction; but secondly, and perhaps more importantly, they go not to the existence of any duty of care (which has clearly been established by *Hamlin* and others) but the extent of that duty and questions of contribution.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd

13.22.11 The Council has referred to this judgment, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, as being relevant to a consideration of the applicability of the principles enunciated in *Hamlin*.

13.22.12 The judgment is referred to in *Three Meade Street* as having been referred to the Court after the hearing but before delivery

of the decision. At para 36 of *Three Meade Street* the Court categorised *Woolcock Street* as a decision that:

> "… there was no duty owed by a consulting engineer to the owner of a **commercial** building, namely a warehouse and office space" (emphasis added)

with specific reference to the decision of the majority in *Woolcock Street* that it was distinguished from *Bryan v Maloney* because the latter established the duty in relation to owners of **dwellinghouses**.

13.22.13 That is, in my opinion, a critical distinction to make in this case as in others cited for the Council when considering the principles enunciated in *Hamlin*.

13.22.14 *Woolcock Street* was indeed a claim against consulting engineers in respect of defective foundations to commercial premises, a warehouse and offices complex. The Court held there was no duty of care.

13.22.15 Although that outcome was different from *Bryan v Maloney*, the majority judgment did say at para 17 that there is no "bright line" between cases concerning the construction of dwellings and cases concerning the construction of other buildings because of the variability of constructions that there are, particularly buildings for mixed purposes. It also referred to:

> "… 'the overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another'. It was the application of this 'conceptual determinant' of proximity that was seen as both permitting and requiring the equation of the duty owed to the first owner with the duty owed to the subsequent purchaser. Decisions of the

> Court after *Bryan v Maloney* [31] reveal that proximity is no longer seen as the 'conceptual determinant' in this area." (para 18)

13.22.16 The judgment referred to the issues of vulnerability and assumption of responsibility and known reliance, vulnerability being described as:

> "… a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way that would cast the consequences of loss on the defendant." (para 23)

13.22.17 The terms of the contract between the original owner and the builder were referred to but the Court found it unnecessary to decide on issues affecting disconformity between those obligations and the duty of care owed to a subsequent owner.

13.22.18 That aspect of vulnerability is referred to by Venning J in *Three Meade Street* in similar terms as:

> "… whether the plaintiff was able or not to protect itself from the risk of damage." (para 52)

13.22.19 Also to note is that McHugh J said at para 54 that:

> "New Zealand Courts have been the most liberal of the Courts in common law jurisdictions in permitting an action in negligence for economic loss caused by defective premises"

citing *Bowen v Paramount Builders (Hamilton) Ltd & Anor* [1977] 1 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Stieller v Porirua City Council* [1983] NZLR 628; [1986] 1 NZLR 84; *Brown v Heathcote County Council* [1986] 1 NZLR 76; *Chase v De Groot* [1994] 1 NZLR 613 and *Invercargill City Council v Hamlin* [1994] 3 NZLR 513. That acknowledgement having been made, care must be taken in

considering Australian (and other overseas) authorities and their applicability to New Zealand law.

Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd

13.22.20 I have considered this case above in the context of general principle statements affecting any alleged duty of care owed by a subcontractor.

13.22.21 In the present context the Council has referred to the general statements of principle in *Rolls-Royce*.

13.22.22 Those principles as stated in *Rolls-Royce* are first that there should be an inquiry into the degree of proximity or relationship between the parties (para 58). This reflects a balancing of the plaintiff's **moral** claim to compensation for avoidable harm and the defendant's **moral** claim to be protected from undue restrictions on its freedom of action and from an undue burden of legal responsibility which in turn involves a consideration of how close the nexus is between the alleged negligence and the claimed loss and degree of harm. It also involves consideration of the burden on the defendant of taking precautions against the risk and also whether the consequences may be out of proportion to its fault. The plaintiff's vulnerability can be taken into account which may require concentration on whether "a defendant with special skills has power over a vulnerable plaintiff" (para 61). Other remedies that a plaintiff could realistically have taken are relevant (para 62) as is the nature of the loss (para 63) and the statutory and contractual background (para 64).

13.22.23 The second issue is then whether there are wider policy considerations that tend to negative or restrict or strengthen the existence of the duty.

Principles – Duty of Care - Conclusion

13.23 I will not attempt to restate in full the various principles that have emerged from a consideration of those cases. I am satisfied that the question is not simply one of whether there has been a residential construction which therefore imposes duties of care including duties on a territorial authority. The nature of the contract must be considered first. That may be a contract for a residence *simpliciter*, as is the case here, or it may be a contract for a more complex development such as a combined commercial/residential development (a block with retail shops on the ground floor and residences above being an example). It may be a more significant contract for a more obviously commercial development such as a motel (*Three Meade Street*). It may be a strictly commercial contract in detailed terms with commercial subcontracts in detailed terms for a substantial construction (*Rolls-Royce* – co-generation plant at timber mill). Each category of contract must be considered in its own merits.

13.24 Normally, however, there is a more likely duty of care in the case of the construction of a residential dwellinghouse *simpliciter* as is emphasised by *Hamlin* and the cases on which it is based.

13.25 The terms of the individual contracts, whether these be a head contract, or subcontracts, or a group of individual contracts as in a labour-only construction, are important. In those individual contracts the contractors agree on the extent of their exposure to liability and the parties, particularly the owner, agree to any limitation on, or exclusions from, that liability. The owner of a site may expressly agree with the head contractor that its liability is restricted or excluded to a greater or lesser extent and that head

contractor is entitled to take advantage of the rights that that creates. There may be insurance issues which arise from clauses restricting or excluding liability. Clauses of that kind do emphasise to the owner the importance of ensuring that its interests are protected in some other way.

13.26 Also important in the contractual context is the agreement for sale and purchase by which the plaintiff buys the residence (if there is such as is the case here). Any claim by the purchaser of a dwellinghouse against any party with which that purchaser did not have a contractual relationship must sue on some other legal basis. This is normally in tort for negligent breach of a duty of care. Relevant to any such claim must be the terms on which that person purchased the dwellinghouse. There will be the contractual terms with the vendor. There will be any exclusion or limitation of liability clauses on the part of the vendor and there will be any further clauses which may be relevant to the question of reliance.

13.27 Contractual terms will be even more significant when the plaintiff/claimant was the owner of the land at the time the dwellinghouse was constructed. The terms of that person's contract with the builder will be relevant (as in WHRS claim 1092 *Auckland City Council v S J Brentnall Ltd*); and the contractual terms between the head contractor and subcontractors or direct contracts for subtrades between the owner and those respective contractors.

13.28 The three cases to which the Council has referred (*Three Meade Street*, *Woolcock* and *Rolls-Royce*) have, to a greater or lesser extent, emphasised the relevance of the contractual terms in that way.

13.29 In the context of alleged negligent breach of a duty of care there will also be the questions of proximity, vulnerability (including the adequacy of means for self-protection by the claimant), the nature of the loss and the statutory and contractual background.

Code Compliance Certificate

13.30 It is submitted for the Council that in general principle the Council's liability for the issue of a Code Compliance Certificate is significantly limited.

13.31 The submissions refer to *Three Meade Street* and to *Attorney-General v Carter* [2003] 2 NZLR 160.

13.32 In *Three Meade Street* Venning J considered *Carter*. *Carter* involved the issue of an interim certificate of survey for a ship under the provisions of the Shipping and Seamen Act 1952. The Court of Appeal held that the purpose of the survey requirements was the safety and seaworthiness of ships and there was nothing in the legislative scheme or its individual provisions to suggest the survey certificate were intended to be issued or relied on for economic purposes.

13.33 In reliance on that authority Venning J said that in *Three Meade Street*:

> "It is not part of the statutory scheme [the Building Act 1991] that by issuing a Code Compliance Certificate the Council was guaranteeing the motel was free from defects which might otherwise cause economic loss to an owner." (para 64)

It is said that a strict approach is taken but he concluded (para 67) that the first plaintiff:

> "… [could not] refrain its claim as a breach of statutory duty to overcome its failure to establish a duty of care."

I take it from that that the Court was saying that if there **was** a duty of care then that could be the foundation for the breach of a statutory duty claim by which I take it that the Court meant that in a case such as the present, if there is a duty of care found to be owed by the Council to the claimant

(and I do so below), then the claimant can **also** claim for breach of the statutory duty – to the extent that duty extends – which has caused it loss.

13.34 The statutory scheme under the Building Act 1991 was considered by Richardson J in the Court of Appeal in *Hamlin* and at p526 he made express reference to include the following:

> "… consents for building work can only be issued by territorial authorities (ss32 and 33), which are entitled to inspect work for compliance with the Act (s76); the territorial authority issues the final Code Compliance Certificate (s43); and even where a private certifier is used the territorial authority retains overriding control … The legislation is performance oriented. It is intended to perform greater efficiencies. Owners may have a degree of choice between territorial authorities and private certifiers with competitive charging by territorial authorities and private certifiers for their services and territorial authorities have overriding responsibility for administering the new building control system."

13.35 In that context Richardson J referred to the 1990 report of the Building Industry Commission "Reform of Building Controls" where in volume 1 para 2.16 there is this:

> "2.16 The purpose of a building control system should be to ensure that essential provisions to protect people from likely injury and illness and to safeguard their welfare will be satisfied in the construction, alteration, maintenance, use and demolition of buildings."

13.36 In *Three Meade Street* Venning J emphasised the health and safety aspects of a territorial authority's responsibility under the Building Act 1991. That was, however, in the context of the commercial premises to which that case referred and, as I have said, although counsel for the Council submitted to me that the adjudicator in claim 277 *Smith v Waitakere City Council*, was incorrect in concluding that *Three Meade Street* could be distinguished as it applied to commercial properties only, that was the very distinction that was argued by counsel for the Council in *Three Meade Street* before Venning J.

13.37 In conclusion, in general principle, provided the other issues concerning the existence of a duty of care to which I have referred are considered and in a particular case do establish a duty of care, in my view the Council can be liable for the economic loss consequences of a Code Compliance Certificate issued by it negligently.

Specific Defences in this Case

13.38 In this claim the Council has raised specific issues. The first is that there was a change of ownership in February 2005. Before then the property was owned by Mr Atkins personally and the trustees of the Trust. After that time the property was owned by the trustees solely. As to the first period of time the Council submits that the claimants were not individuals of modest means; the house was not constructed nor purchased under any régime of Government support and funding; and the claimants could have obtained a pre-purchase report but decided not to.

13.39 In my view none of those factors alter the duty of care which I have described on the Council above. I do not think that the means of any particular purchaser of the property affects the duty of care owed by a Council in its involvement at an earlier stage in the construction of the dwelling. It does not know who subsequent purchasers are to be. Indeed there may be a succession of subsequent purchasers of differing means. The Council owed an obligation to each of those when it undertook its supervisory role in respect of the construction of the dwelling in the first place. Likewise I do not consider that the overarching "régime" affects that duty of care. That may have been a matter mentioned by Richardson J in *Hamlin* but that is not of itself a critical and determinative factor. As to the pre-purchase inspection report, this property was purchased initially in 1998 by Mr Atkins and the Trust and it was not common then to obtain pre-purchase inspection reports nor could it be said to be negligent to fail to do so.

13.40 Secondly the Council refers to the remaining period of time after the purchase by the Trust of Mr Atkins' personal half interest claiming first that the Trust was aware of weathertightness issues and secondly that the property had "essentially become a vehicle for investment and thus could be termed commercial".

13.41 I do not accept that those factors affect the duty of care or the claimants' claims in this matter. Certainly there was an awareness of weathertight issues and that is the reason for the reduction in the purchase price of the half share. But that factor is taken into account in the way the claim is now structured including a claim for the loss to Mr Atkins on the sale, a loss which he has assigned to the Trust, namely $75,000.00. I do not regard this as a commercial venture sufficient to require further consideration of such cases as *Three Meade Street* or others mentioned above. Mr Atkins and Mrs Atkins lived in the property between July 1998 and July 2002 when they moved to San Diego and rented the property. At that point this was simply a matter of investment return for them in respect of a home that they had purchased as a home but had vacated for personal reasons. I do not regard the purchase of Mr Atkins' half share as being in any way a commercial investment by the Trust. The Trust was simply continuing the investment circumstance that had arisen after Mr & Mrs Atkins left for San Diego. All this is a very far cry from the *Three Meade Street* circumstance where a commercial structure is built for commercial reasons and using the protection of commercial contracting resources, so as to impact on any duty of care that the Council may otherwise have had. This was a residence that was constructed at the time of Council's involvement. It was always intended as a residence. The duties of care that the Council owed were created then quite independently of who subsequently became the owners.

14. Council Liability: Specific Issues

14.1 The claim against the Council by the claimants is in three aspects:

14.1.1 Issue of building consent.

14.1.2 Inspections.

14.1.3 Issue of a Code Compliance Certificate.

14.2 I will deal first with the general principles raised and secondly the specific application of those to individual aspects of water entry and damage.

Issue of Building Consent

14.3 The Council submits that there is no obligation on the Council before issuing a building consent to seek further information and no obligation to refuse a building consent on the grounds of insufficient information. Reliance is placed on *Three Meade Street* at para 39 where Venning J clearly held that the Council's obligation is to grant or refuse the application for consent under s34 of the Building Act 1991. Although it has the power under s34 to suspend the relevant period until further information is provided that is not, His Honour effectively held, a statutory empowerment for the Council to require the provision of further information.

14.4 The Council has relied on statements of principle in WHRS claims 27 (*John Gray Family Trust v Lay & Ors*) and 1276 (*Hartley v Balemi*).

14.5 The Council also submits that the standards must be judged by the conduct and standards **at the time** of the conduct complained of and refer to *Aspen v Knox* [1989] 1 NZLR 248, *Lacey v Davidson & Anor* (Auckland High Court; A546/65; 15/5/86; Henry J), *Hartley v Balemi* (op cit) and WHRS claim 1917 (*Hay v Dodds*). I accept that that is so, namely that in assessing negligence the standards at the time of the negligent conduct are those which are relevant.

14.6 In light of those authorities my view on s34 of the Building Act 1991 is clear that the obligation on the territorial authority was to grant or refuse the application (subsection (1)) and to do so within the prescribed period which it could suspend until any further information reasonably required was supplied (subsection (2)) but that it had no obligation to insist on further information. The territorial authority's obligation under subsection (3) was to grant the building consent:

> "… if it [was] satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application."

14.7 That requirement meant however, in my view, that as it considered the application for building consent the territorial authority had to determine whether the plans and specifications submitted with the application would mean that a building properly completed in accordance therewith would satisfy the provisions of the Building Code. Under subsection (4) the territorial authority could impose waiver, modifications or conditions and in doing so was required under subsection (5) to have "due regard to the provisions of the Building Code and the matters set out in section 47 …".

14.8 Those obligations were reflected in the further obligation under s43 that the territorial authority issue a Code Compliance Certificate:

> "… if it is satisfied on reasonable grounds that … the building work to which the certificate relates complies with the Building Code [or any approved waiver or modification contained in the building consent]".

14.9 In support of their claim the claimants adduced evidence from Roger William Cartwright who had worked for the Auckland City Council for 18 years, the first 12 as a building inspector. On the basis of his interpretation of certain sections of the Building Act 1991 he listed certain information that would, in his opinion, be required to satisfy the Council on reasonable grounds that the provisions of the Building Code would be met, an

expression which clearly refers to the requirements of s34 mentioned above. There were eight categories of detail which he said would be required and in his opinion the plans and specifications that were on the file did not contain sufficient detail for the Council to be so satisfied and he dealt with the specifics in relation to each category of claimed defect.

14.10 In reply for the Council Mr M B Jones, an employee of the Manukau City Council and a person with significant background involvement in Council inspection and certification, disagreed and expressed the opinion that with the level of information generally required and accepted **at that time** there was sufficient information available to the Council to enable it to issue consent. He did not elaborate. In my view, as expressed above, the Council should have refused to issue consent if the information provided did not satisfy it on reasonable grounds that the provisions of the Building Code would be met if construction was in accordance with the information.

14.11 There was no part played in this adjudication by the person responsible for the drawings and specifications, the fifth respondent, Mr Smits, and I have above drawn inferences from that that he accepted that there were design issues implicating him for which he was at fault.

14.12 That being so, I have considered the respective aspects of water entry and damage in the context of design inadequacy and Council processing of those inadequacies below.

14.13 The evidence from Mr Roxburgh on all issues was in the context of individual aspects of defect and damage and I shall address those later. Mr Grigg did not address the issue of Council processes at all. The issue was not addressed at the technical meeting referred to at paragraph 3.8 above.

Inspections

14.14 Counsel's submission on the authority of WHRS claim 134 (*Kellaway & Ors v Waitakere City Council & Ors*) is that:

- The Council inspector must act as a reasonably prudent Council inspector would act.
- The standard in relation to any inspection may epend on the magnitude of the consequences.
- A Council inspector is not a clerk of works.
- Council are obliged to ensure works are carried out in accordance with consent and code.
- The standard of care does not extend to identifying defects which require testing.
- Council are obliged to put in place proper inspection processes at appropriate intervals and stages during construction to maximise inspector's ability to ensure compliance with the Building Code.
- Council must undertake necessary research.

Code Compliance Certificate

14.15 I have referred above to the requirements of the Building Act 1991 as to the issue of a Code Compliance Certificate and my view that there is a liability if this is issued by a territorial authority negligently where there is a duty of care. Mr Cartwright's evidence is that the satisfaction on reasonable grounds that code compliance has been achieved can be obtained by undertaking the necessary inspections or by other means such as producer statements or product appraisals. He said that the 16 inspections apparently undertaken were deficient in failing to identify a number of breaches of the Building Code that were "readily apparent" and I deal with the specifics below. Neither Mr Jones nor Mr Roxburgh nor Mr Grigg gave specific evidence on this issue other than in the context of the respective defects.

14.16 If a claim is based on a defective Code Compliance Certificate in circumstances where the Council owed a duty of care and has negligently breached that in the issue of the certificate, then a claimant cannot proceed with a claim unless there is evidence of reliance on the defective certificate. Clearly a certificate sitting in a Council file which is not inspected by a person purchasing a property cannot form the basis of any reliance. It may be that if there were evidence that a Code Compliance Certificate had been issued and this was known by a purchaser/claimant at the time of purchase there could be some argument that the knowledge or understanding that a certificate had been issued is sufficient to establish some reliance. The Council has by that certificate certified that the dwelling does meet the performance standards in the Building Code and an awareness of the issue of a certificate (assuming it had in fact been) indicates a reliance on the Council's certification.

14.17 I turn now to consider the specific areas of water ingress.

Inadequate Waterproofing to Parapet Tops

14.18 In his evidence in support of the claim in this respect Mr Earley simply refers to the evidence of Mr Cartwright but in his summary alleges that the Council has:

> "… failed to identify construction not in accordance with consented plans at construction stage".

That is an inspection issue.

14.19 Mr Cartwright referred to sheet 5 of the approved plans showing parapets having a "pre-finished steel capping as flashing to top". He said that at the inspection on 6 September 1995 (and I presume it was an error that he referred to "1996") and the three that followed it should have been clear to Council inspectors looking from ground level that there was steel capping on the rear parapets but none on the side parapets and none visible on the

front parapets. The 6 September 1995 inspection was of unit 1 but the final inspection for unit 2 appears to have been 18 March 1996 and I am taking it that his remarks relate to that inspection also.

14.20 For the Council Mr Jones first made general comments about the extent of knowledge of weathertightness issues at the time of construction and the general practise of inspections at the time. He referred to the matters that would have been considered at a pre-line inspection and matters at a final inspection. He said that there was effectively no individual who had been personally involved in these two units now available to give effective evidence. He explained that there were a number of methods of construction of a cladding system such as this so far as parapets were concerned including installation of a metal capping and installation of a sloped surface covered in a proprietary waterproof membrane. He referred to the side parapets as being "said to have no slope" and he said it would be unlikely that a Council officer would have been on site at the time of installation of any membrane covering over the parapets or the nailing of the Hardibacker surface. He said that any slope would have been toward the roof which would not have been visible from ground level.

14.21 Mr Roxburgh too referred to the sloped parapet construction in accordance with Duraplast details of March 1995 as being an acceptable alternative to the cap flashing and said that it was:

> "… not common practise for Council inspectors to undertake roof level inspections and they were not supplied with the equipment to do so".

14.22 Mr Hursthouse in cross-examination, while conceding that either the capping or the membrane had potential to work and it would not be expected to see the capping if the membrane had been used, did confirm that at the technical experts meeting it had been agreed that the requirement in the drawings for capping meant continuous capping.

14.23 Mr Grigg did not comment on the matter from the point of view of Council responsibilities or inspection.

14.24 This aspect was identified at the experts technical meeting referred to at para 3.8 as one of the two most significant causes of leaking and damage (refer para 3.8.9).

14.25 In deciding the Council's liability in this matter I have taken account of standards that pertained at the time and the increased knowledge of weathertightness issues that has been learned since. I take into account that Mr Cartwright conceded that in 1995/96 inspectors were not issued with a ladder but he did say that if needed an inspector can try to climb onto the roof or gain access in some way.

14.26 The drawings required cap flashings. In my view the Council inspections should have ascertained whether those cap flashings were supplied or not. Although that may have been difficult to see from the ground appropriate steps should have been taken to find out if the cap flashings had been used. It may subsequently have become more apparent that water penetrates parapets if uncapped but that is not an issue here where the drawings were required to be capped and some at least of them were not. That should have alerted the inspector to make further inquiry to ascertain how the parapets were protected from any water entry.

14.27 In my opinion the Council has been negligent in its inspection process in failing to identify this departure from the drawings and to check that the construction course followed in fact achieved weathertightness to meet the performance standards of the Building Code.

14.28 Accordingly I find the Council liable to the claimants in this area and deal with quantum below.

Window and Door Joinery Flashing Installation

14.29 Mr Earley's schedule, apparently relying on other evidence, is that the Council has:

> "[f]ailed to confirm details of proprietary cladding system at consent stage and failed to identify construction not in accordance with Duraplast details at inspection stage."

14.30 Mr Cartwright's evidence refers first to an obligation on the Council to request details of window flashing and junction and the applicant for building consent could have provided the Duraplast technical information. I do not think the Council has any liability in that respect because, as Mr Cartwright's evidence makes clear and I have mentioned in detail above, the Duraplast technical information was not followed.

14.31 Mr Cartwright then refers to the failure to note that the window joinery as in fact installed was neither face fixed nor recessed. He referred to the as built sketch by Mr Earley. Mr Cartwright referred to the gib bracing inspection and said that that should have revealed that the joinery was not installed in accordance with specifications or with an acceptable solution.

14.32 Mr Jones' evidence was that the sill and jamb flashings to the windows and joinery had been correctly installed in accordance with the Plaster Systems detail but I have found that that was not the case. The window and door joinery was neither face fixed nor recessed and, while it had a flange which I have found to be possibly more effective than the then specified flange, did not in fact have the flange in the correct place. Mr Jones said that those flashings would not have been visible at the time of the inspections.

14.33 Mr Roxburgh gave similar evidence stating that most Council inspectors would not have been able to tell the difference between stucco and Duraplast at final inspection and that it would be impossible to confirm how the sill and jamb flashings had been formed after the plaster finish was

applied. The standard form of pre-line site visit checklist applicable at the time does not include express reference to joinery installation or flashings. It has been found in other adjudications that sill and jamb flashings were not standard at the time.

14.34 The Council relies on the principle that standards must be judged in their then contemporary context. In *Askin v Knox* [1989] 1 NZLR 248 at 252 Cooke P said:

> "Even by the standard of the balance of probabilities there is a natural reluctance to condemn [the two inspectors who had died before the hearing] as negligent. In the early 1960s inspectors, acting according to the standards then regarded as reasonable, may have been less conscious of the risk of subsidence that has been underlined by the litigation of more recent decades. This unwillingness to find negligence may be a misfortune for the plaintiffs, but it also illustrates the drawback of trying to resolve a dispute or fact more than 20 years afterwards."

14.35 Having considered all the evidence and submissions I have come to the conclusion that the Council was not negligent in respect of window and sill flashings. There was clearly a departure from the required installation of that joinery which in turn required that the plasterers respectively modified the plastering system to allow for the created situation. I have dealt with the liability of other parties above. I do not think that, given those circumstances and given the standards at the time, it could be said that the Council inspections should have identified that there was a potential risk of water entry and damage. In the circumstances it was appropriate for the inspector(s) to accept advices given on site that the necessary installation and plastering had been done. Given particularly that the agreed view of the technical experts was that sealant failure was a principal issue in relation to joinery failure, I do not think that the Council inspections could have, or at least should take responsibility for, finding sealant issues and identifying potential failures. In any event it is submitted for the claimants that there was no cladding inspection and therefore no inspection of the installation of the window joinery. It is not for a Council to initiate an

inspection. A Council cannot be found liable for a negligent inspection that did not occur.

14.36 Although there is reference to fault at design stage my view is that there is no evidence of any aspect of the design that was wanting and no obligation on the Council to question the design issues or suspend the time for issue of a building consent in that respect.

14.37 Accordingly I find the Council has no liability for that defect.

Cladding Below Ground and Floor Level and Cladding Hard Down to Paved Decks

14.38 Mr Earley's schedule refers to both these issues as both consent and inspection issues.

14.39 Again as to consent stage, Mr Cartwright's position is that because there was nothing on the plans showing where the plaster was to finish relative to ground level or deck level the Council should have requested these details. On the authorities discussed above my view is that the Council was under no obligation to do so as such but could have suspended the time for issue of building consent.

14.40 Against that Mr Roxburgh conceded in his evidence that the Council officer should have noticed cladding in contact with the ground at the time of final inspection provided the concrete had by then be laid; and he conceded the Council would have seen retrofitted drainage as a sensible attempt to provide separation (and he may have been referring there to unit 18A but that is not clear). He expressed the view that the problem of plaster was not considered to be a high risk at the time. As to the cladding to decks, he said that there was less "clarity available" but conceded that it was an unsatisfactory practise that the Council should have recognised as inappropriate.

14.41 He said that the capillary action from these cladding issues was less likely to have caused decay than from other causes. That was the agreed position of the technical experts, namely that wicking damage was significantly less than damage caused by other defects (see para 3.8.5 above).

14.42 Mr Jones accepted that there was insufficient height between internal and external floor levels and that cladding was in contact with the exterior ground level. He conceded that the difference in the former was visible at the time of construction and that the Council inspection picked this up. He said that the side elevations were not under cover and would have been the only area considered at risk and he referred to the front elevations as containing the garage. He expressed the opinion that the inspector would not have been able to tell that the Duraplast literature had not been followed at the time of his final inspection and would have noted the retrofitted channel in front of the garage.

14.43 Having considered the evidence and submissions I have formed the view that the Council has been negligent in respect of the aspects relating to ground and floor levels. The witnesses have conceded that this issue was before the Council inspections and in my view the Council inspector should have taken steps to ensure compliance. Having said that, however, I have not been persuaded that that was such a significant issue that the Council should be contributing to the cost of repair in respect of the ground levels. There is a significant element of duplication with both the parapet tops repair costs and the sill and jamb flashing repair costs. I have found the Council liable in respect of the former but not the latter. The evidence, and indeed the agreed position of the technical experts, was that wicking from cladding below ground and floor to external ground levels was a relatively minor cause of damage and the most significant cause was gravity water passage from other factors. The repairs to the north-east elevation are

occasioned by all three causes (cladding below ground, parapets and flashings); the repairs to the south-east elevation by two causes (cladding below ground and flashings); the repairs to the south-west elevation from all three causes; and the repairs to the nib wall only from cladding below ground floor. The cost of that exclusive item is $9,400.00. On balance I do not see that the Council has any additional liability in respect of wicking so far as ground levels are concerned.

14.44 As to the paved decks, Mr Cartwright's view was that from the final inspections it would have been obvious that plaster was taken hard down on to the deck with no step down from lounge and bedroom on to the deck and that a prudent inspector would know that this was a breach of the performance standards of the Building Code.

14.45 Mr Jones confirmed that the inspection did detect an issue with relation to drainage to the decks and that the inspector asked for it to be rectified. His expectation was that when the officer returned he did not go up on to the deck but simply observed the drainage overflow from the exterior of the house. Mr Roxburgh, as I have said, acknowledges that the Council should have recognised the unsatisfactory practise of plaster hard to decks as inappropriate.

14.46 The costs for repairs to the cladding having been taken hard down onto the paved decks totalled $57,403.00 plus GST and I deal with quantification of the claim against the Council below.

Internal Gutter Flashings

14.47 This is identified by Mr Earley's schedule as an inspection issue:

> "Failed to identify construction not in accordance with consented plans at construction stage."

14.48 Mr Cartwright expressed the view that Council inspectors should have noticed the lack of capping during final inspections. Mr Jones' evidence was that:

> "It was not the practise of Councils at the time of construction to inspect areas in and around roofs. They simply did not have the equipment to do so"

and for that reason defects were not visible. Mr Roxburgh gave similar evidence.

14.49 Mr Cartwright provided a statement of evidence in reply and did not respond to Mr Jones' statement as quoted above.

14.50 It may seem strange in 2006 that an inspection to ensure compliance with the performance standards of the Building Code such that a Code Compliance Certificate could be issued does not include a roof inspection. It is trite to say that water falls down and first onto the roof and questions of water entry are bound to start there. It has often been said that gravitational water damage is much more significant than entry from other means. However I have to assess the standards as they applied at the time of construction of this dwellinghouse in the light of the evidence that is submitted. The claimants rely on s76(4) of the Building Act 1991 which provided that:

> "… every person engaged in any building work shall give every reasonable facility to enable the territorial authority's authorised officers to inspect all or any part of the building or the building work"

and submitted that that required the inspector to request a ladder. That statutory provision does not of itself impose an obligation on the inspector. It simply imposes the obligation on the owner to provide the facility.

I refer again to the statement of principle by Cooke P in *Askin* at para 14.34 above.

14.51 Given that the evidence from both Messrs Jones and Roxburgh is that roof inspections were not normally carried out at that time and given that that is not replied to by Mr Cartwright in his statement, I have formed the view that there is insufficient evidence for me to determine that the Council was negligent in its inspection of the guttering at the roof level as is alleged by the claim.

14.52 The repairs that are said to be occasioned by this matter relate to the north-west and south-east elevations and the rear deck. The south-east elevation repairs are implicated in the amounts said to be due from cladding hard down onto paved decks and there is an element of duplication there.

14.53 Insofar as there are claims relating to damage from failure to identify construction issues in relation to the flashings to the central internal gutter I find the Council has no liability.

Glass Penetration to Flat Tops of Balustrades

14.54 This is identified in Mr Earley's schedule as both a consent and an inspection issue:

> "Failed to insist on weathertight details for critical junctions at consent stage and failed to identify the vulnerable junction during inspections."

14.55 Mr Cartwright's view was that at consent stage the Council should have requested a cross-section of the deck barrier and, for the reasons I have mentioned above, I do not find that the Council had an obligation to request further detail as has been claimed. Mr Cartwright also says that it "should have been obvious" that glass penetration of the balustrades was a source of moisture ingress and that it was "surprising" that the Council allowed toe holds around the glass.

14.56 Mr Jones conceded that the glass balustrade walls were installed as outlined by Mr Earley but said that, even if the Council inspector had gone onto the deck once the glass balustrades had been installed, he would have been unlikely to have considered the manner of installation as in breach of the Code or have recognised that it would give rise to weathertightness issues at a later date.

14.57 Mr Roxburgh gave a qualified answer relating to reliance on sealants.

14.58 Having considered the evidence and heard the witnesses and seen the photographs I have formed the view that the glass penetration to the balustrades was quite inadequate and I have dealt with this earlier in relation to other parties. That should have been quite apparent to an inspector at the time such that questions concerning the adequacy of drainage from the penetration should have been raised.

14.59 I find the Council negligent in relation to that matter. The amounts claimed as due for repairs are the same as those for the cladding to paved decks issue and there is duplication in that respect. I have dealt with quantification below.

Code Compliance Certificate

14.60 The Council has a liability as I have found on the basis of negligent inspections and it is perhaps unnecessary then to consider any further liability under the Code Compliance Certificate. I have expressed the opinion above that there can be a liability for the issue of Code Compliance Certificate which is wrong but I have limited this to a claim in respect of a dwellinghouse and only where there is a pre-existing duty of care. I have found there to be that duty of care owed by the Council to the claimants in this case. The Code Compliance Certificate is in fact wrong in that the

dwelling did not comply with the Code at the time the certificate was issued and further, to use the words of s43(3) of the Building Act 1991, there was not proper ground to satisfy the Council on reasonable grounds that the building work complied with that Code. There is, however, no evidence of any reliance on that Certificate by the claimants.

15. Result – Council Liability

15.1 I find that certain of the claims against the Council are made out and it has a liability to the claimants for the following repairs:

North-east elevation	44,094.00
South-west elevation	49,410.00
Parapets	14,700.00
South-east elevation	28,241.00
Front decks	23,500.00
Internal repairs master bedroom	5,662.00
Total	$165,607.00
Total (including GST)	**$186,307.88**

15.2 Although the evidence of Mr Roxburgh was that he disagreed with Mr Earley's apportionment of repair costs to damage caused, my view is that the Council's liability is for the damage resulting from its negligence. If the negligence relates to one cause of damage but not another, in my view the Council has a liability for the full cost of the repairs even although there were other causes as well for which the Council does not have a liability. That question may go to one of contribution and I mention that later, but it does not, in my view, affect the Council's primary liability for repair costs for damage occasioned as the result of water leakage which could have been avoided by compliance with proper standards.

15.3 In addition there are the other aspects of claim referred to, and there has been the change to the basis of claim as mentioned. Again I have thought it appropriate that there should be one half of the costs where I have found

liability plus an apportionment of the "loss on sale (assigned)" claim for $75,000.00 based on the proportion of the amount I have found the Council liable for to the total repair claim and now tabulate the net liability:

Total repair costs items 1 - 7	202,462.00		
Including GST	227,769.75		
Amounts claimed for repairs in respect of items 2, 5 and 6		165,607.00	
Including GST		186,307.88	
Percentage of allowed repair claims against total (186,307/227,769)			82%
Percentage of loss on sale (assigned) claim (75,000 x 82%)			61,500.00
Plus one half repair costs allowed (186,307.88/2)			93,153.94
Plus one half reduction in rental			2,080.00
Less deduction – para 5.18			4,916.50
Less deduction contributory negligence			6,000.00
Balance liability			$145,817.44

15.4 I therefore **ORDER** that the first respondent, **North Shore City Council**, pay to the claimants, **Peter Bruce Frederick Atkins** and **John Richard Muller** as trustees of the Bruce Family Trust, the sum of **$145,817.44**.

16. Contribution

16.1 Various respondents have made cross-claims for contribution under s17(1)(c) of the Law Reform Act 1936 which provides as follows:

> "**17. Proceedings against, and contribution between, joint and several tortfeasors—**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> …
>
> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover

> contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

It will be seen from s17 that there can only be recovery from one tortfeasor against another.

16.2 The only submissions of substance made are on behalf of the Council where it is submitted that Councils are typically never found responsible for more than 20% of losses flowing in respect of the losses for which it is found responsible with reference to the following cases:

Young v Tomlinson [1979] 2 NZLR 441 – Council 10 - 25%
Riddell v Porteous [1999] 1 NZLR 1 – Council 20%
Mt Albert Borough Council v Johnson [1979] 2 NZLR 234 – Council 20%
Scott v Parsons (High Ct; CP 776/90; 19/9/94; Cartwright J) – Council 15%
Morton v Douglas Homes Ltd [1984] 2 NZLR 548 – Council 10%

16.3 In approaching the issue of apportionment I have first looked at the individual areas of repair and the respective causes of damage occasioning that repair which I now tabulate:

Item	Cause % Cladding to ground	Cause % Parapet tops	Cause % Joinery	Cause % Gutter Flashings	Cause % Cladding to Deck	Cause % Glass Balu-strades	Cause % Saddle flashing	Cause % Masonry wall
S/E Elevation	10		20	20	20	20	10	
S/W Elevation	10		90					
N/E Elevation	10	90						
Nib Wall	100							
Parapets		100						
N/W Elevation			50	50				
Rear deck			50	50				
Lounge floor			100					

Front Decks	100			
Master bedroom	40	40	20	
Internal tanking				100

16.4 I have then considered the respective contributions of the relevant parties to those repair areas taking the repair costs and adding GST and the resultant contribution to the cost as follows:

Item	Party	%ge Fault	Repair Cost	GST incl	Share Total
S/E elevation	J Williams – 3rd resp	50	28,241.00	31,771.13	15,885.56
	Developers – 4th resp	10			3,177.11
	NSCC – 1st resp	10			3,177.11
	Plaster Systems – 8th resp	15			4,765.67
	Murphy – 6th & 7th resp	15			4,765.67
		100			$31,771.13
S/W elevation	J Williams – 3rd resp	50	49,410.00	55,586.25	27,793.13
	Developers – 4th resp	10			5,558.63
	NSCC – 1st resp	10			5,558.63
	Plaster Systems – 8th resp	15			8,337.94
	Murphy – 6th & 7th resp	15			8,337.94
		100			$55,586.25
N/E Elevation	J Williams – 3rd resp	75	44,094.00	49,605.75	37,204.30
	Developers – 4th resp	10			4,960.58
	NSCC – 1st resp	10			4,960.58
	Murphy – 6th & 7th resp	5			2,480.29
		100			$49,605.75
Nib Wall	J Williams – 3rd resp	95	9,400.00	10,575.00	10,046.25
	Developers – 4th resp	5			528.75
		100			$10,575.00
Parapets	J Williams – 3rd resp	75	14,700.00	16,537.50	12,403.13
	Developers – 4th resp	10			1,653.75

	NSCC – 1st resp	10			1,653.75
	Murphy – 6th & 7th resp	5			826.88
		100			$16,537.50
N/W Elevation	J Williams – 3rd resp	65	18,055.00	20,311.88	13,202.72
	Developers – 4th resp	5			1,015.59
	A G Smits – 5th resp	10			2,031.19
	Plaster Systems – 8th resp	10			2,031.19
	Murphy – 6th & 7th resp	10			2,031.19
		100			$20,311.88
Rear Deck	J Williams – 3rd resp	65	1,500.00	1,687.50	1,096.88
	Developers – 4th resp	5			84.38
	A G Smits – 5th resp	10			168.75
	Plaster Systems – 8th resp	10			168.75
	Murphy – 6th & 7th resp	10			168.75
		100			$1,687.50
Lounge Floor	J Williams – 3rd resp	65	7,900.00	8,887.50	5,776.88
	Developers – 4th resp	5			444.38
	A G Smits – 5th resp	10			888.75
	Plaster Systems – 8th resp	10			888.75
	Murphy – 6th & 7th resp	10			888.75
		100			$8,887.50
Front Decks	J Williams – 3rd resp	80	23,500.00	26,437.50	21,150.00
	Developers – 4th resp	5			1,321.88
	A G Smits – 5th resp	5			1,321.88
	NSCC – 1st resp	10			2,643.75
		100			$26,437.50
Master Bedroom	J Williams – 3rd resp	80	5,662.00	6,369.75	5,095.80
	Developers – 4th resp	5			318.49
	A G Smits – 5th resp	5			318.49
	NSCC – 1st resp	10			636.98
		100			$6,369.75

Internal Tanking	J Williams – 3rd resp	90	7,638.00	8,592.75	7,733.48
	Developers – 4th resp	10			859.28
		100			$8,592.75
			$195,400.00	$219,825.00	

16.5 Translating that into percentages of total repair costs produces the following:

Party	**Total Proportionate Liability**	**Percentage**
J Williams – 3rd respondent	$157,388.12	66.6%
Developers – 4th respondents	19,922.79	8.43%
A G Smits – 5th respondent	4,729.05	2.00%
North Shore City Council – 1st respondent	18,630.79	7.88%
Plaster Systems Ltd – 8th respondent	15,303.54	6.85%
Murphy – 6th and 7th respondents	19,499.46	8.24%

16.6 In reaching those percentages I have carried out certain rounding.

16.7 Because of the way in which the claim is formulated I have considered contributions best allocated by taking the claimed repair costs (and there are slight variances between parties), the claimed losses on assignment and the other items that I have added or deducted as above and as shown below and calculated the above percentage of those amounts as follows:

Claimed Item	**Amount**	**Percentage as above**	**Contribution**
Repair claims	128,634.00		
Loss on sale (assigned)	75,000.00		
Allowed reduction in rental	2,080.00		

Less reduction internal renovation – para 5.17	4,916.50		
Less reduction contributory negligence	6,000.00		
Balance	**$194,777.50**		
Party			
J Williams – 3rd resp		66.6%	129,721.81
Developers – 4th resp		8.43%	16,416.62
A G Smits – 5th resp		2.00%	3,896.00
NSCC – 1st resp		7.88%	15,351.94
Plaster Systems – 8th resp		6.85%	13,342.46
Murphy – 6th & 7th resp		8.24%	16,048.67
Total		100%	$194,777.50

16.8 If all respondents paid the sums shown against their names in the previous subparagraph the claimants would have received the total claims made by them as I have determined above.

16.9 If any respondent fails to pay to the claimants the amount for which he or it is liable and another respondent has paid a greater sum than is shown, then the latter respondent is entitled to recover from the former a sum so as to achieve that apportionment of the amounts payable.

16.10 In fixing the percentages in paragraph 16.4 I have had regard to all the evidence from all witnesses. No witness gave express guidance as to percentages but, as I have mentioned at length in this Determination, there were many factors which pointed to appropriate apportionment and I have made the apportionment accordingly. Without attempting to restate matters in full or provide an exhaustive explanation there are these factors which I have considered:

16.10.1 In relation to the south-east elevation the cladding is an issue but not a significant one. I consider it and the absence of saddle flashing to be about equal in their cause and responsibility spread

between the other five causes, joinery, gutter flashings, cladding to the deck and the glass balustrades issues. The liability for this must be shared primarily by Mr Williams as builder with a responsibility on the part of the developers. It is not a design issue and I have omitted Mr Smits. There are plasterers' issues that affect Plaster Systems Ltd and Messrs Murphy in relation to joinery issues and I have apportioned their liability equally between them. The Council has the remaining 10% liability for its share in causing the loss.

16.10.2 The south-west elevation issues are attributed to cladding to the ground and joinery. Again the builder must take a significant responsibility for this as must the developers. The joinery issues are shared equally between Plaster Systems and Messrs Murphy at 15% each and the Council must carry the remaining 10%.

16.10.3 The north-east elevation issue relates to cladding to the ground and the parapets where Mr Williams must carry the major part of the liability with the developers carrying 10%, the Council 10% and Messrs Murphy a share (5%) for their failures. I have found that there is not a design issue in that regard.

16.10.4 The nib wall is solely a cladding to ground issue where the liability must be shared between the builder and the developers as shown. The parapets are their own issue again with the builder and developers carrying the lion's share and the Council carrying a 10% liability for inspection issues.

16.10.5 The parapets are partly plasterers' and partly inspection issues with the major liability lying with the builder and developers.

16.10.6 The north-west elevation is equally shared between joinery and gutter flashing issues. The joinery question I have shared equally between Plaster Systems and Messrs Murphy as to 10% each. There are design issues affecting Mr Smits and the remainder of the liability lies with the builder and the developers.

16.10.7 The same considerations apply to the rear deck.

16.10.8 As to the lounge floor this is solely a joinery issue and does implicate design questions. I have shared the liability equally between Mr Smits, Plaster Systems Ltd and Messrs Murphy with the remainder being the liability of the builder and developers.

16.10.9 The front decks are a cladding to deck issue primarily the liability of the builder but with a share of liability from the developers and the Council for inspection issues.

16.10.10 The master bedroom is attributed to cladding to the deck issues, glass balustrades issues and absence of saddle flashing where again there is a design issue but primarily liability lies with the builder and the developers with residue liability to the Council for inspection issues.

16.10.11 Finally, the internal tanking lies solely with the builder but the developers must share that to a degree.

16.11 All respondents must realise that these comments are in relation to contribution issues only and do not affect the primary liability that **each** has to the claimants as set out earlier.

17. **Costs**

17.1 No party has expressly claimed costs in this adjudication.

17.2 Costs are dealt with by s43 of the WHRS Act and allow for a determination of costs if it is found that a party has caused costs and expenses to be incurred unnecessarily by another party by bad faith or allegations or objections that are without substantial merit.

17.3 I do not find those grounds to exist in relation to any of the parties in this claim.

17.4 The claimants' claimed costs for the CoveKinloch report but I do not regard those as any different from any other costs incurred by them in the bringing of this claim and I make no order in respect of that.

18. **Result**

18.1 I find the third respondent, **Jason Thomas Williams**, liable to the claimants, **Peter Bruce Frederick Atkins** and **John Robert Muller** as trustees of **the Bruce Family Trust**, in the sum of **$199,093.50** and **I ORDER** that that sum be paid to them.

18.2 I find each of the fourth respondents, **Grant Hearle Williams**, **Jason Thomas Williams** and **Desmond Sarjant Williams,** liable to the claimants, **Peter Bruce Frederick Atkins** and **John Robert Muller** as trustees of **the Bruce Family Trust**, in the sum of **$199,093.50** and **I ORDER** that that sum be paid to them.

18.3 I find the fifth respondent, **Anthony G Smits**, liable to the claimants, **Peter Bruce Frederick Atkins** and **John Robert Muller** as trustees of **the Bruce Family Trust**, in the sum of **$77,741.25** and **I ORDER** that that sum be paid to them.

18.4 I find the sixth and seventh respondents, **Francis John Murphy** and **Philip Murphy**, liable to the claimants, **Peter Bruce Frederick Atkins** and **John Robert Muller** as trustees of **the Bruce Family Trust**, in the sum of **$143,357.25** and I **ORDER** that that sum be paid to them.

18.5 I find the eighth respondent, **Plaster Systems Limited**, liable to the claimants, **Peter Bruce Frederick Atkins** and **John Robert Muller** as trustees of **the Bruce Family Trust**, in the sum of **$133,792.50** and I **ORDER** that that sum be paid to them.

18.6 I find the first respondent, **North Shore City Council**, liable to the claimants, **Peter Bruce Frederick Atkins** and **John Robert Muller** as trustees of **the Bruce Family Trust**, in the sum of **$145,817.44** and I **ORDER** that that sum be paid to them.

18.7 If any of the respondents shall have paid to the claimants a sum greater than is shown alongside that respondent's name in para 16.7, that respondent is entitled to recover from each other respondent such sum, not exceeding the respective percentage of the total amount claimed, $194,777.50, on the following percentages:

Party	**Percentage**
J Williams – 3rd resp	66.6%
Developers – 4th resp	8.43%
A G Smits – 5th resp	2%
NSCC – 1st resp	7.88%
Plaster Systems – 8th resp	6.85%
Messrs Murphy – 6 & 7th resp	8.24%
Total	100%

so that the percentage contributions shown in that column are achieved between respondents; and I emphasise that the claimants are not entitled to any sums greater than totalling $194,777.50.

DATED at Auckland this 2nd day of October 2006

____
David M Carden
Adjudicator

Notice

Pursuant to s41(1)(b)(iii) of the Weathertight Homes Resolution Services 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 amounts for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.