Claim No: 2643

Under	the Weathertight Homes Resolution Services Act 2002
In the matter	of an adjudication claim
Between	**Burke Family Trust** Claimant
And	**Wellington City Council** First respondent
And	**Gavin Baron Still** and **Natalie Pam Still** Second respondents
And	**Ryan Edward Salt** Third respondent
And	**Joanne Leigh Quilter (formerly Salt)** Fourth respondent
And	**Desmond Eric Witana** Fifth respondent
And	**Toyle Consultants Limited** (formerly named Abuild Consulting Engineers Ltd) Sixth respondent
And	**Darren Robert Bain** Seventh respondent
And	**Peter William McKenzie Angus** Eighth respondent
And	**Trevor Mark Faulknor** Ninth respondent
And	**David Cole** Tenth respondent

Determination
2 October 2006

1. Index

2. Summary

2.1 The claimants, the trustees of the Burke Family Trust, claimed under the Weathertight Homes Resolution Services Act 2002 sums totalling $222,300.00 for remediation costs plus $4,516.27 for remediation costs already incurred with other claims for accommodation expenses, general damages and stigma damage naming the respondents.

2.2 Following hearing repair costs from leaks has been fixed at $111,418.00. Certain of the remediation costs already incurred have been disallowed as have claims for reasonable accommodation costs, general damages and stigma damage. The net amount has been reduced by 10% to represent contributory negligence in the circumstances of the purchase leaving a net balance which has been accepted as properly claimed of $95,251.05.

2.3 The first respondent has been negligent in its inspections and resultant issue of a Code Compliance Certificate in respect of certain items of defect which has caused 30% of the net repair costs incurred by the claimants after

allowances and deductions, namely $28,575.32 and is ordered to pay that sum.

2.4 The third and fourth respondents owed a duty of care to the claimants as subsequent purchasers of the dwelling in their development of the site and having built thereon the dwellinghouse using separate contracts for kitset supply, building and other trades and they are ordered to pay the claimants the sum of $95,251.05.

2.5 The fifth respondent has been negligent in the discharge of his duty of care to the claimants as subsequent purchasers he having been the builder who had the responsibility to achieve the performance standards of the Building Code as imposed by the Building Act 1991 and he is ordered to pay the claimants the sum of $95,251.05.

2.6 The tenth respondent, David Cole, had not been served and did not participate in the adjudication at all and no findings have been made against him leaving it open to all parties to make such claims against him as they see fit.

2.7 Claims against all remaining respondents, namely the second, sixth, seventh, eighth and ninth respondents, have been declined as there has been no proven duty of care and/or negligence.

2.8 No order for costs has been made against any party in favour of another.

2.9 Apportionment has been ordered between the liable parties and contribution under s17 of the Law Reform Act 1936 as to 5% to the Council, 47.5% to the third and fourth respondents and 47.5% to the fifth respondent.

3. Adjudication Claim

3.1 The claimants are the trustees of the Burke Family Trust, owners of a property at 70A Buckley Road, Island Bay, Wellington, being Lots 3 and 4, DP 88323, CT WN55D/316. They made application under s9 of the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**) and gave Notice of Adjudication under s26 of the WHRS Act on 13 October 2005 naming the first to fifth respondents inclusive as respondents. I was assigned as the adjudicator.

3.2 After several preliminary exchanges and conferences I convened a hearing at Wellington on 7 August 2006.

3.3 By then there had been joined as respondents pursuant to s33 of the WHRS Act the sixth to tenth respondents inclusive.

3.4 At the hearing there were present and represented:

3.4.1 the claimants by counsel, Mr M McLelland;
3.4.2 the first respondent by counsel, Mr S Quinn;
3.4.3 the second respondents represented by Mr G B Still;
3.4.4 the fifth respondent, Mr D Witana;
3.4.5 the sixth respondent represented by Mr J Evans;
3.4.6 the seventh respondent by counsel Ms Palu;
3.4.7 the eighth respondent by counsel Mrs Peacock;
3.4.8 the WHRS assessor.

There was no appearance for or by the third, fourth or tenth respondents. The third respondent, Mr R E Salt, did not participate in the adjudication claim at all. The fourth respondent, Mrs J Quilter, had done so but had advised at an earlier conference that she would not be attending the hearing. Contact was made with her at her request by telephone as mentioned below. The tenth respondent, Mr Cole, had not been served and

therefore was not aware of the claim. During the course of the hearing some inquiry was made as to his whereabouts and this was possibly identified but the hearing proceeded on the basis that he was not involved in the claim and therefore could not respond to it or to any cross-claims that any other respondent may make against him. His liability is left open for later determination in some appropriate forum which includes any liability he may have to other respondents. Because of the possibility of his being located, although I had initially indicated I would strike him out as a respondent, I did not do so.

3.5 At the conference I requested that the WHRS assessor convene and chair a meeting of technical experts to discuss areas of agreement (if any) and that occurred chaired by the assessor, Mr Neville, and attended by Mr S V McCormack, a witness for the claimants, and Mr M Hazlehurst, a witness for the first respondent (**the Council**). It was also attended by Mr R G Taylor, a director of the sixth respondent (which has changed its name but which was referred to and which I refer to as **Abuild**) but only on the basis that he discussed initial ground clearance issues, the only factors implicating Abuild.

3.6 I indicated from the outset that any party leaving the hearing did so of their own choice and the hearing would proceed in their absence.

3.7 There was a site visit on Tuesday 8 August 2006 attended by:

3.7.1 Mr McLelland with Mr Burke and Ms Faulkner;

3.7.2 Mr Quinn with Mr Hazlehurst and Mr Geraghty;

3.7.3 Mr Witana;

3.7.4 the WHRS assessor, Mr Neville.

3.8 At the conclusion of the hearing I have received submissions from various parties.

4. The Dwellinghouse

4.1 The dwellinghouse at 70A Buckley Road, Island Bay, was built between 1999 and 2000 with the building consent application dated 1 July 1999 and the Code Compliance Certificate issued 4 February 2000.

4.2 The then owners were the third and fourth respondents (whom I shall call **Mr & Mrs Salt** – although Mrs Salt has now changed her name to Quilter).

4.3 At that time the seventh respondent (**Mr Bain**) was then a salesman for a company named Kensway Homes Limited (**Kensway**) which was then trading as Kingswood Homes. Kensway was then owned by the eighth respondent (**Mr Angus**) and an architect for the company was the tenth respondent (**Mr Cole**).

4.4 The site at 70 Buckley Road was capable of subdivision and Mr & Mrs Salt proposed subdivision and the building and sale of no 70A to fund the building of a home on an adjoining site at 72 Buckley Road. They were helped with this project by Mr Bain whose parents eventually bought the subdivided part of 70 Buckley Road and had a house built there.

4.5 The house at 70A was a kit-set home sold under a "component supply" contract dated 23 May 1999 between Kensway and Mr & Mrs Salt.

4.6 The house was constructed by the fifth respondent (**Mr Witana** (trading as Eastland Building Services)) under a labour only contract dated 2 July 1999 which provided for Mr Witana to erect the house in a "thorough and workmanlike manner and in conformity with the Building Act and any By-laws and regulations of the Local Authority having jurisdiction in respect thereto" for the sum of $15,322.00.

4.7 There were other subtrades on site including a separate contractor who erected the horizontal and vertical corrugated iron cladding to the dwelling and who was not a party to this adjudication. Evidence was given about the supervision and direction during construction by Mr Angus and Mr Cole and I deal with that below.

4.8 The application for building consent in respect of the dwelling was made to the Council on 5 July 1999 and was accompanied by appropriate certification by Compass Building Certification Limited (**Compass**) as approved building certifier. Council representatives inspected the dwelling at certain times during construction, the first being a sitings and footings inspection on 13 July 1999 and the next being on 9 August 1999. The records show ten inspections after the first and Mr John Robert Drysdale-Smith (**Mr Drysdale-Smith**) gave evidence about those inspections although his evidence was from records as his first attendance was on 31 January 2000 to complete the final plumbing inspection.

4.9 The Code Compliance Certificate under the Building Act 1991 was issued by the Council (by Mr Drysdale-Smith) dated 4 February 2000. The Certificate was not in fact signed but is accepted as having been properly issued at that date. It excluded energy work not relevant to this claim and it excluded other building work "at the same address". Although the site address is shown as "72 Buckley Road", the certificate refers to building consent 54980 which appears to be the correct reference to the subject dwelling.

4.10 Mr & Mrs Salt had entered into an agreement dated 23 November 1999 for sale of 70A Buckley Road to the second respondents (**Mr & Mrs Still**) for $299,500.00. The agreement for sale included as clause 18 that the vendors, Mr & Mrs Salt, would complete construction of the property in accordance with plans and specifications, ensuring that best trade practises and all requirements of the Building Act 1991 were complied with. The

specifications annexed to the agreement are in basic "Outline" form and appear to be different from the specifications on the Council file lodged with the building consent application which are in more traditional format and headed "Kingswood Homes Standard Specifications".

4.11 The sale agreement was signed on behalf of Mr & Mrs Salt by Mr Darren Bain as "authorise [sic] agent".

4.12 Mr Still said in evidence that he noticed a small leak in the centre of the roof in the lounge in the first week in the house and spoke to Mr & Mrs Salt who arranged for Mr Bain to come to see it and he, Mr Bain, carried out certain work. Mr & Mrs Still engaged a builder's apprentice to build a fence and they landscaped the house which, Mr Still said, included removal of "approximately 50mm of dirt from around the house [with contouring] away from the house [and laying] paving stones but with large gaps filled with pebbles to allow for drainage".

4.13 Mr & Mrs Still put the house on the market for sale in late 2001. They entered into an agreement for sale dated 20 September 2001 to Mr Burke or his nominee for $312,500.00. The agreement was subject to clauses for a registered valuation, an engineer's report, approval to title and a report "pertaining to the warranties on the property"; and a warranty from the vendors (Mr & Mrs Still) that "the subsidence on the Southwest corner of the property [would] be remedied in a workmanshiplike manner prior to settlement". The agreement also contained the standard warranty in clause 6.2(5):

> "Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
> (a) the required permit or consent was obtained; and
> (b) the works were completed in accordance with that permit or consent; and

(c) where appropriate a Code Compliance Certificate was issued for those works; and
(d) all obligations imposed under the Building Act 1991 were fully complied with."

4.14 Before the offer to purchase was made by Mr Burke he asked the ninth respondent, Mr Faulknor, who was the brother of his partner, to "do … a favour and have a look over the property". Mr Faulknor visited the property on 17 September 2001 and commented on various matters.

4.15 Before settlement of the purchase by the Burke Family Trustees there were exchanges between solicitors concerning aspects of warranties.

4.16 Following purchase by the Burke Family Trustees Mr Burke and his partner found matters of concern about the construction and water entry to the dwelling. He had Mr Faulknor carry out certain repairs and in August 2002 commissioned building consultants to investigate and report. Because of the content of that report the trustees applied to the Building Industry Authority (**BIA**) for a determination regarding the status of the Code Compliance Certificate and on 25 June 2003 the BIA gave a written determination that the house did not comply with the Code on the grounds of the evidence provided concerning dampness and leaks and reversed the decision to issue the Code Compliance Certificate noting that it was possible there were other aspects of the house where there may have been non-compliance with the Code.

4.17 On the basis of what they knew by then the trustees made application under the WHRS Act which has resulted in this adjudication. That included the provision of the assessor's report.

5. The Claim

5.1 The assessor's estimate of cost of repairs as at 9 May 2005 was $125,443.12 including GST. The claimants have already spent $2,726.00 on repairs to the roof. They then commissioned a report from Mr S V McCormack who gave evidence at the hearing. His estimate of costs was a total of $222,300.00 including GST. He disagreed with the assessor who had recommended remedial work in specific areas and he expressed the view that a cladding repair with a cavity system must include the cavity system "throughout the entire length of the wall in question" and he criticised the "hit and miss" approach of the assessor. He referred to the exposed nature of the site, difficulties of site access, certain excavation work that would be required, the requirement for a cavity system and replacement of cladding and damaged framing material where necessary.

5.2 The claim as made therefore was for the sum of $222,300.00 for remedial costs but that was the subject of technical expert discussion as mentioned below.

5.3 The claim was also for the sum of $4,516.27 for "remediation costs that the claimants have incurred to date". First I note that those claims include certain fees and expenses, namely:

Joyce Group	$400.00
BIA	250.00
Joyce Group	840.00
Total	$1,490.00
GST inclusive	$1,676.25

5.4 I do not think that costs claims of that nature can be included and disallow them leaving a balance of $3,316.50. The Council opposed any payment on the further basis that there was no evidence that these costs were incurred

by the claimants, the invoices having been addressed to Mr Burke personally. I do not regard that as a valid objection. Although the Trust must be treated separately (and I do so below), in the normal course of dealings of this kind one cannot expect detailed precision about entries in invoices for costs of this nature. I suspect that the debts were incurred by Mr Burke and the invoices addressed to him but that would clearly have been on the basis that this was an expense incurred by him on behalf of the trustees, the owners of the property being repaired, and in due course he would expect reimbursement from those trustees. I therefore allow the sum of **$3,316.50**.

5.5 The claim included $7,200.00 for estimated accommodation expenses during repair (16 weeks at $450.00 per week). This claim was expressly opposed by the Council again on the grounds that the accommodation was that of Mr Burke and his partner personally and any accommodation costs they may incur during remediation are their loss and not a loss of the claimant. The Council submitted there was no duty of care owed to Mr Burke personally and further that there is no jurisdiction under the WHRS Act to enter claims by non-owners.

5.6 I accept those submissions. It has become quite common for residences to be owned by family trusts and this is one case of that. There are benefits in that structure. There are also legal ramifications and requirements. The first of these is that there should always be a clear line between trust property, finances and dealings and those of individuals. The second is that there are legal rights and obligations on the Trust as owner of the property which the individuals do not have (and that may be one of the reasons for the Trust ownership in the first place) and legal rights and obligations that the individuals may have which are not enjoyed by, or imposed on, the trustees. It is not uncommon in the circumstance of that nature for there to be an occupation licence under which the basis on which the individual family

members occupy the residence are spelt out. I was given no evidence of that in this case. I accept that any claim by Mr Burke and/or his partner personally for accommodation costs is a personal loss to them. They may have some rights in respect of trustees as owners of the property but I was given no evidence of that including that I was given no evidence of the basis on which they occupy the Trust property. If the Trust is required to incur cost in remedial work and if for that purpose it requires the occupants to vacate then the rights and obligations between the Trust/owner and the individual/occupant is a matter between them and on the basis of their legal relationship. So far as the respondents in this claim by the trustees are concerned I do not consider that they have a liability to Mr Burke or his partner for any accommodation costs they may incur.

General Damages - Stress

5.7 In respect of the claim for general damages of $15,000.00 the Council referred me first to a number of determinations under the WHRS Act where general damages in favour of a Trust were respectively disallowed and allowed. I was also referred to *La Grouw v Cairns* (CIV 2002-404-156; O'Regan J; Auckland High Court; 16/2/04). That was an appeal against a District Court judgment where a claim had been made by a trustee as purchaser of a dwellinghouse against the vendor for alleged misrepresentation concerning leaks caused to the property. The High Court dismissed the appeal from the District Court on the grounds that general damages could be awarded where the vendor had experienced problems with leaks and would have known the distress caused by leaks and was therefore liable to the purchaser for misrepresentation, it being reasonably foreseeable that the purchaser would suffer distress and inconvenience when purchasing on the basis of that misrepresentation. The Council sought to distinguish that case from the present case (at least so far as the Council is concerned) on the grounds that that was a case of

misrepresentation whereas the present one is against the Council in tort in negligence.

5.8 My view is that that is not an acceptable distinction. The damages which flow from the tort of negligence (if that is proved to exist) are sufficiently wide to include the type of damage that was enunciated by O'Regan J in the High Court in *La Grouw*. Although that was a case of foreseeability of distress and inconvenience from the misrepresentation in my view, if there is no distinction made between the purchaser of the house (the Trust) and the occupant or intended occupant of the house, as appears to be the outcome from *La Grouw*, then the fact that the cause of action is tort rather than remedy for misrepresentation does not distinguish the claim.

5.9 The second submission for the Council is that, this being a claim under the WHRS Act, it is only the owner that can bring a claim and reference is made to s7(1) of the WHRS Act:

> "A claim may be dealt with under this Act only if –
> (a) it is a claim by the **owner** of the dwellinghouse concerned …" (emphasis added)

5.10 The definition of "owner" in the WHRS Act includes a shareholder of a company, the principal purpose of which is to own the dwellinghouse or the dwellinghouses within the building concerned. That gives clear legislative indication that the Act is intended to look beyond the strict legality of ownership and to allow a claim where strict ownership is vested in another party (a company).

5.11 In *Berry v Lay & Ors* (WHRS claim 136 – 11/3/05) the adjudicator said:

> "Individual trustees are human beings who may own and occupy, or own and lease, the dwelling. They are the persons who will suffer as a result of the defects in the construction and will often suffer distress, anxiety, inconvenience or trauma that may go with the problem.
> …

> I … can see no reason why trustees may not be awarded general damages if they can show that they have suffered the stress, the anxiety or the emotional strain as a direct result of the leaks."

5.12 The fact is that Mr Burke is the occupant of the property (along with his partner) and he is one of the owners, albeit on trust for the beneficiaries of the trusts. I was not given detail of who those beneficiaries are but they **may** include Mr Burke personally. The fact is that he has given evidence of stress having been suffered and, in my view, as an owner of the property and a person who has suffered that stress (if it is proved) he is entitled to bring the claim and I have jurisdiction to consider it.

5.13 The amount claimed is $15,000.00 and the basis of the claim is Mr Burke's evidence of not having ever "been able to enjoy the home or feel secure in it"; "worry over the deterioration and devaluation of the property"; inability to use the balconies; lack of freedom to sell and relocate; "subsequent strain on my relationship with my partner" and significant time spent dealing with the problem.

5.14 There have been a range of awards made in WHRS claims for general damages and the Court has upheld the jurisdiction of an adjudicator to make such an award. I do not think that I can take into account the personal circumstances such as Mr Burke's desire to move to Auckland for his work needs and the claimed inability to sell and relocate. There is nothing to stop him selling and relocating. There is nothing to stop the Trust from expending the necessary cost to carry out repairs so that that can happen. Likewise I do not think that it is appropriate to try to compensate hours lost or time spent in relation to addressing the problems. That is not the nature of general damages of this kind. The nature of these damages is to compensate for emotional stress and anxiety consequent upon the matters where liability is found. Claims of this nature are often better accompanied by medical evidence but that is not the case here.

5.15 I do not think that every case of a leaky home claim qualifies for general damages of this kind. It is a matter of considering each case on its merits. That will require consideration of the evidence including any medical evidence. Having heard the evidence from Mr Burke, and particularly in the context that he is a trustee/occupant, I have come to the conclusion that this is not a case for general damages and I decline to award those.

Stigma Damage

5.16 The further claim is made for $75,000.00 for "stigma damages".

5.17 In support of the claim Mr Burke sought to adduce as evidence extracts from media information about stigma damage and an article by Song Shi written in 2003. I do not regard that as factual evidence as such but I take the views expressed into account. As to factual evidence the claimants relied on evidence from Ms M J Cruickshank, a residential sales consultant in Wellington with 3 years experience. She was not aware of the extent of the damage but simply appraised the property on the basis that it was considered to be a "leaky building" and the impact this would have on price. She said that if there had been no problems or history of leaks then the value would have been approximately $450,000.00 "or possibly slightly more" but that with a history of leaks even if these were all remedied and a Code Compliance Certificate issued the current market value would be in the range of $350,000.00 - $375,000.00. She said that this was first because of the history of the problems and members of the public "steering away" from purchasing the dwelling at all and buyers tending "to believe they may be faced with similar problems in the future". She said that the second factor was that the dwelling "looks like a leaky building" having been constructed during the relevant period and not to a conventional design.

5.18 I immediately discount the second factor. It was the choice of the claimants to buy the house with the design that it has and it was the choice of Mr & Mrs Salt to build it with that design in the first place. If circumstances are such that buildings of that design do not have as great a value then I do not think that that factor of itself justifies any award of stigma damages.

5.19 The Council opposed any award and sought from Ms Cruickshank details of the market evidence on which she based her opinions expressed. It transpires that she relied on information from other estate agents within the company for which she works and it transpires that the seven properties on which she based her opinion were all of a different category and none of them were such that leaks had been identified and remedied, a Code Compliance Certificate issued and then sold for a significant discount.

5.20 Having heard the evidence from Ms Cruickshank including evidence of her qualifications, experience and resource material, I have not been satisfied that there is evidence of any stigma damage in this case and I decline to award that.

5.21 In the result therefore the amounts of claim that I consider are:

5.21.1 The remediation costs which were the subject of discussion between the technical experts and evidence.

5.21.2 The balance of remediation costs already incurred which I allowed at **$3,316.50**.

I deal with those claims in respect of the individuals below.

6. Contributory Negligence

6.1 The Council claims that any liability it has to the claimants should be reduced because of the claimants' contributory negligence. It relies on s3(1) of the Contributory Negligence Act 1947:

> "Where any person suffers damage as the 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 for the damage …".

There is the proviso that the section does not operate to defeat any defence arising under a contract and deals with contractual limitation of liability clauses.

6.2 The Council claims that the claimants were negligent in the following respects:

6.2.1 Failure to act upon concerns communicated by Mr Faulknor prior to purchase.

6.2.2 Completing the purchase despite confirmation that the house was not built by a master builder as had been sought.

6.2.3 Waiving compliance with the special condition as to an engineer's report despite knowledge that the house was built on uncompacted fill.

6.2.4 Waiving compliance with the special condition for assignment of warranties.

6.2.5 Increase in repair costs since May 2002 and failure to mitigate loss.

6.3 The Council relies on *Hay v Dodds* (WHRS claim 1917; 10/11/05) where damages claimed were reduced by 75% in a circumstance where an architect had inspected the house as had been provided in a special condition in the agreement for purchase and recommended that a building inspector's report be obtained which the claimants chose not to do.

6.4 I immediately comment that that is a significant reduction for contributory negligence which the adjudicator must have considered was appropriate in the particular circumstances of that case.

6.5 I deal in more detail with Mr Faulknor's involvement below in considering the claims against him. In the context of the claim for contributory negligence however it is important to note that Mr Burke **did** obtain advice from Mr Faulknor before purchasing. It is a matter more of how he dealt with what he was told that may give rise to some defence.

6.6 The agreement for purchase by Mr Burke was subject to several conditions. The Council relies first on the condition concerning an engineer's report and claims that the waiver of compliance with that condition despite knowledge that the house was built on uncompacted fill was negligent. Mr Burke's evidence confirmed that the Trust never obtained an engineer's report as he was satisfied with Mr Faulknor's comments and did not believe it necessary also to get an engineer's report. Any contributory negligence claim must, of course, refer to negligence which **contributes to the loss claimed**. In this case there are no claims that pertain to the fill on the site. There are certainly claims concerning the level of excavation but that is a different issue. I was not aware of there being evidence of damage caused by fill, therefore I do not see that any failure to obtain an engineer's report on that subject is of itself negligence contributing to loss. It might be argued that, because there was uncompacted fill it was incumbent upon the purchaser to obtain the engineer's report which might **in turn** have revealed other matters

pertaining to leaks and damage but I think that is too remote. I discount that as a ground for contributory negligence.

6.7 The second condition relied on by the Council relates to warranties and was a condition:

> "… upon the vendor providing the purchaser with a report pertaining to the warranties on the property, such report to be satisfactory in all respects to the purchaser."

In the pre-settlement exchange of correspondence there is reference to assignment of warranties not being available because the builder was not a registered master builder (with reference to "Kingswood Homes"). In fact that was the trading name of Kensway Homes Limited until November 1999 when it became the trading name of O'Connor Construction Limited. O'Connor Construction therefore had no interest in the contract and has no claimed liability. It is a question of Kensway Homes Limited (and possibly Mr Witana) as a registered master builder. Either way it seems that the warranties were not forthcoming for that reason. I therefore discount any consideration of alleged waiver of compliance concerning assignment of warranties. The condition referred only to a "report" and that appears to have been canvassed in the correspondence. I do not regard that as a basis for any contributory negligence.

6.8 As to mitigation of damage that is certainly always a requirement of any claimant but that is addressed in the questions of quantification below. I do not consider that there is sufficient evidence that the costs as dealt with below are significantly greater than they might have been in May 2002. In any event I do not consider it necessarily follows that a claim will be disallowed simply because it is brought on current figures as against repair costs estimated at an earlier time. If the repair costs were incurred then there would be interest considerations to be taken into account. Clause 15 of the Schedule to the WHRS Act allows for interest at a rate not exceeding

the 90 day Bill Rate plus 2%. That may well be an equalling offset against the rise in remediation costs. There was no evidence about that in this case and I discount that ground as a claimed basis for contributory negligence.

6.9 The fourth basis relates to Mr Burke's completing the purchase despite having been told that the house was not built by a master builder contrary to earlier information received. I do not consider that to be contributory negligence either. It is a question of the quality of the construction rather than the identity of the builder although I acknowledge that it does give reassurance to an owner and in due course a purchaser to know that there have been some standards constraints on the builder such as come from membership of an appropriate organisation. It may be said that Mr Burke, having raised the question of whether the home was built by a registered master builder and then having been told it was not, should have been put more on his guard particularly in the context of what he had been told by Mr Faulknor. I turn to that topic now.

6.10 Mr Faulknor was (and still is) the brother of Mr Burke's partner. He was asked by Mr Burke to provide verbal advice on "an informal or casual basis". Although he gave evidence of his qualifications and 16 years of experience, I was surprised when he gave evidence that he was not aware of the requirement for ground clearance below the floor level which I thought was a relatively basic factor that any builder should know.

6.11 He said that Mr Burke met him at his place of work and took him to the site. He did not have a ladder but used one that Mr & Mrs Still had to look into the ceiling. He climbed onto the roof which he thought was an area of potential problem. He observed a stain to the ceiling but that was the only sign of leaks. He said he pointed out areas of concern being gaps between the window frames and the cladding; fresh nailing of ply cladding; "bagginess" of

flashing on roof parapet; water streaks on the ceiling around the lounge manhole and some "other minor flashing/join details".

6.12 He said there was no payment made to him and that this was an act of goodwill for a friend and family member.

6.13 Mr Burke's evidence went further insofar as he said Mr Faulknor commented on a movement in the south-western retaining wall, inadequate sealing around the aluminium frames and doors (which may be the same as "gaps"), a loose or missing pipe on the northern wall and attempts to repair leaks to the ceiling (which may also be the same matter mentioned by Mr Faulknor).

6.14 I have formed this view about Mr Faulknor's role. He was asked to give a comment as a family member who had had building industry experience. He was taken to the site, was there for only one hour and inspected the property. He made certain comments to Mr Burke. That was the end of his involvement. I do not find that he has any liability to the claimants (and indeed they are not making any claim against him) nor to make any contribution to any other respondent.

6.15 In the context of contributory negligence claims against the claimants I find:

6.15.1 Mr Burke was sufficiently mindful of construction issues to have the various conditions included in the agreement for purchase from Mr & Mrs Still that related to those issues.

6.15.2 He was sufficiently mindful of those concerns to have comment from a builder albeit a family member, present for a short period and orally.

6.15.3 There were other title and construction issues raised in the course of pre-settlement exchanges.

6.15.4 The factors combined should have led him to make further inquiry about the matters to which Mr Faulknor's comments referred and he failed to do so.

6.15.5 That failure is relatively minor however having regard to the nature of the comments made by Mr Faulknor and the general unawareness at that stage of leaky homes issues.

6.16 Mr Hazlehurst for the Council also referred to maintenance issues and the necessity to maintain seals around windows and doors. He said that "once the mitres opened and the timber caps distorted as a result weathering was compromised". His comments on maintenance were not strongly critical of the claimant and the submissions for the Council did not refer to it. I do not regard there as being sufficient evidence of lack of maintenance for that to affect contributory negligence.

6.17 Having regard to all those factors I have decided there should be a reduction in the damages claimed by the claimants for contributory negligence of **10%**.

7. Location of Leaks, Damage and Repairs

7.1 In his report the assessor identified 21 causes of water entry, 10 locations of damage and 14 aspects of repair.

7.2 At the hearing I conducted I arranged for a meeting between the technical experts of the parties to seek to reach any agreement on matters pertaining to their expertise. That was attended by the WHRS assessor, Mr Neville, as chairman, Mr S V McCormack, witness for the claimants on quantification issues, Mr M Hazlehurst, witness for the Council on causation and quantification issues and Mr R Taylor, director of Abuild, strictly in relation to ground clearance issues insofar as the claim affected Abuild. A measure of

agreement was reached between them to which I refer in detail. They addressed the 14 aspects of repair as contained in the assessor's report.

7.3 It is necessary, however, in determining the respective liability of the respondents to the claimants and then to each other in this claim for me to address the specific **location** of damage, the **cause** of that damage, the **liability** of any respondent, and then **apportionment** of that liability for the purpose of contribution orders.

7.4 The only evidence that was given about cause of leaks came from the assessor, Mr Neville, Mr Hazlehurst for the Council and Mr Witana, the builder. Mr Witana's evidence on causation addressed only the question of responsibility. He did not appear to be contesting that there were leaks or what was said to be the cause of those leaks. His evidence was directed to the person responsible for those causes.

7.5 In general terms Mr Hazlehurst's evidence addressed causation issues too but were primarily addressed to the question of whether the causes of leaks as identified either by him or by the assessor would have been apparent to the inspectors at the time of construction and therefore could implicate the Council in liability.

7.6 The assessor listed 21 separate causes of moisture ingress and damage, some of which are in turn an amalgam of various causes.

7.7 In an attempt to make the issue clearer Mr Hazlehurst has provided a schedule of leaks totalling 8 which identify his view of the causes of them. That is a helpful process and it is to be encouraged in all expert evidence on leaky homes claims. Indeed there is now becoming commonly used a Leaks List which seeks to achieve that objective.

7.8 Mr Hazlehurst's identification of leak location and causes (his opinion only) are as follows:

Location	Cause
Balcony over study (S/W corner)	Open mitre at the balcony corner and gap under the timber cap at corner.
Balcony over study (N/W corner)	Open mitre at the balcony corner and gap under the timber cap at corner.
Balcony over master bedroom (N/W corner)	Open mitre at the balcony corner and gap under the timber cap at corner.
Balcony over master bedroom ensuite (N/E corner)	Open mitre at the balcony corner and gap under the timber cap at corner.
Main bathroom/dining room (external corner)	Poor flashing design and installation to the sides and at the sills of windows to the ground and first floors.
Dining room exterior door (balcony access)	Lack of drainage from the head flashing/water entry at the sides of the door.
Study (west facing window)	Capillary action at the head flashing window flange intersection/lack of drainage from the head flashing.
Rear entry door (ground floor)	Poor detailing at the parapet corner above the door and the parapet junction with the dwelling.

7.9 The assessor's statement of causes may be categorised as:

7.9.1 Capillary action from penetration of cladding into ground or insufficient ground clearance or fitting into concrete foundation.

7.9.2 Various construction detail including integrity of flashing, lack of returns, lack of anti-capillary grooves, loose facings, lack of drainage provision, unsealed sill to doors and windows, lack of continuity of window seal, unsealed joints, loose cladding, lack of return. I categorise these together because they all appear to relate to construction issues. I deal with Mr Witana's evidence about supervision and construction processes below but as to causation these all appear to be in the same category.

7.9.3 Unsealed penetrations (and I again deal with Mr Witana's evidence below).

7.9.4 Breakdown of membrane.

7.9.5 Roof drainage issues although these were addressed at an earlier stage including the application of "copious sealant" but the assessor thinks a situation may still exist. Mr Hazlehurst expressed the view that it "appears that the re-membraning of the roof has fixed this problem …".

7.10 One area of disagreement between the assessor, Mr Neville, and Mr Hazlehurst was in relation to questions of capillary action and damage. Mr Neville had referred to this having occurred where there was insufficient ground clearance, where the plywood cladding fitted onto the concrete foundation and where there was a 5mm clearance gap not provided at the base of the sheet (although he refers to that as "may be" a cause). Mr Hazlehurst's opinion was that he did not consider high ground levels to be the originating source of water entry into the dwelling, that the lack of anti-capillary gap is limited to a small part of the dwelling, and that there was no evidence of moisture entry or damage from the absence of a 5mm clearance gap.

7.11 It has certainly been expressed to me as an adjudicator several times that capillary water entry is less of a cause of damage than gravitationally directed water entry from such causes as absence of flashing or poor mitre joints.

7.12 Following the technical expert meeting I was told that it was agreed by all participants that moisture had entered the base of all the plywood cladding on the three sides of the main bedroom and ensuite and to the lower framing at the north-west corner of the main bedroom caused by capillary

action/wicking due to close ground proximity. There was disagreement from Mr Hazlehurst, however, as to moisture ingress from that cause into the lower framing in other areas identified by Mr Neville in his report.

7.13 At the hearing Mr Hazlehurst gave evidence that he had excluded the cost of recladding certain aspects of the dwelling on the grounds that there was insufficient evidence of water entry and damage.

7.14 I was also told at the site inspection by Mr Hazlehurst that Mr Burke had not allowed access to a significant storage cupboard under the stairs for personal reasons and Mr Neville was therefore unable to carry out certain water moisture testing in that area.

7.15 Having considered the evidence and views carefully I have formed the view that I prefer the evidence of Mr Hazlehurst on this issue. I accept his reasons for disagreeing with Mr Neville.

Cost of Remedial Work

7.16 At the technical expert meeting there was a significant level of agreement between Mr Neville and Mr Hazlehurst. That is not, of course, any concession on Mr Hazlehurst's part that any sum is payable by the Council or any other respondent. It is simply an agreement as to the cost of remedial work required to the dwelling. As I have said, other respondents addressed questions of liability. They all seemed to accept that to a greater or lesser extent the dwellinghouse is leaking and from the causes identified by Mr Neville and/or Mr Hazlehurst.

7.17 The assessor's estimate had been $125,213.00 inclusive of GST. Mr Hazlehurst, when comparing the different components of the calculations made by the assessor, came to an estimated repair cost of $111,418.00 inclusive of GST, a difference of $14,625.00.

7.18 Mr McCormack did participate to a degree in that meeting although he had other personal pressures which intervened during that time and precluded his full attendance. His evidence had been as outlined above and on the basis mentioned. However it transpired at the hearing that he had taken as a cladding surface area 216m² whereas the more accurate measurement by Ortus totalled 127m². Mr McCormack's measurement was from pacing only and he said he took 43 paces and the dwelling was 5 metres high. That was the basis for his calculation. That is, of course, extremely generalised and does not allow for windows and doors and other breaks to the cladding nor is it exactly precise. I came to the conclusion that that factor cast significant doubt upon his evidence. Furthermore, as mentioned above, he gave evidence of complete recladding with cavity system. To the extent that Mr McCormack did participate in the technical expert meeting he did reach the point of agreement with the conclusions there and signed a memorandum and schedule accordingly.

7.19 As I understand the agreed outcome from the technical expert meeting, Mr Hazlehurst had estimated $111,418.00 inclusive of GST as the reasonable repair costs for damage to the dwelling from leaks. This represented some $14,625.00 less than had been estimated by the assessor and in general terms that was attributed to the disagreement between those persons as to whether there was damage from wicking except to the north-west corner of the main bedroom. I accept Mr Hazlehurst's opinion on that and therefore accept his quantification of the repair costs. That is different from the schedule that was attached to his statement of evidence and I am taking it that he has moved from that schedule to the agreed position. It is significantly helpful to the adjudication process if experts are prepared to consider the views of others and adjust their position. The locations in question arising from this disagreement and where the assessor says remediation work is required because of capillary action and wicking are the

north-east, north and west walls of bedroom 1, the south-west corner of bedroom 2, the east wall of bedroom 3 and the entrance and stair areas. There is also the question of replacement of ply and horizontal cladding with cavity where the assessor estimated $29,500.00 which was not agreed by Mr Hazlehurst. Again I accept his evidence and find that there is no evidence of a need to replace the ply and the horizontal cladding with cavity as had been estimated by the assessor.

7.20 Against that however there is included in the cost estimations agreed the sum of $8,900.00 for "cavity". Although that may now be required to meet current building standards or may be better practice, it does, in my view, represent an improvement on the dwelling as constructed and as purchased by the claimants and constitutes betterment. I therefore disallow that sum, **$8,900.00**.

7.21 In the context of those findings I now turn to the individual liability of the respective parties.

8. Liability: D E Witana – 5th Respondent - Builder

8.1 The agreement dated 2 July 1999 between the fifth respondent, Desmond Eric Witana, and Mr & Mrs Salt showed the builder as "Eastland Building Services" and Mr Witana's statement of evidence was that he was not personally contractually engaged but only worked as an employee of the company. The agreement does not show any reference to a limited liability company. In an affidavit sworn 23 March 2006 in this adjudication Mr Witana refers to himself as the builder of the dwelling and makes no reference whatever to Eastland Building Services. I do not find any evidence that either Mr & Mrs Salt were aware they were dealing with a limited liability company or indeed that Mr Witana considered at the time that he was working only as an employee of the company and it was not until a significantly late stage that that issue was even raised. In any event Mr

Witana has personal exposure to liability as the builder on site and I now consider that.

8.2 Mr Witana's case does not effectively challenge that the dwelling is leaking or the causes of it. He was an active participant in the adjudication process and I appreciated his contributions and the frank manner in which he presented his case and position. He was quite ready to acknowledge that it was he who installed the windows.

8.3 His case relates primarily to responsibility. In his statement of evidence he went through the 21 aspects where the assessor had said in his report that there was moisture gaining access. He referred to the responsibility of other contractors including the plumber, the corrugated metal iron contractor, the applicator of the membrane roofing, the contractor responsible for application of sealant and the electrician. He also referred to the materials that he was provided with to carry out construction. In particular as to flashings he said that he would have used flashings provided and installed them in accordance with design. He said there was no mention made of grooving to the timber work and he simply used what was provided. He said no flashings were provided where the parapet abuts the building ie no saddle flashings. He said he was provided with some fascia and that he was provided with building paper and 50/50mm flashing for the ply corners.

8.4 He especially referred to the advices he was given by representatives of Kensway and by Mr Bain. He said he had difficulty obtaining specifications for fixing the outside ply cladding which he raised with Mr Bain. Certainly the specification issue was vague, there having been a set submitted with the consent application but a separate Summary set provided in the sale by Mr & Mrs Salt to Mr & Mrs Still. Mr Witana said that while he acknowledged responsibility for the ply to the roof trusses this was difficult because of the design requirement to bend the ply. He discussed this with Mr Cole, the

tenth respondent, who suggested soaking them in water and leaving them overnight.

8.5 At the hearing Mr Witana confirmed his written statement and expressed regret that the claim had come as far as an adjudication hearing. He said that the problems were mainly a design fault at the time and he was not responsible for subcontractors. He said he had to "play by ear" questions of flashings to the joints between corrugated iron and ply and that it was rather a matter of materials and advice being omitted than fault. He emphasised he was a labour-only builder and that he discussed issues mainly with Mr Cole but if he was not there with Mr Bain but that it was mainly Mr Cole he spoke to. In particular he was asked about differences between his 23 March 2006 affidavit and his statement of evidence insofar as there is different reference to Mr Bain's involvement in the latter.

8.6 Mr Witana did not participate in the technical expert meeting and consultation but I did give him the full opportunity to question those persons and make his own contribution. His suggestion was that there should be an exploratory sum awarded to allow removal of panels under the windows and all corners. He acknowledged the window installation but not the installation of the corrugated iron which was the responsibility of another. He emphasised again that he acted on the instructions he received and the limited information he was given for construction of this home and said he was let down by Kensway which employed him.

8.7 The building agreement dated 2 July 1999 that Mr Witana signed with Mr & Mrs Salt provided that he would erect the kitset home in a thorough and workmanlike manner and in conformity with the Building Act [1991] and any Bylaws and regulations of the Local Authority. There are contract sums for the different stages of construction. Although it refers to erection of the home in accordance with the plans and specifications, Mr Witana now says

it was a labour-only agreement and that there were other contractors separately contracted to Mr & Mrs Salt for work on site. Certainly that seems to have been the case.

8.8 It is a question then of Mr Witana's responsibility as builder on site given that there was a kitset home supplied by Kensway and given that there were other contractors on site completing work.

8.9 The requirements of s7 of the Building Act 1991 were clear:

> "All building work shall comply with the Building Code to the extent required by this Act, whether or not a building consent is required in respect of that building work."

8.10 The Building Code had its performance based standards including clause E2.2:

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

8.11 The claim against Mr Witana is that as the builder responsible for the construction of the dwelling he owed a duty of care to the claimants as subsequent purchasers to build in a proper and workmanlike manner, in accordance with the necessary statutory standards, and in accordance with the plans, specifications and building consent.

8.12 In closing submissions, counsel for the claimants emphasised first the difficult position that the evidence indicated Mr Witana had been in referring to the confusion of roles of Messrs Bain, Angus and Cole, the significant problems with design and a number of these being unresolved or left to Mr Witana to resolve and the lack of awareness of who the other contractors were with total lack of supervision of this work. The submissions emphasised the very difficult site and the complex kitset building which was difficult to construct especially in this special wind zone. The submissions

refer to the 13 Council inspections which were said by Mr Witana to have been "now and then once over lightly" and in conditions of difficulty of access and bad weather. The net result of those submissions appears to be that the claimants are saying that, **for the purpose of apportionment**, Mr Witana should carry only a small share of liability. I take it, however, that the claim against him is still made on the basis from the outset.

8.13 The Council's closing submissions refer to the primary responsibility that Mr Witana had as a builder both under clause 2 of his contract and his obligations under the Building Act 1991. They claim that it was his responsibility to obtain details or information where there is a lack of detailed design in some junctions or windows. With regard to other contractors, those submissions refer to uncertainty as to the identity of those contractors but say that "the obligations in Mr Witana's contract are clear". Those submissions are, in the case of the Council, of course, addressed to questions of apportionment.

8.14 In his closing submissions Mr Witana refers to a contribution "to costs". I deal with the costs of the adjudication below but I take it he is referring to a contribution to any liability he may be found to have and he claims that there is contribution liability from Mr Bain, Mr Cole, Mr Angus and the Council. He does conclude by referring to his "loss of income and lawyer fees" and seeking a realistic contribution towards them and I deal with adjudication costs below. His submissions finally refer to his employment by the limited liability company but I have rejected that submission above and it is a question of his personal liability that is at stake.

8.15 It is now well established that the builder of a house does owe a duty of care to future owners to take reasonable care to build the house in accordance with the building consent and relevant Building Code and By-laws (*Chase v De Groot* [1994] 1 NZLR 613).

8.16 It is not enough for a builder to say that he has no liability because component parts are not supplied nor is it enough for him to say that he asked for guidance but it was not given. The obligation that was imposed by s7 of the Building Act 1991 and the Building Code meant that the builder, Mr Witana, should have done what was necessary to make sure that this kitset house he had agreed to build met the performance standards and either should have ensured from the outset that there were adequate specifications and details for him to work to or should have ensured that work did not progress until the necessary components were supplied and work done.

8.17 Many of the causes identified by the assessor relate, in my opinion, to building issues and I have summarised them above. I find that in his capacity as builder Mr Witana had an overall responsibility in respect of all those matters. Although there may be some liability on other parties that does not negate his liability. He had a personal duty of care as the builder on site to ensure that the performance standards of the Building Code were met and he failed to achieve that.

8.18 Accordingly I find him liable to the claimants for the damages that I have found established referred to above reduced by the contributory negligence that I have found. Those damages are:

Repair costs for repairs reasonably required to remedy leaks, defects and damage	$111,418.00
Less cavity allowance	-8,900.00
Balance	102,518.00
Repair costs already incurred as allowed	3,316.50
Total	$105,834.50
Reduced by 10% for contributory negligence	**$95,251.05**

8.19 I order that the fifth respondent, **Desmond Eric Witana**, pay to the claimants, **the trustees of the Burke Family Trust**, the sum of **$95,251.05**.

8.20 I deal with questions of contribution below but Mr Witana has that liability in any event.

9. Liability: R E Salt and J L Quilter (formerly Salt) - 3rd and 4th Respondents: Owners

9.1 Mr Salt did not participate in the adjudication despite having been properly served under s37 of the WHRS Act. I have the power to determine the claim despite Mr Salt's failure to make submission or comply with any call for a conference or do other things requested and under s38 of the WHRS Act I have the power to draw inferences from his failure. I exercise that power and I infer that Mr Salt, in failing to provide information or attend any conference or attend the hearing has acknowledged that he has a liability in the matter.

9.2 Mrs Quilter (formerly Salt) filed a statement by way of affidavit but did not attend the hearing either. As a matter of convenience to her contact was made by telephone and she affirmed on oath her statement.

9.3 The claim against Mr Salt and Mrs Quilter is that as builders/developers of the property they owed a non-delegable duty to the claimants to take reasonable care in the construction of the dwelling to ensure that it complied with the Building Act 1991 and the Building Code, that all work done would be and was carried out with reasonable care and skill, and that all materials would be reasonably fit for the purpose used.

9.4 The Council also claims that Mr Salt and Mrs Quilter were developers of the property and owed that duty of care relying on *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.

9.5 Mr Salt and Mrs Quilter were owners of the property at the time of construction and entered into the respective contracts with Kensway Homes Limited trading as Kingswood Homes for supply of the kitset home and Mr Witana trading as Eastland Building Services for construction of the home.

9.6 It was not made clear but I am taking it that they also entered into various contracts with other contractors. The adjudication process would have been helped if they had given full detail of the contracts that were entered into for the construction so that the respective liabilities of other parties (if any) could have been more accurately determined. The fact was, however, that Mr Salt and Mrs Quilter took upon themselves the responsibility to enter into those contracts and for construction of the dwelling.

9.7 They also contracted with Mr Bain for his role in the construction and I deal with that contract below. In contracting with Mr Bain, Mr Salt and Mrs Quilter were again taking responsibility for what he would do in relation to the development.

9.8 Overall they are the developers of the subject dwellinghouse and have the duty of care to subsequent owners of that dwellinghouse that is referred to in cases such as *Mt Albert Borough Council v Johnson*. They have not discharged that duty of care and are negligent in doing so as I take to be acknowledged by Mr Salt's failure to explain his position. Mrs Quilter's affidavit is addressed to the role of Mr Bain and does not comprehensively explain her own role. When contact was made during the hearing with her by telephone she did not refer to her role any further but concentrated on questions addressed to her about Mr Bain's role.

9.9 Accordingly I find that both Mr Salt and Mrs Quilter are liable to the claimants in the sum of **$95,251.05** and I order that **Ryan Edward Salt** and

Joanne Leigh Quilter each pay that sum to the claimants, **the trustees of the Burke Family Trust**.

9.10 Any question of contribution between them is for them but questions of contributions from other parties I have dealt with below.

10. Liability: D R Bain – 7th Respondent: Project Manager

10.1 The Points of Claim for the claimants dated 15 June 2006 do not identify any claim made against Mr Bain. That claim was at that stage limited to the first, second, third, fourth, fifth and sixth respondents.

10.2 Mr Bain was not originally named as a respondent by the claimants and it was in Procedural Order No 3 dated 13 February 2006 that I joined him as a respondent on the application of the Council.

10.3 In his response dated 14 July 2006 Mr Bain has recorded that there is no claim by the claimants against him.

10.4 In their closing submissions the claimants do not refer to any claim against Mr Bain but in the closing submissions for the Council there is reference to Mr Bain's role as "project manager" and I have taken it that the Council is making a claim for contribution against Mr Bain.

10.5 Likewise Mr Witana, as I have said, refers to Mr Bain in his closing submissions in which he seeks a "costs" contribution which I am taking to be a claim that he, Mr Bain, is liable to the claimants and therefore liable to contribute to any liability that Mr Witana is found to have to the claimants.

10.6 It is necessary therefore to consider his role and whether, had it been claimed against him by the claimants, he has any liability to the claimants. It

is only then that questions of contribution under the Law Reform Act 1936 arise.

10.7 Mr Bain's role was, I find, more than that of a sales representative. Mr Bain had known Mr & Mrs Salt for some time and they showed him the section at 70 Buckley Road that they had found. Between them they arranged for subdivision of that section. Mr & Mrs Salt proceeded with the kitset supply agreement with Kensway of which Mr Bain was salesman and which he introduced them to. The section next door was sold to Mr Bain's parents and they also entered into a kitset supply agreement with Kensway. Their home was built at about the same time.

10.8 Mr Bain said that he did a significant amount of work **on the subdivision** including "a lot of work into the pole retaining wall [along the north-west corner of the property] [involving] sourcing the supply of the poles and assisting them into their holes, building and backfilling the retaining wall". He said he also helped with the car deck retaining wall required for the subdivision.

10.9 In addition to that work he said that his assistance included "help with arranging and checking up on the attendance of various subtrades and assistance with the sales contract between the Salts and the Stills".

10.10 There was evidence about the return or remuneration that Mr Bain was seeking for his involvement. Mr Bain himself said:

> "For my efforts I expected to receive a share of profits at the end of the project."

10.11 He also said in his own statement that "[a]t no time was I in a contract as a project manager for the project" and he "was not paid to project manage that development [ie the building of 70A Buckley Road]".

10.12 Finally he says:

> "If I was project manager I would have ensured that there was some sort of formal agreement between the Salts and I. I would have also ensured that I would be paid a certain sum **or percentage** for my work, and would have made sure that I was to be paid by way of progress payments which is the [sic] usually how project managers are compensated. There was however no formal arrangement between the Salts and I, and neither was I paid progress payments." (emphasis added)

10.13 Mr Bain was in fact paid $25,000.00 which he described as a "modest sum". Mrs Quilter said that Mr Bain had "wanted $70,000.00" and they:

> "… argued with him that why should he be entitled to a share of the profit (the so called profit Darren Bain had worked out) when he hadn't gone into this as a partnership with us as he had not put in any money and that a project manager would not get paid that much."

10.14 Reading Mr Bain's own statements mentioned above I have formed the view that in his mind a project manager could be compensated by a share of the profits ("percentage for my work").

10.15 Mr Bain said:

> "I wanted more money from the Salts [beyond the $25,000.00 paid] because I thought that they would have made **a reasonable profit**." (emphasis added)

10.16 Mrs Quilter spoke of Mr Bain having argued for a greater payment in the context of share of profit. All that adds up to me to Mr Bain's perception that he was entitled to a share of the profits, that the $25,000.00 paid did not reflect that, and that his entitlement arose because of the role he was playing. I think that he considered himself at that time as a project manager of the total project of subdivision and building of the dwelling at 70A. Indeed that may have included the project of building his parents' dwelling although I was given no evidence of that other than that he did undertake a "supervisory role in respect of delivery of kitset components and materials".

10.17 In addition to his involvement with Mr & Mrs Salt I find it also relevant that Mr Bain was an active participant in their sale to Mr & Mrs Still and indeed signed the agreement for sale on behalf of Mr & Mrs Salt.

10.18 There seemed no doubt in the mind of Mr Still who in his statement said that Mr Bain "acted as the project manager and contact point in all the dealings". There is certainly a difference between the role of selling a development once completed (or in the course of completion) and actually being involved in managing the development itself. However it also points to the overall role to consider this aspect. The sale from Mr & Mrs Salt to Mr & Mrs Still occurred **before** the construction was completed and it was Mr Bain, who on his own admission was managing the subdivision, who signed the agreement for sale. He gave Mr Still no misunderstanding about his role.

10.19 Likewise there was no misunderstanding on the part of Mrs Quilter who in her statement said that Mr Bain "agreed to be project manager for the building of **both** houses" (emphasis added). In her telephone examination Mrs Quilter said that Mr Bain was project manager for overseeing the building at 70A and then the building at 72. As to remuneration she said that Mr Bain suggested partnership and referred to his bankruptcy. She said that when he asked for $70,000.00 he also asked how much he would receive as his "share of profits".

10.20 The Council refers to certain documentary evidence supporting its claim that Mr Bain was project manager, namely:

10.20.1 A producer statement from Abuild which describes Abuild as having been "engaged by Darren Bain (Owner/Developer/Contractor)". That however contrasts with another producer statement from the same company which refers to "The Salts (2)" as the

owner/developer/contractor which engaged it. Neither of those documents are authored by those respective parties and cannot be seen as admissions by them. I do not attach much weight to those because they merely reflect the author's perception at the time of completion of a standard form.

10.20.2 Correspondence between Abuild and Mr Bain with respect to the retaining wall. Again I do not attach much weight to that because Mr Bain openly acknowledges involvement in the retaining walls but says this was not part of the "project" which he is said to have managed namely construction of the dwelling.

10.20.3 Correspondence between Mr Bain and the Council in December 1999. This was a letter written on O'Connor Construction Ltd letterhead. That company was then trading as "Kingswood Homes". It is signed by Mr Bain and it refers to 70B and 72 Buckley Road but does contain reference to the final Code Compliance Certificate for 70A Buckley Road.

10.20.4 Invoices from Mr Witana addressed "c/o Darren" or "c/o Darren Bain". Again these are not authored by Mr Bain but do indicate a degree of perception of the position from Mr Witana.

10.20.5 An e-mail from Mr Cole to Mr Angus on 22 November 1999 which contains reference to deliveries.

10.21 For a project manager to have a duty of care to subsequent purchasers that manager must have significant involvement in the actual project on which the claim is based. That person must take responsibility for construction decisions. Where there is defect in construction that person must be shown to have had a sufficient involvement in the decisions or processes that led to

that defect occurring which impose a duty of care. It may be that the totality of the project requires a duty of care in all its component elements. It may be that the involvement of the person against whom the claim is made is of more limited capacity.

10.22 It is submitted for Mr Bain in this claim that there is significant uncertainty as to roles and I accept that. This claim accentuates how things can go wrong when there is uncertainty of role and responsibility.

10.23 Mr & Mrs Salt found the section and chose to proceed. They chose to have subdivision of the section and involve Mr Bain in that. They chose to have, with Mr Bain's sales encouragement, a kitset home from Kensway Homes Limited. They chose not to have a home designed for the site but chose to go the kitset way. The design they chose in fact was a complex one involving several different exterior forms of cladding (plywood, vertical corrugated iron and horizontal corrugated iron). The site they chose to erect this kitset home on was on a steep section at Island Bay in a special wind zone. The project, unless it had been properly documented and controlled, was probably destined to fail from the outset.

10.24 Mr & Mrs Salt then signed a labour only agreement with Mr Witana. Mr Witana relied on the advices and support (or lack of it) that he was given by representatives of Kensway Homes. He did his best with the construction but failed to meet the performance standards. Other contractors were employed. Mrs Quilter was unable to ascertain who they were and she could not remember them. Mr Salt has not participated in the adjudication claim; and he may have been able to provide that information but has not.

10.25 Mr Bain's primary responsibility was to effect the sale of the component kitset home to Mr & Mrs Salt and to ensure appropriate delivery of components. That is the normal role of a salesman. He took on the added

responsibilities involved in the subdivision of the site and the construction of retaining walls. On Mr & Mrs Salt's behalf he was involved in the on-sale of the dwellinghouse to Mr & Mrs Still when it was still incomplete. None of that, in my view, implicates him in construction decisions or defects.

10.26 He then participated in certain aspects of performance of the kitset supply contract. He assisted in liaison with other contractors. That is an understandable addition to, or consequence of, his role as a salesman. It is part of every good sale that there would be after sales service and to a degree that is what Mr Bain was doing. To a degree also he had greater involvement because of the dwelling erected next door for his parents. He performed much the same function there and, of course, one might expect that he did more because it was for family members.

10.27 I have come to the conclusion that none of that brings him into the category of "project manager" that would impose a duty of care on him. He was not the contractor in any respect in the construction.

10.28 So far as the payment to him was concerned, despite his expectation of a share in the profits and despite his understanding that a share in the profits **may** make him a project manager, there is on the other side the significant uncertainty about the terms of remuneration to him. I accept that if he were to take the full responsibility for project management he would have also had it spelt out quite clearly what his return was to be, whether a set fee or a share of profits. There may have been his intervening bankruptcy which may have coloured the way in which that was dealt with but I have no evidence about that and in any event I do not think that the very casual arrangement undocumented that was entered into between him and Mr & Mrs Salt means that of itself he became a project manager; nor does it mean, in combination with the other factors, he should be regarded as a project manager.

10.29 There is no claim against him by the claimants. Insofar as the Council and other respondents are seeking a contribution from him I do not consider that he has a liability such as would allow for recovery of contribution under s17(1)(c) of the Law Reform Act 1936.

10.30 Accordingly I make no finding of liability against the seventh respondent, **Darren Robert Bain**. He is not entitled to costs in relation to the claim because the provisions of s43 of the WHRS Act do not apply. He was joined as a party on the application of the Council and not the claimants. There was no bad faith on the part of the Council and the allegations against Mr Bain certainly had substantial merit such that they needed to be tested at this hearing. I decline any order for costs in his favour.

11. Liability: G B & N P Still – 2nd Respondents: Vendors

11.1 The claim against the second respondents is in both contract and tort. Insofar as it is in contract the provisions of s17 of the Law Reform Act 1936 do not apply and if Mr & Mrs Still are found to have a liability in contract they will have no entitlement to claim contribution from other respondents against all of whom claims are made in tort; and conversely if any claim against another respondent succeeds, because that is in tort, there can be no claim for contribution against Mr & Mrs Still.

11.2 That does not apply insofar as the claim is also made against them in tort.

Contractual Liability

11.3 The claim is based on the warranty in clause 6 of the agreement for sale and purchase between the claimants and the second respondents dated 20 September 2001 referred to above.

11.4 The claim in negligence is that Mr & Mrs Still owed a duty of care to the claimants in respect of any building work that they did that this was carried out in accordance with the Building Act, the Building Code and to reasonable building standards "and/or to ensure that all work done on and around the dwelling (including landscaping) was carried out with reasonable care and skill".

11.5 At the time Mr & Mrs Still agreed to purchase the dwelling it was still in the course of construction and the agreement for sale contained the provision requiring the vendors, Mr & Mrs Salt, to continue with construction.

11.6 There may be a question, but I do not need to decide that in this case, whether the warranty in standard clause 6.2(5) such as was in the agreement for sale Still/Burke refers to work which the vendors (Still) were entitled to require to be done under the covenants in the agreement under which they bought the property. It might be argued that by taking the benefit of the covenant they had with Mr & Mrs Salt for Mr & Mrs Salt to continue and complete the work to that standard, Mr & Mrs Still were in their turn causing or permitting work to be done for which a building consent was required so as to bring the warranty provisions of clause 6.2(5) into play. However I do not need to decide that in this case.

11.7 The factual basis on which the claims are made by the claimants and any cross-claim which it is entitled to make in respect of tortious liability by the Council all relates to landscaping issues. Indeed the submissions from the Council expressly record that any entitlement to contribution from Mr & Mrs Still must only be on the basis that Mr Hazlehurst's evidence as to ground levels causing water entry is not accepted. There was evidence concerning the extent of excavation but that too becomes irrelevant given the finding that I have made to accept Mr Hazlehurst's view that there was no sufficient

evidence of damage from water entry by virtue of the landscaping and cladding/ground contact issues referred to by the assessor.

11.8 I have found above, favouring Mr Hazlehurst's evidence, that there is insufficient evidence of damage from wicking or issues arising from the proximity of the cladding to the ground. That is not to say that it is not unwise practice to have landscaping in close proximity to the cladding and I understand that the claimants are to attend to that as a matter of caution and good landscaping practice. For the purpose of this claim, however, I have found that there is insufficient evidence of damage arising from that issue.

11.9 It follows from this that, because the claims and cross-claims against Mr & Mrs Still relate only to work done by them in relation to landscaping, there being no evidence of damage from the landscaping work, there is no claim against them.

11.10 Certainly as framed, insofar as the claim refers to building work and building standards, there is no evidence that Mr & Mrs Still did any work requiring to meet those standards and any claim against them must be limited to the landscaping issues which, as I have said, are not shown to have caused damage.

11.11 Accordingly I find there is no basis for claim against the second respondents, **Gavin Barry Still** and **Natalie Pam Still**.

11.12 I decline any order for costs under s43 of the WHRS Act in favour of Mr and/or Mrs Still there being no evidence of any bad faith on the part of the claimants and it is certainly the case that the allegations against them were made with substantial merit given the views held by the assessor.

12. Liability: Abuild Consulting Engineers Ltd – 6th Respondent

12.1 The sixth respondent was added as a respondent by Procedural Order No 2 dated 2 December 2005 on application by the claimants. That company had been mentioned by the assessor in his report insofar as foundation inspection was implicated but had not been included in the original Notice of Adjudication.

12.2 The basis of the claim against it was in tort, it being claimed that there was a duty of care that it owed to the claimants and negligence in the discharge of that duty. The Points of Claim referred to structural engineering elements associated with the design and construction and inspection of foundations. In closing submissions counsel for the claimants referred to the issues of ground level at the time of producer statement PS4 which led to the issue of the Code Compliance Certificate; whether the building pad or slab was too low; and a failure by Mr Taylor of Abuild to notice and draw attention to the fact that the plywood cladding was fitted to the concrete foundation with no anti-capillary gap. No other respondent has made a cross-claim against Abuild.

12.3 Abuild's only involvement was in relation to the ground floor slab, concrete pile foundations, bracing calculations and advice on the size and spacing of second floor joists. It did this work under contract with Kensway Homes Limited. It also gave structural engineering advice regarding a timber pole retaining wall.

12.4 Two producer statements were completed, the first being dated 9 July 1999 which is limited to structural clause B1, and the second dated 1 February 2000 again relating to structural clause B1.

12.5 Mr Taylor for Abuild in his sworn statement referred to there having been no evidence from Mr McCormack or in the assessor's report or any other

evidence that implicates structural issues or matters where Abuild were involved in weathertightness issues on which this claim is based. He said that at the time of his inspection of the property no landscaping had been carried out and the proper ground clearance between ground level and finished floor level had been achieved.

12.6 Mr Neville, the assessor, confirmed to the hearing that there were no structural issues in the claim at all. Mr Taylor said that the clearance of 225mm between ground level and floor level is "very very fundamental" and arises in every project and because this was already shown on the drawings there was no need for the engineer to include that reference again.

12.7 I did not hear any evidence which implicated Abuild or engineering issues or structural issues concerning aspects that Abuild was involved in and I find there is no basis for claim against it.

12.8 The only possible arguable basis related to the ground clearance issue. The question, of course, became academic when I found that there was no evidence that capillary action arising from landscaping had caused damage.

12.9 The question, however, is relevant to an application for costs that Abuild has made. That is based on s43 of the WHRS Act and is against the claimants. The application refers first to the claimants having joined Abuild as a party, secondly their having opposed its application to be struck out as a respondent and thirdly their continued claim against the respondents despite the evidence provided in anticipation of the hearing and indeed at the hearing. It is claimed that Mr Burke knew from an early stage that Mr & Mrs Still had completed the landscaping around the house. It is submitted that evidence from Mr Witana and from Mr Geraghty for the Council confirms external ground clearance of the foundation, that the cross-examination of Mr Taylor for Abuild concentrated on the irrelevant retaining wall and there

was inconsistency between the assessor's explanation that the structure was sitting too low and absence of any reference to this in the report.

12.10 Claims under the WHRS Act are difficult at the best of times. This claim is no exception. The investigative process requires constructive input from all parties and indeed from persons who may not be parties but are cognizant of relevant facts. The starting point is the assessor's report but that is built on as the picture becomes clearer and information is provided. It may be that the assessor's initial views are confirmed; it may be that they are refuted and other factors become relevant. The costs régime of s43 reflects that. This is not a case as in Court litigation where the onus is on the plaintiff to prove the case against a defendant and, in the absence of proof, is likely to meet a costs order. It is a case where there is only liability for costs in the circumstances mentioned in s43, namely bad faith or allegations without substantial merit.

12.11 In this case there was an issue raised by the assessor's report as to damage from capillary action. That raised factual questions of responsibility for landscaping and the lack of separation between floor level and the ground level. The assessor referred to Abuild as a party who should be a party to the claim. That duly became the case. When Abuild applied to be struck out as a respondent that application was declined with specific reference to the causes of water leak referred to in paragraph 6.1 of the report "some of which may be said to be indirectly at least related to the involvement of the sixth respondent" – and these are water capillary ground clearance issues mentioned.

12.12 In the process of preparing for the hearing Abuild has submitted its evidence and other parties have submitted theirs. So far as landscaping was concerned this was dealt with by Mr Still in his statement.

12.13 At the hearing questions of causation were addressed and it was not until well through the hearing that the technical meeting concluded and the participants in that were able to report back to me as adjudicator.

12.14 In all those circumstances I do not consider that the claim against Abuild can be said to have been without substantial merit or otherwise to entitle it to costs under s43 of the WHRS Act.

12.15 Its application for costs is dismissed.

13. Liability: P W M Angus – 8th Respondent: Director Kensway Homes Ltd

13.1 Mr Angus was at all material times a director of Kensway Homes Ltd. He was joined as a respondent by Procedural Order No 3 on 13 February 2006 at the application of the Council. He applied to be struck out as a party and that was declined. One of the reasons was that as a respondent he was first required to make positive input into the adjudication claim inquiry and he had failed to do so. It is particularly necessary that principal players in the construction of a dwellinghouse participate in the adjudication process especially when knowledge of the facts are best obtained from that person. In this case the home was supplied by Kensway Homes Ltd of which Mr Angus was at the time a director. There was evidence at that stage too that suggested he had been involved on site. The application was declined.

13.2 There is no claim against Mr Angus by the claimants and he is not mentioned in the closing submissions of counsel. Accordingly I do not consider any liability he may have to the claimants except in the context, as with Mr Bain, of any cross-claim that is made against him. As I have said before a cross-claim can only succeed against him under s17 of the Law Reform Act 1936 if he has a liability in tort to the claimants such that contribution can be ordered against him pursuant to the provisions of s17 of the Law Reform Act 1936.

13.3 Cross-claims are made against Mr Angus by the Council and by Mr Witana. The Council relies on evidence from Mr Witana. That evidence is contained in two passages from his brief. The first relates to meetings at the Kensway office on a number of occasions when there were discussions about material and design questions on flashings around the windows. Mr Witana says that he pointed out that there was no flashing detail on the plans to show how the flashings should be fitted around exterior windows and which Mr Witana said **David Cole** said he would get back but never did.

13.4 As to Mr Angus, Mr Witana said he asked him about the detail of the flashings and claddings and the handrail to the corrugated iron and Mr Angus said he would look into the situation but Mr Witana says he never heard back from Mr Angus. Mr Witana says that he installed the flashings "in the best way I knew how" trying to use flashings that he had.

13.5 Mr Angus in his written statement affirmed at the hearing denied that that occurred. He said that Mr Cole was employed at all relevant times as the designer and that he, Mr Angus, was neither designer, architect nor building tradesman and could not possibly have answered those questions himself.

13.6 The component supply agreement between Kensway Homes Ltd and Mr & Mrs Salt dated 23 May 1999 provided for the supply and delivery of the component material for the kitset house. It contained as clause 14.1 an express acknowledgement that the agreement was:

> "… for the supply … of the components for the Kit House. In particular … it is the sole responsibility of the purchaser [Mr & Mrs Salt] to ensure that the Kit House is erected in a good and workmanlike manner and in accordance with the Plans and Specifications…"

It contained an indemnity from Mr & Mrs Salt that they would:

> "… hold harmless [Kensway Homes Ltd] against any claim of whatever nature that may arise out of the erection of the Kit House by [Mr & Mrs Salt], any contractor or subcontractor of [Mr & Mrs Salt] or any person or company [and that Kensway Homes Ltd] shall have no responsibility whatsoever in regard to the construction of the Kit House."

13.7 I have already referred to the terms of the contract that Mr & Mrs Salt had with Mr Witana and the responsibilities that he had as builder of the kitset house.

13.8 It is in that context that the claim against Mr Angus must be considered. He was at all material times a director of Kensway Homes Ltd and he says that, if there is any liability in this matter, it is a liability of that company and not his and he relies on the principles enunciated in *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517.

13.9 It is certainly the case that directors of a construction company can have personal liability to subsequent purchasers and there are many cases such as *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 where the director of a company developing a site has been held to owe a duty of care to subsequent purchasers and is liable for his negligence in the discharge of that duty.

13.10 It is in reliance on those principles that the Council claims Mr Angus has a liability referring to his involvement in advertising for and appointing contractors, attending the site and responding to queries as to how the house was built. The Council claims that, in reliance on Mr Witana's evidence, Mr Witana was more a subcontractor to Kensway than a direct contractor to Mr & Mrs Salt. I do not accept that. The contractual relationships were clear. There were two contracts, one for supply of the component parts by Kensway Homes Ltd and the other for building the home by Mr Witana.

13.11 The Council also refers to certain involvement of Mr Angus from his own statement of evidence and also from an e-mail from Mr Cole to Mr Angus dated 26 November 1999:

> "Des [Mr Witana] rang tonight. Wants glue and nails/screws. Told him to ring you direct."

13.12 I have considered all this evidence carefully and I do not find that the involvement of Mr Angus was any greater than one would expect from a director of a company supplying component parts for a kitset home. It is good after sales service to follow up the supply and to make sure that the customer's queries are met. This would be partly in relation to the customer, Mr & Mrs Salt, and partly in respect of their contract builder, Mr Witana. When the question was raised about the adequacy of the flashings and Mr Angus said he would look into this, I think the principal responsibility still lay with Mr Witana to be sure that he received the flashings that he needed and that appropriate steps were taken to achieve the performance standards for weathertightness prescribed by the Building Code. I have already found that he failed in his discharge of his responsibilities in that regard.

13.13 I do not think that it necessarily follows that Mr Angus has a liability to the claimants as subsequent purchasers merely because he did not follow up the flashings issue.

13.14 Perhaps it is because the claimants acknowledge that that is the case that they have not made any claim against Mr Angus. It is the Council which has made these allegations in its claim for contribution against him.

13.15 Those claims are also made by Mr Witana who in his closing submissions refers to both Mr Bain and Mr Cole having worked for Kensway Homes but also to Mr Angus' involvement as a director and his responsibility for his employees. It is the company that has any responsibility or liability for its

employees and not a director. It is a basic principle of vicarious liability that it is the **principal** and not a director of the principal that may have any liability for the acts of the agent. Mr Witana's submission deals with that issue but critically at stake is the question of whether Mr Angus can be said to have owed a duty of care for the claimants such that he should be ordered to make a contribution to the liability that may be found against other tort feasors, in this case the Council and/or Mr Witana.

13.16 On the evidence that I have been presented I do not find Mr Angus had sufficient involvement in the critical questions of construction which have led to leaks and damage to have any liability. The only possible area is in relation to flashings and, as I have said, the responsibility for that lay primarily with the builder. The fact that he raised this matter with Mr Angus and received the response that he did not impose on Mr Angus a liability such that it could be said he has been negligent in the discharge of any duty of care to the claimants.

13.17 Accordingly I find that Mr Angus has no liability to the claimants and therefore he has no liability on any cross-claims made against him.

13.18 He too has sought costs in relation to his involvement against Mr Witana, the Council and the claimants. I have referred to the grounds under s43 of the WHRS Act for any order for costs. There is no suggestion of bad faith on the part of any of those parties. As with Abuild Construction Ltd, the involvement of the respective parties was a matter of continued supply of detail and evidence. Mr Angus applied to be struck out as a respondent which I declined. This was partly because of the requirement that, as a principal player in the process, he continued to provide information which would assist resolution of the claims. So far as the merits of claims against him were concerned these needed to be explored at the hearing and I find

that there was substance to the allegations made against him. I therefore decline his application for costs.

14. **Liability: D Cole – 10th Respondent: Designer**

14.1 Claims are made against Mr Cole by the claimants and cross-claims are made against him by various respondents.

14.2 He has not been served with the adjudication claim and has not participated to any degree.

14.3 That is not to say that he may not have some liability to the claimants and a liability to respondents on cross-claims. It has simply not been possible to explore that in the context that he was not served and did not participate.

14.4 It is disappointing that that happened given that it seems a simply inquiry at the time of the hearing probably located his whereabouts such that he could have been served but the claim proceeded without him.

14.5 I simply record that there are claims made and cross-claims made in respect of Mr Cole and these may well need to be the subject of separate proceedings. I can order no relief against him either on claims or cross-claims in his absence.

15. **Liability: T M Faulknor – 9th Respondent: Pre-purchase Inspection**

15.1 The claims against Mr Faulknor are not made by the claimants but rather are cross-claims by other respondents. That is perhaps not surprising given that Mr Faulknor is related to the claimants and indeed the brother of Mr Burke's partner.

15.2 That aside, I must consider his involvement and whether he has any liability to the claimants such as to attract cross-claim liability to other respondents in the manner mentioned earlier.

15.3 I have earlier outlined in detail Mr Faulknor's involvement and do not intend to repeat it here.

15.4 Briefly, however, his position was that he is a family member and he was asked to give some comment on the home. He does have building experience but, as I have said, did not seem to know the requirement for ground to floor clearance that was described as "very very fundamental". Despite that and having regard to his building experience he was collected from work by Mr Burke and taken to the subject site. He borrowed a ladder there and carried out a one hour inspection. He gave comment to his sister's partner concerning the purchase and on the basis of that certain decisions were made and the claimants proceeded with their purchase.

15.5 I have rejected above the defence by the Council of contributory negligence on the part of the claimants in relation to their responses to Mr Faulknor's oral report.

15.6 For the same reasons as I expressed there I do not consider that Mr Faulknor's involvement was such as to create a duty of care on his part which attracts liability for negligence. I do not consider that there was an intention on the part of Mr Burke and Mr Faulknor to create legal relations by what transpired. This was simply a family member being asked to comment in the context of his apparent expertise and he did so. That is a significant, if not determinative, factor in deciding whether Mr Faulknor owed Mr Burke and other trustees a duty of care.

15.7 It is only the Council that claims Mr Faulknor has a liability to contribute to any liability that the Council may have. Its submissions are first that a lack of payment is irrelevant to responsibilities. While I accept that in principle I think it is relevant to the question of existence of duty of care. While Mr Burke may have relied on advices given to him by Mr Faulknor (or he probably would otherwise not have asked him to go in the first place), the fact that he was not paying a family member for those comments and indeed the extent to which he did not take action in response to them points, in my view, to a measure, if not complete, absence of reliance. Secondly the Council submits that it is either a breach of his duty or not a correct recollection for Mr Faulknor to say that he was not asked to use his expertise to provide advice. Mr Faulknor's evidence referred to matters which were of concern to him that he observed and which he pointed out. Finally the Council submits that the ground clearance issue was a fundamental point and that Mr Faulknor did not know about this or identify it. That aspect has no relevance to the claim given my finding that there is no evidence of damage from capillary or wicking issues.

15.8 Having considered all the evidence concerning Mr Faulknor I have formed the view that there is no sufficient evidence to establish that he owed a duty of care to the claimants so as to impose liability on him nor do I find he has been negligent in relation to his involvement in the exchanges with Mr Burke. He would therefore have no liability to the claimants. He has no liability to any respondent on any cross-claim.

16. Liability: Wellington City Council – 1st Respondent: Territorial Authority

16.1 The basis of the claim by the claimants against the Council is that it owed a duty of care to the claimants and has been negligent in discharge of that duty by failing to ensure the dwelling was constructed in accordance with the Building Act and Code, failing to carry out inspections, issuing a building consent when it could not reasonably have been satisfied the Building Code

could be met and issuing a Code Compliance Certificate when it could not have been satisfied on reasonable grounds that the building work complied with the Building Act and Code.

16.2 Mr Witana makes a cross-claim against the Council referring to its responsibility in respect of inspections and site reports and effectively claiming that the Council has a liability to contribute to his liability to the claimants for the same reasons as are advanced by the claimants.

16.3 Neither of those parties submitted any evidence in support of their claim. The claimants relied on the assessor's report on the one hand and evidence of quantification from Mr McCormack on the other but advanced no objective evidence as to the Council's responsibility. The evidence from Mr Burke and Ms Cruickshank did not touch on that. Mr Witana did not give evidence other than his own in relation to the claim.

16.4 In their closing submissions the claimants refer to "numerous instances of territorial authorities being found liable in the same or similar circumstances". They refer to the provisions of s43(3) of the Building Act 1991 which requires a territorial authority to issue a Code Compliance Certificate if it is satisfied on reasonable grounds that the building work complies with the Code. It is submitted that the building failed to comply with the Code and these areas of non-compliance should have been obvious at the time of final inspection if not before. The claimants rely on the Code Compliance Certificate and submit that the Council could not have been satisfied on reasonable grounds that the building work complied with the Code when it issued the Code Compliance Certificate.

16.5 Liability is denied by the Council which submits that the Council's role is not that of a Clerk of Works (referring to *Sloper v W H Murray Ltd* (Dunedin High

Court, A31/85, Hardie Boys J, 22/11/85) and *Smith v Waitakere City Council* (WHRS claim 277: 20/7/04)).

16.6 It submits that the Council is neither a guarantor of a building nor an insurer and the main purpose of the Council's power of control is to ensure structural stability of the building (*Lacey v Davidson* (Auckland High Court, A546/85, 15/5/86)). The Council is not, it submits, negligent if it carries out its inspections at such time and in a reasonable manner so that it can conclude on reasonable grounds that the work done has complied with the Building Code and that does not extend to identifying defects which cannot be discovered during a visual inspection.

16.7 It submits that the Council inspectors who carried out the final two building inspections and who gave evidence were reasonable and careful in the checks they carried out and that it would be wrong to judge the standard of an inspection by deficiencies in workmanship noted by the assessor. Significant emphasis was placed on the relatively limited resources available including time for inspections it being said that if more time were taken the cost of inspections would increase and it contrasts the significantly greater time that the assessor had for his reporting.

16.8 The Council did call evidence on this issue from Mr Hazlehurst and, as I have said above, Mr Hazlehurst was frank in his acknowledgements that there were some things that the Council inspector should have observed. First he said that, in relation to the framing at the side of the lower external door, the detailing was visible from the balcony above and should have been noted during inspections. Secondly he said that the blockage to the outlet of the balcony above the main bedroom and the level of the overflow pipe being higher than the floor level should have been picked up by the Council on its final inspection. That was a fairly significant issue in that once the outlet pipe was blocked if there was excess water then the overflow pipe did

not function as such before there had been flooding into the first floor area. This was exacerbated by the original design which provided for roof stormwater to discharge onto that balcony, a problem which Mr Burke remedied by diverting the stormwater from the roof away from that balcony area. Finally Mr Hazlehurst in his list of eight locations of leaks has identified four where he believes potential causes of water entry could have been seen by the Council and these are the last four listed above at paragraph 7.8. The opening submissions of counsel for the Council referred to that concession.

16.9 The evidence from the other two witnesses for the Council on this issue were Mr Peter Geraghty and Mr John Drysdale-Smith. Mr Drysdale-Smith is, and was then, a building officer and a registered craftsman plumber and drainlayer. He referred to the inspections of the site undertaken by other Council officers as noted in the Council Inspection Diary notes. Specifically he attended on 31 January 2000 to complete the final plumbing inspection but was pressed by Mrs Salt for completion of a Code Compliance Certificate in response to which he contacted Mr Geraghty in the area to ask him to join him for the final building inspection. Mr Geraghty joined him (and gave evidence about this himself) and a list of eight items of remedial or additional work was completed and left on site. Mr Drysdale-Smith then returned to site on 3 February 2000, confirmed that all works appeared to comply and approved the issue of the Code Compliance Certificate which was issued dated 4 February 2000 but not in fact signed.

16.10 Mr Geraghty in his evidence went through the 21 causes of water entry and damage as identified by the assessor.

16.11 Mr Geraghty had completed the inspection with Mr Drysdale-Smith on 31 January 2000 and supplied his diary note made at the time. That indicates that one hour was spent and the entry is:

> "Final, quite a few items picked up in both building and plumbing
> Site report 2884"

He also produced the site report which contained the eight items mentioned earlier which were later followed up by Mr Drysdale-Smith.

16.12 It is the case for the Council that many of the matters referred to in the assessor's report would not have been, and in fact were not, visible to Mr Geraghty at the inspection that he was involved in which his notes indicate took one hour. I need not deal at length with his comments about finished ground levels because I have found that there is no evidence that that is a cause of damage. In general terms he refers to reliance "to a certain extent" on builders and component suppliers. He says that some items that the assessor has noted were not a problem at the time such as loose window facings, penetrations behind facings, waterproof membrane breakdown and installation of secondary overflow piping. He said that "at the time roof inspections were not part of our standard practice".

16.13 Mr Geraghty's final inspection on 3 February 2000 was "to check the other matters listed on Site Report had been attended to" and it appeared that they were the only matters considered then.

16.14 Despite what Mr Geraghty has said about the separate 21 items I am very mindful of Mr Hazlehurst's independent concession that there were four aspects of damage to the dwelling that have been caused by matters which should have been observed by the Council inspection, namely:

- Main bathroom/dining room (external corner
- Dining room exterior door (balcony access)
- Study (west facing window)
- Rear entry door (ground floor).

16.15 The causes that Mr Hazlehurst attributes to damage in those areas and the respective remedial costs without cavity are:

Main bathroom/dining room (external corner)	Poor flashing design and installation to the sides and at the sills of windows to the ground and first floors	$8,250.00
Dining room exterior door (balcony access)	Lack of drainage from the head flashing/water entry at the sides of the door	4,000.00
Study (west facing window)	Capillary action at the head flashing window flange intersection/lack of drainage from the head flashing	1,050.00
Rear entry door (ground floor)	Poor detailing at the parapet corner above the door and the parapet junction with the dwelling	1,050.00
		$14,350.00

16.16 That sum represents nearly 30% of the total remedial costs that Mr Hazlehurst had identified in his schedule, $49,200.00.

16.17 It does not follow, as has been submitted for the claimants, that simply because there was a territorial authority involved in the construction of a dwelling which later proves to be leaky that that territorial authority has any liability to the claimants and I do not accept the submission that the Council in this case should be liable simply because "there are numerous instances of territorial authorities being found liable in the same or similar circumstances" without there being further consideration of the specific issues.

16.18 For the Council to be liable there must be proven:

16.18.1 A duty of care. There is no doubt on the authorities that the Council does owe a duty of care to subsequent purchasers of a residence and *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 is but one of many cases confirming that.

16.18.2 That the Council officers have been negligent causing damage. That is normally addressed to approval of drawings and other detail for the issue of the building consent or its inspections during construction or to negligence in the circumstances of the issue of the Code Compliance Certificate.

Code Compliance Certificate

16.19 The Council relies on s43(3) of the Building Act 1991 which provided:

> "(3) … The territorial authority shall issue to the applicant in the prescribed form … a Code Compliance Certificate, if it is satisfied on reasonable grounds that:
> (a) the building work to which the certificate relates complies with the Building Code …"

16.20 It is submitted for the Council that the assessor's report indicates that the dwelling failed to comply with the Building Code in "a number of serious and often obvious respects".

16.21 The submissions from counsel appear to relate the issue of the Code Compliance Certificate to inspection questions and include the submission:

> "The very fact that a CCC was issued despite [areas of non compliance that would and should have been obvious at the time of the final inspections] provides some insight into the standard of the inspections carried out."

16.22 It is important to make that connection between the issue of the Code Compliance Certificate and the basis on which it is issued. Section 43 clearly makes that connection with the use of the words "if it is satisfied on reasonable grounds". The territorial authority was obliged to issue the Code Compliance Certificate **but only** when there had been reasonable grounds to satisfy it of compliance with the Building Code. In this case the Council relied on the inspection process to so satisfy itself.

16.23 In my view the limited resources issue is not one which absolves the Council from its responsibilities. It may have only had one hour of Mr Geraghty's time to spend on inspection. Its budget and rating basis may have precluded more time on that. That does not, in my view, mean that its responsibilities are less. The requirement of s43 is for reasonable satisfaction and if that takes greater time or cost then that must be done and cost structures adapted to cope. If that meant that inspection fees were required to be higher then that is a matter for the Council. It does not, in my opinion, excuse a territorial authority from adequate compliance with the requirements of s43 of the Building Act 1991 for it simply to say that its resources did not extend sufficiently to allow it to do a proper job.

16.24 In Mr Hazlehurst's view there were aspects where defects which may well have meant non-compliance with the Building Code would have been obvious on a reasonable inspection.

16.25 The matters he identified represented some 30% of the cost which he had said in his written statement were the reasonable costs for remediation work. There was no direct evidence from the claimants that pointed to negligence on the part of the Council in its inspection process and I do not regard the entries in the assessor's report of non-compliance with the Code as of itself evidence of negligence on the part of the Council. The basis on which the assessor stated that the Council should be a party was "issued CCC" but in my view that is not in itself a ground to add a territorial authority as a respondent or find it liable. There is the further step that I have mentioned that there must be evidence that it did not have reasonable grounds to be satisfied that the building complied with the Code before it issued the certificate. The claimants are significantly assisted by the evidence from Mr Hazlehurst in that respect.

16.26 The next point raised by the claimants' submissions are that:

> "… the Council is primarily or 100% liable for the loss suffered by the claimant".

16.27 In reply submissions counsel for the Council has disputed that stating:

> "… no authority is provided …"
>
> "That submission is without merit and is contrary to established law."

16.28 In support of that submission the Council has said:

> "The relevant test for the Council's liability relates to discoverability from a reasonable inspection, which is clearly quite different from the responsibility of the primary parties on site who must ensure that the building work complies with the Building Code."

16.29 Insofar as that submission goes to **apportionment** and the rights of one respondent to recover from another under the provisions of s17 of the Law Reform Act 1936, the submission is correct.

16.30 That submission **is not correct** as to the consequences of the Council's negligence if found.

16.31 In my view it is established clearly by the cases that if a tort feasor has caused damage that tort feasor is liable to the injured party for the full (or 100%) loss suffered by that injured party. It may be that there is another party or other parties who have caused the damage to the injured party from negligence and it may be that that other party or those other parties also have a liability to the injured party for the full (100%) damage suffered. That fact does not limit the liability of the first tort feasor. Each tort feasor has full liability for the damage caused by that tort feasor's negligence. It is only when there are questions of apportionment and contribution between them that arise where claims are made in that regard under s17 of the Law Reform Act 1936 that issues of percentage arise.

16.32 I therefore reject the submission for the Council if it is addressed to consequences of negligence.

16.33 It follows from that that the Council is 100% liable for the damage which flows from its negligence.

16.34 To assess that I have looked at those areas where Mr Hazlehurst in his evidence has said a reasonable inspection should have found a difficulty as mentioned above and the respective causation factors he attributes.

16.35 In relation to the first four areas of damage that Mr Hazlehurst said would **not** have been apparent at inspection, the main cause he attributes is the open mitre at the balcony corners. His evidence on that is:

> "… at the time of final inspection, it is unlikely the mitres at the corner of the balustrades would have been open."

He refers to the wetting and drying cycles that would have subsequently occurred to open up the mitres. I accept that explanation as indeed do I accept the other evidence from the Council to the extent that it refers to deficiencies that would not have been apparent **at the time** of the inspections. That is a different issue from deficiencies that should have been seen at that time given adequate time and resources.

16.36 I think the fairest way to deal with the different aspects of evidence is to find the Council liable for 30% of the net cost of repairs. This is **not** a contribution or apportionment issue. It is my assessment of the proportion of the remedial work for which the Council has a liability having regard to the negligence in its involvement in the inspections and consequent issue of the Code Compliance Certificate. I find that it has not been negligent in respect of all issues such that it should have liability for all repair costs.

16.37 Accordingly the Council's liability is:

Repair costs as determined	$111,418.00
Less deduction for cavity	8,900.00
Balance	$102,518.00
Plus allowed proportion remediation costs already incurred	3,316.50
Total	$105,834.50
Reduced by 10% for contributory negligence	$95,251.05
Reduced to 30%	**$28,575.32**

16.38 I **ORDER** that the first respondent, the **Wellington City Council**, pay to the claimants, **the trustees of the Burke Family Trust**, the sum of **$28,575.32**.

17. Apportionment

17.1 The parties have requested that I then carry out an apportionment exercise and cross-claims are made by each liable respondent against the others under s17 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)—
> …
> 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."

17.2 The only affected parties are:

17.2.1 the first respondent;

17.2.2 the third and fourth respondents;

17.2.3 the fifth respondent.

17.3 As to the Council's share of liability for relevant repairs on the authority of cases such as *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 I fix its proportion at **15%**.

17.4 In respect of the liability of the second and third respondents on the one hand and the fourth respondent on the other I fix their liability at **equal contribution** which varies according to the category of repairs.

17.5 In respect of those repairs for which I have found the Council has a liability totalling $28,575.32 that results in the following apportionment:

Repair Cost	**Council**	**Witana**	**Salts**	**Total**
	15%	**42.5%**	**42.5%**	
$28,575.32	$4,286.30	$12,144.51	$12,144.51	$28,575.32

17.6 In relation to the remaining repairs ($95,251.05 - $28,575.32), $66,675.73, these are shared equally between Mr Huitema and Mr & Mrs Salt as follows:

Repair Cost	**Witana**	**Salts**	**Total**
	50%	**50%**	
$66,675.73	$33,337.87	$33,337.86 (rounded)	$66,675.73

17.7 The total amounts payable if each party pays its contribution to liability will therefore be:

First respondent, Wellington City Council	$4,286.30
Third and fourth respondents between them, R E Salt & J L Quilter	45,482.37
Fifth respondent, D E Witana	45,482.38
Total	$95,251.05

17.8 If any party pays, as they are legally obliged to do, a greater sum than the shared contribution set out above that party is entitled to recover from the other parties the appropriate percentage to achieve that division of liability.

17.9 I **ORDER** contribution between the parties pursuant to s17 Law Reform Act 1936 accordingly.

18. **Costs**

18.1 I have already dealt with costs claims by the sixth and eighth respondents. The grounds for costs are set out in s43 of the WHRS Act, namely costs caused by bad faith or allegations or objections without substantial merit.

18.2 I do not find that any of the allegations against any of the respondents made by the claimants or any of the objections from any of the respondents were without substantial merit and I decline any order for costs.

19. **Result**

19.1 I **ORDER** that the first respondent, **Wellington City Council**, pay to the claimants, **the trustees of the Burke Family Trust**, forthwith the sum of **$28,575.32.**

19.2 I **ORDER** that the third and fourth respondents, **Ryan Edward Salt** and **Joanne Leigh Quilter**, pay to the claimants, **the trustees of the Burke Family Trust**, forthwith the sum of **$95,251.05.**

19.3 I **ORDER** that the fifth respondent, **Desmond Eric Witana**, pay to the claimants, **the trustees of the Burke Family Trust**, forthwith the sum of **$95,251.05.**

19.4 I **ORDER** that contributions be made between the parties as set out above and that each respondent is entitled to recover from other respondents any excess over its share as fixed above that it has paid to the claimants so as to achieve the following percentages of the total net repair costs, $95,251.05:

19.4.1 First respondent, Wellington City Council – **4.5%**;

19.4.2 Second and third respondents, Ryan Edward Salt and Joanne Leigh Quilter – **47.75%**;

19.4.3 Fifth respondent, Desmond Eric Witana – **47.75%**

19.5 I make no determination in respect of the claims against the tenth respondent, David Cole, because he was not served and all claims by any party against him are reserved for another forum.

19.6 I make no order for costs by any party in favour of any other party.

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.