

**Claim No:** 2891

**Under** the Weathertight Homes Resolution Services Act 2002

**In the matter** of an adjudication claim

**Between** **David Lindsay Cameron** and  
**Brenda Muriel Cameron**

Claimants

**And** **Hastings District Council**

First respondent

**And** **David Lawrence Stevenson**

Second respondent

**And** **Chris Chote**

Third respondent

**And** **BMW Plumbing Limited**

Fourth respondent

**And** **Garry Brown**

Fifth respondent

**Determination  
20 June 2006**

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## 2. **Summary**

- 2.1 The claim was for certain amounts for assessed repairs to the dwellinghouse at 130 Whakapirau Road, Maraekakaho, Hastings, built by the second respondent with plastering work by the company employing the third respondent, certain LPG plumbing fittings by the fourth respondent and painting some 10 months later by the fifth respondent.
- 2.2 After consultation between experts it was agreed that the reasonable cost of repairs would total \$11,250.00 including GST.
- 2.3 Of that sum the claimants had entered into a settlement with the first respondent reducing the balance of their claim to \$3,920.00 including GST.
- 2.4 Negligence and breach of contract was found against the second respondent in respect of installation of inadequate flashings and failure to meet the performance standards for weathertightness of the dwelling and he was ordered to pay the sum of \$3,920.00.
- 2.5 Negligence was found in respect of the plumbing aspects of the installation of the gas cylinder penetration for which the plumber was found liable for 10% of total repair costs, \$1,125.00, which it was ordered to pay.
- 2.6 No order was made against the plasterer or the painter.
- 2.7 No order for costs was made.

### 3. **Adjudication**

3.1 The claimants brought an adjudication claim under the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**) by notice of adjudication dated 25 October 2005 naming the above respondents except the fifth respondent as parties. I ordered the joinder of the fifth respondent as a respondent on the application of the first respondent (**the Council**).

3.2 I was assigned as adjudicator to the claim. After several telephone conferences and interlocutory applications I convened a hearing of the parties on 30 May 2006 which was attended by:

3.2.1 **Mr & Mrs Cameron**, the claimants;

3.2.2 **Mr D L Stevenson**, the second respondent;

3.2.3 **Mr C Chote**, the third respondent;

3.2.4 **Mr R Barrett**, on behalf of BMW Plumbing Limited, the fourth respondent;

3.2.5 **Mr G Brown**, the fifth respondent;

3.2.6 **Mr C J Phayer**, the Weathertight Homes Resolution Service (**WHR**S) assessor;

3.2.7 One **M Hazlehurst**, who advised that he had been appointed as the technical adviser on behalf of the second and fourth respondents, Mr Stevenson and BMW Plumbing Limited.

3.3 The hearing lasted all day. I heard evidence from Mr Cameron, Mr Stevenson, Mr Chote, Mr Barrett and Mr Brown. There was also evidence from the WHRS assessor, Mr Phayer. As to the role of Mr Hazlehurst, he virtually assisted both Mr Stevenson and BMW Plumbing in submissions made, cross-examination and in giving evidence himself. That process was contrary to what had been directed in earlier Procedural Orders which required all parties to present their evidence well before the hearing in written form so that there were no surprises at the hearing. I did allow Mr

Hazlehurst to act in that way, however, because I thought that was fair to the two respondents he was engaged by. Because the claimants were relying on the WHRS assessor, Mr Phayer, on technical matters and because of the agreement during the course of the hearing to which I shall refer, I considered that their interests on technical matters was adequately protected by Mr Phayer's presence.

3.4 There was no appearance at that hearing of or on behalf of the first respondent. A notice of withdrawal of the claim against it signed on behalf of the claimants and the first respondents and dated variously 12 and 16 May 2006 had been sent to me as adjudicator. That purported to be first a withdrawal of the claim under s30(1)(b) of the WHRS Act, and secondly confirmation of a settlement between those parties pursuant to s42(5) of the WHRS Act. I indicated to those parties that I could not treat that as a withdrawal of the claim as all parties had not consented to it under s30 of the WHRS Act nor as a settlement of the claim pursuant to s42 as it was not a full settlement of the whole claim.

3.5 I was advised, as I had requested, that pursuant to that settlement the claimants had received \$7,330.00 from the first respondent in full settlement of its claims against it and that it was part of the terms of their agreement that the claimants agreed to indemnify the Council against any cross-claim liability that may be found against it.

#### 4. **The Dwellinghouse**

4.1 The dwellinghouse was constructed at 130 Whakapirau Road, Maraekakaho, Hastings, during the year 2000. The claimants were the then owners of the site and drawings and consent documents were drawn by Bryan Musson Architectural Design Limited (**Musson Ltd**). The construction was by Mr Stevenson with certain plastering work done by Mr Chote through

his company Chote Contracting Limited, the subcontract plasterer, and certain work by BMW Plumbing Limited. Mr & Mrs Cameron moved in in July 2000. They had the dwelling painted by Mr Brown in April 2001.

4.2 They noticed a musty smell in the upstairs cupboard at first but in July 2004 there was a small puddle of water after rainfall. They continued with their enquiries which eventually led to this adjudication claim being made.

## 5. **The Claim**

5.1 The claimants relied on the WHRS assessor's report in support of their claim both as to causes of water entry and damage and as to remedial costs.

5.2 The causes of water entry identified by the assessor were:

5.2.1 Failure of joints between aluminium joinery and stucco cladding.

5.2.2 Inadequate installation of jamb flashings.

5.2.3 Inadequate finishing and flashing provisions at the service penetrations for the gas cylinder.

5.2.4 In general terms the assessor considered that the timber framing did not remain durable because the cladding system was failing and some replacement was necessary. The decay damage was severe but localised concentrating in the upstairs corner area. He speculated that future damage would show once wall linings were fully removed.

5.3 The assessor's report does contain a significant amount of information, commentary and advice which are perhaps outside the strict bounds of an

adjudication claim. At paragraph 1.2.2 he referred to aspects of design considered as risk areas but not presenting evidence of significant water penetration. At paragraph 5.4.13 he made recommendations as to enquiries to ensure future durability and weathertightness. In paragraph 5.3.28 and Appendix H he gave details of general maintenance observations which he considered should be drawn to the claimants' attention due to the potential to cause future deterioration. While those comments may well be helpful to the claimants I have had to treat his report carefully in isolating those matters which pertain to the adjudication claim because the claimants rely on it and their claim against the respondents can, of course, only be in respect of matters for which respondents may have a liability for present leaks causing damage.

- 5.4 In the same vein he has at paragraph 6.3.2 and Appendix G included two schedules of repair costs. The first he describes as "ESSENTIAL REPAIRS – SW CNR" totalling \$16,933.00 including GST and the second is headed "RECOMMENDED REPAIRS – REFLASH WDWS" totalling \$36,668.00 including GST. In the text at paragraph 6.3.2 he describes these latter recommended works as "of a more preventive nature".
- 5.5 In paragraph 6.3 generally he refers to recent legislative changes and gives recommendations to the claimants concerning these and recommended works. He acknowledges at paragraph 6.3.3 that additional improvement work "may not be eligible for consideration under the WHRS Act 2002".
- 5.6 In his first schedule, "ESSENTIAL REPAIRS – SW CNR", the assessor has listed labour and materials totalling \$16,933.00 and no issue was taken by any respondent with the calculations as such. In the "RECOMMENDED REPAIRS – REFLASH WDWS" the assessor has included a significant cost for labour and materials in scaffolding and "chop away stucco around

openings" bringing a total of \$36,668.00 including GST in respect of which there was again no apparent objection to quantification from respondents.

- 5.7 In his summary of moisture meter readings, Appendix C, the assessor has given certain moisture content readings but left many omitted. Those readings above 18% are:
- 5.7.1 upstairs cupboard 21.5%;
  - 5.7.2 upstairs cupboard 22.5%;
  - 5.7.3 stairs landing 23.4%;
  - 5.7.4 stairs landing 23.7%;
  - 5.7.5 stairs landing 29.1%;
  - 5.7.6 upstairs cupboard 20.1%;
  - 5.7.7 BRHC staircase window sill trimmer 21.9%.

Other readings are below 18%.

- 5.8 In the plans in Appendix B there is noted on page 34 the "Essential Repairs Area" being around the stairwell area.
- 5.9 Having considered all this material and the evidence at the hearing I have come to the conclusion that the only evidence of leaks causing damage for which there can be any liability on the part of a respondent is around the stairwell and windows area.
- 5.10 One of the aspects on which Messrs Phayer and Hazlehurst reported they had reached agreement after their discussions at the hearing to which I shall refer was in respect of the cost of repairs. This was that essential repairs could be concluded for no more than \$10,000.00 plus GST made up as follows:

Labour to demolish framing and linings – 60 hours	2,400.00
Gibboard and stopping	600.00
Painter	1,000.00
Steel worker	1,000.00
Plumbing	250.00
Plastering	250.00
Access including scaffolding	1,000.00
Territorial authority fees	500.00
Miscellaneous carpentry	500.00
Preliminary and general	750.00
Margins	1,600.00
<i>Total</i>	<u>\$9,850.00</u>

**Say: \$10,000.00**

- 5.11 I accept that assessment. The basis for it was a proposal which both Messrs Phayer and Hazlehurst agreed is likely to work for a "tissue bandage" which Mr Hazlehurst described in the evidence as a practical option with not a lot of cost and which he said could easily be tested to confirm it was effective. He and Mr Phayer both confirmed to me that this was a realistic option likely to be effective.
- 5.12 The figure proposed does not differ significantly from the "ESSENTIAL REPAIRS – SW CNR" that Mr Phayer had originally estimated at \$16,933.00.
- 5.13 I accept that that is the amount at issue in this claim because first, it was agreed by the two experts at the hearing and the parties had all agreed to accept what those experts agreed on matters at issue; and secondly, because there is no evidence of any other leaks causing damage nor any other liability on the part of any respondent to contribute to the cost of "RECOMMENDED REPAIRS – REFLASH WDWS". Mr Cameron's concern was that there **may be** other aspects of leaking or damage from similar window joinery and finishings on other windows as had been the case in the staircase windows. However there was simply no evidence that that was the



case and I am not prepared to, or able to, speculate. Certainly there are no water meter readings from the assessor's report in any other area which suggests concern.

- 5.14 Accordingly on the evidence before me I find the cost of repairs needed for damage to the dwellinghouse from leaks is \$11,250.00 including GST. Of this sum the claimants have received part compensation of \$7,330.00 leaving a balance of **\$3,920.00** including GST.

## 6. **Causation**

- 6.1 The question of the factors which have led to leaking and damage was assisted by discussion that was held between the experts (the WHRS assessor and Mr Hazlehurst) at the outset of the hearing. That meeting was conducted with the agreement of all parties who agreed that any common ground those two experts found would be taken into account. After some time of discussion those experts told me and the parties that they had agreed on four issues.

6.1.1 The costs of repair to which I have referred.

6.1.2 That the exterior paint coating was inadequate for the conditions. This was a solid plaster home in a significantly exposed setting and had been painted with Wattyl Solaguard. They said that stucco plaster finishing was not of itself watertight and that there was a significant requirement on the paint covering to assist in prevention of water entry. They said that an elastomeric paint coating was required and they expressed the view that a standard acrylic paint would not accommodate the necessary weather protection in these conditions. I deal further with that matter below in the context of the painter, Mr Brown, the fifth respondent.

- 6.1.3 That the sill jamb flashings were not installed in accordance with the documents in that the jamb flashings at least in the critical windows did not run onto the sill flashings. They said that there was an inadequate drain path which did not adequately allow for water movement from the flashings.
- 6.1.4 The LPG tank connections included penetrations through the stucco plaster surface to the dwellinghouse. A wooden block shown in one photograph as protruding indicated a high possibility, they said, of water behind the stucco and the block should have been removed. They said that there should have been a flange around the main penetration from the LPG gas tank through the stucco plaster.
- 6.2 I was not convinced, despite that apparent agreement, about the apparent relative importance that was placed on the paint finishing. As I understand it, paint finishing can never be relied on as being a complete waterproofing process. The paint finish to exterior cladding prevents water being absorbed into the cladding, and encourages the moisture to be shed away from the cladding. The dwelling, however, must be constructed adequately to prevent water entry without reliance solely on the paint surfacing. Mr Hazlehurst described the paint surfacing as the "first line of defence" and, while I accept that paint finishing is certainly a factor in prevention of water entry, it is not in my view to be regarded as the prime method by which water entry is prevented. There must be adequate construction of the dwellinghouse in relation to more critical water prevention measures such as cappings, flashings and flanges with paintwork being an important, but inevitably secondary, factor in the prevention of water entry and damage. Paint work is to protect the existing surface from exposure to the elements and to prevent water being absorbed into the cladding; it is not, in my view, the primary basis for prevention of water entry.

- 6.3 As to the gas cylinder the assessor said in the report that there was inadequate finishing and flashing provisions at the service penetration allowing direct ingress of rainwater by capillary action and absorption.
- 6.4 Accordingly in my consideration of liabilities I have concentrated more on the sill jamb flashings and the LPG connections than the paintwork.

## 7. **Liability of Respondents**

### *Hastings District Council – First Respondent*

- 7.1 The first respondent did not appear at the hearing. It had reached a settlement with the claimants. A term of that settlement was that the claimants would indemnify it against any liability found against it for contribution to other respondents. I was not asked by the claimants to make any finding for liability against the Council. Other respondents may have claimed a contribution liability from the Council in respect of any liability which I might find against them. However, as \$7,330.00 represents some 65% of the cost of repairs as found, \$11,250.00, I have come to the conclusion that I would not have found the Council liable for any greater percentage than that had I been asked to fix a percentage.

### *D L Stevenson – Second Respondent*

- 7.2 Mr Stevenson was the building contractor for the dwellinghouse. He has since incorporated a company but at the time was a sole trader and thus carries personal liability.
- 7.3 He said in his written statement that the dwelling was built "in good trade practice".

- 7.4 In his report the WHRS assessor, Mr Phayer, said that the sill flashings had not been constructed exactly as drawn with the stucco plaster being butt-jointed to the window facings and finished in the same plane. He said the flashing system was not installed in accordance with industry standard guidelines and did not readily discharge to the outside face. He said that the jamb flashing only underlapped the head flashing by a minimal amount.
- 7.5 Although in his report the assessor made reference to there being a "whistling problem", he said there was "no lasting damage ... evident from [his] inspection and various moisture readings taken ...".
- 7.6 At the hearing the WHRS assessor gave evidence that there was no specific detail as to how the corner flashings were to be formed but there were references to the requirement for flashings to overlap each other. He said that the level of detail provided by the specifications as to flashing junctions was fairly standard for the time.
- 7.7 Mr Stevenson acknowledged that he or his employees were responsible for the installation of flashings. He said that he relied on the drawings and in those days there was no other way to do the flashings than as he had done. He said the drawings were vague but he accepted that the joint flashings should have lapped the sill flashings.
- 7.8 On the evidence given I have formed the view that the flashings were the prime cause of water damage in the staircase area in question and that this was because they were not strictly installed in accordance with the drawings or the best trade practice.
- 7.9 The second respondent, Mr Stevenson, has the liability for that. I find that that has been the cause of water entry and damage. I find that it was a breach of his contract with the claimants for Mr Stevenson not to install the

flashings in accordance with the drawings and best trade practice and I find that he owed a duty of care to them to do so which he has breached in the ways mentioned.

7.10 Accordingly I find that Mr Stevenson, the first respondent, has a liability to the claimants in the sum of \$3,920.00 and I have included an order for him to pay that sum to them below.

7.11 Furthermore, had I found an issue with plastering (see below) Mr Stevenson would have had primary responsibility to the claimants for that under the building contract.

*C Chote - Third Respondent*

7.12 Mr Chote was the plasterer on site. He claimed throughout that if there was any liability from plastering it was the liability of the company, Chote Contracting Limited, of which he was an employee.

7.13 There have been many cases concerning the duty of care owed by a director or employee of a company to subsequent purchasers of a dwellinghouse where the work was done by that company as contractor or subcontractor and *Morton v Douglas Homes* [1984] 2 NZLR 548 is a case in point.

7.14 Perhaps more contentious is the question whether a subcontractor or the employee of a subcontractor owes a duty of care to the owner of a dwellinghouse as is alleged in this case. Clearly a subcontractor will have responsibility to the head contractor under the contract in question and the head contractor will have responsibility to the owner under that head contract (and possibly in tort as well). The question remains whether the subcontractor, which is not in a contractual relationship with the owners,

owes an independent duty of care to them in the work that it does. That is not a question that I need to consider in this case because of the causation matters that I now mention.

- 7.15 In support of their claim against Mr Chote, Mr & Mrs Cameron have relied on the assessor's report and evidence. That report refers to Mr Chote as the subcontract plasterer who should be a party to the claim. Mr Cameron questioned Mr Chote about the plastering work that was done.
- 7.16 The report does not itself directly implicate the plastering or the plasterer. As to causes of water entry, there is reference to hairline cracking at the perimeter joints around openings which is described as having been "due to differential expansion/contraction movements between the aluminium and stucco plaster". Apart from that reference to the plastering, however, there is then concentration on the flashings and the gas cylinder and none of that, in my view, directly criticises the plastering work.
- 7.17 In a response on his behalf and in his evidence Mr Chote has referred to this matter. He also referred to the fact that the flashings were changed from aluminium to galvanised steel as a requirement, he said, of the territorial authority inspector. He took the view that, the flashings having been installed by Mr Stevenson and changed and approved by the Council, that indicated an acceptable standard and he proceeded with his plastering accordingly.
- 7.18 He also mentions in his response and evidence questions of painting maintenance and contributory liability and I shall deal with those below but so far as he is concerned those only arise if there is some liability on his part. Likewise he has questioned remediation costs but again this only affects him if he has a liability (and I have already dealt with remediation costs above).

7.19 Having considered all the evidence I formed the view that there was no defect in the plaster work insofar as the relevant areas of the dwellinghouse (the stairwell area and windows) are concerned and no evidence of negligence on the part of Mr Chote or his company, Chote Contracting Limited.

*BMW Plumbing Limited – Fourth Respondent*

7.20 The fourth respondent (**BMW**) was named by the assessor in his report as a company which should be a party to this adjudication "in the role of flashing installers & gas fitters".

7.21 It is clear from the evidence that BMW was not involved in flashing installation.

7.22 The only matter affecting it therefore relates to the gas cylinder where the assessor's report refers to "inadequate finishing and flashing provisions at the service penetration".

7.23 When the experts met together (and that was with the agreement of Mr Barrett on behalf of BMW), one item they agreed on was that the LPG tank connections through the penetrations were a cause of water entry (see paragraph 4.1.4 above).

7.24 In its Response and at the hearing BMW took the position that it was not the last contractor on site and that any penetration of the stucco that it had made for the purpose of the gas cylinder should have been protected by other contractors or BMW should have been informed when the time arrived for it to make the penetration watertight. As to the height of the gas cylinder, it referred to the photographs which indicate, it says, that the gas cylinder is

at the same height as the gully trap which would have been the required height above ground level and that the fact that there is inadequate space between ground level and the gas cylinder is as a result of the landscaping work that had been done subsequently.

- 7.25 Mr Barrett did concede that the party which made the penetration has the primary responsibility to protect it. He also conceded that, having made the penetration, BMW should perhaps have taken some initiative as the weeks went by to enquire whether the time had arrived for it to complete its weather protection processes. After the temporary block had been installed to hold the fitting to the house while plastering, painting etc was completed, the process would be for removal of the block, plastering of the surface, sealing of the plaster, painting, the fitting of the appropriate flange and finally the permanent fitting of the cylinder and its fittings to the dwelling; temporary blocks being installed during that process as necessary.
- 7.26 There certainly seems from the photograph to be inadequate provision for prevention of water entry at the time the painting was done and perhaps that should have been the subject of comment by the painter.
- 7.27 I have formed the view that BMW does have some liability for water entry in respect of the penetration and that it should have taken responsibility to ensure that permanent water entry prevention measures were taken. I find it negligent in that regard.
- 7.28 As to the contribution that it should make to the cost of repairs, it is difficult to assess how much of the cost should be borne by it and how much of the repair work is as the consequence of water entry at that point. I do not consider that BMW has a liability for all of the repair work and costs referred to in paragraph 3.10. On balance I have considered that its liability for repair costs totalling \$11,250.00 (including GST) is 10% or \$1,125.00 and I have



included an order for payment of that sum by it to the claimants below. Clearly if that sum is paid by it then the amount paid by Mr Stevenson, the second respondent, is reduced accordingly.

*G Brown – Fifth Respondent*

- 7.29 Mr Brown was added as a party during the course of the adjudication process on application from the Council. He had not been named by the claimants as a respondent initially in their adjudication claim but he is named by the assessor in his report as a party who should have been involved in the adjudication.
- 7.30 In his Response Mr Brown refers to the assessor's report saying that there is nothing in it reflecting on the integrity of the coating system and that certainly does seem to be the case.
- 7.31 There was the reference to painting issues in the agreed material of the assessors at the hearing (refer paragraph 4.1.2 above) but I have expressed my view at paragraph 4.2 about the relative importance of the paint work in water prevention as against construction issues.
- 7.32 Mr Brown gave evidence that included that he was personally unable to do the work on site for health reasons at the time and relied on his staff. He conceded that it was not good practice to have painted over the LPG gas cylinder pipe where it entered the stucco while there was inadequate water prevention measures in place. He was questioned at length by Mr Hazlehurst about the adequacy of the paint system used but he maintained his position throughout that that was an adequate system.
- 7.33 The paint work was not done for some months after the dwelling was completed and was done by entirely separate contract with the claimants. I

have formed the view, having heard the evidence, that I cannot say the painting was negligent nor can I say that painting issues directly contributed to water entry and damage as is claimed.

7.34 I therefore find no liability on the part of the fifth respondent, Mr Brown.

## 8. **Claimants – Mr & Mrs Cameron – Contributory Negligence**

8.1 Several of the parties raised issues concerning the claimants' care of the dwelling and reduction of liability because of contributory negligence.

8.2 That related first to the failure to paint the dwelling for some months after completion. Certainly there was evidence that the stucco plaster surface should have been left to cure but not for nearly as long a period as in fact was the case which was some 16 months after the plastering was completed and 10 months after the claimants had moved in.

8.3 There was criticism too of design issues on the decision to use the particular windows and glazing in an exposed high wind risk area but there was no real evidence about those features being causative of water entry.

8.4 There were other criticisms of design issues such as the absence of an overhang and the absence of a drained cavity system.

8.5 The primary causes of water leaking and damage to this dwelling are construction issues which relate first to the builder on the one hand and secondly the penetrations from the installation of the gas cylinder on the other. I have dealt with those questions above. I do regard those as the primary issues and I do not consider that other criticisms of the claimants enter those primary liabilities.

## 9. **Result**

- 9.1 The claimants' claim is appropriate to the extent of \$11,250.00.
- 9.2 The claimants have received by way of settlement of claims against the first respondent, the Council, the sum of \$7,330.00 leaving a balance of \$3,920.00.
- 9.3 There has been negligence and breach of contractual duties by the second respondent, Mr Stevenson, causing water entry and damage to the stairwell and landing area for which he has a liability for the sum of \$3,920.00 and I **ORDER** that Mr Stevenson, the second respondent, pay that sum to Mr & Mrs Cameron, the claimants.
- 9.4 There has been negligence on the part of BMW in relation to gas cylinder penetrations and the entry of water causing damage and I **ORDER** that it, BMW Plumbing Limited, the fourth respondent, pay to Mr & Mrs Cameron, the claimants, the sum of \$1,125.00.
- 9.5 If Mr Stevenson has paid the full amount to Mr & Mrs Cameron he is entitled to recover from BMW Plumbing the sum of \$1,125.00. If BMW Plumbing Limited pay that sum, \$1,125.00, to Mr & Mrs Cameron, the liability of Mr Stevenson is reduced accordingly to \$2,795.00.

## 10. **Costs**

- 10.1 Under the WHRS Act a party is entitled to an order for costs only if it is found that that party has incurred costs and expenses caused unnecessarily by bad faith on the part of another party or allegations or objections that are without substantial merit (s43).

10.2 I do not find those grounds in respect either of the claims made against the third or fifth respondents or in respect of the responses and defences raised by the second or fifth respondents. Accordingly no order for costs is made.

### **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.

**DATED** at Auckland this 20<sup>th</sup> day of June 2006

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David M Carden  
Adjudicator