CLAIM NO: 02368

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN	**CHRISTINE MURIEL WEST** and **WILLIAM HENRY HAWKEN** as Trustees of the **CHRISTINE WEST FAMILY TRUST** Claimants
AND	**GLENN ANDREW PERRY** and **LYNDA MAREE PERRY** First Respondents
AND	**JESSOP ARCHITECTS LIMITED** Second Respondent
AND	**BERNIE W LEE** trading as Island 2000 Third Respondent
AND	No fourth respondents, Michael Craig Norgate and Alison Jane Norgate having been struck out
AND	No fifth respondent, Clive Robert Lonergan having been struck out
AND	No sixth respondent, Curnow Realty Limited trading as Bayleys having been struck out

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DETERMINATION OF ADJUDICATOR
(Dated 14 July 2006)

Intituling continued next page

AND	**AUCKLAND CITY COUNCIL**
	Seventh Respondent
AND	No eighth respondent, Cornwall Trustees Limited having been struck out
AND	**DARREN JESSOP**
	Ninth Respondent
AND	**ISLAND 2000 LIMITED**
	Tenth Respondent
AND	**COCO SANTANA**
	Eleventh Respondent
AND	**STYLEX LIMITED**
	Twelfth Respondent

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1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("WHRS Act") in May 2004. The claim was deemed to be an eligible claim under the WHRS Act. The Claimants then filed a Notice of Adjudication under s.26 of the WHRS Act, which was received in November 2004.

1.2 I was assigned the role of adjudicator to act for this claim. A preliminary conference was arranged to be held in Auckland on 14 December 2004 for the purpose of setting down a procedure and timetable to be followed in this adjudication.

1.3 I have been required to issue eleven Procedural Orders and three Memoranda to assist in the preparations for the hearing, and to monitor the progress of these preparations. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the matters covered by these Orders will need to be referred to in this Determination.

1.4 It was ascertained at an early stage that it would be prudent, if not necessary, to determine the status of an alleged settlement reached after a mediation in March 2004 as a preliminary issue in this adjudication. I set down a timetable so that any Respondent who wished to make an application for removal (from the adjudication) on the basis of this Settlement could file an application, with the usual opportunities for response and reply by the other parties.

1.5 Comprehensive written submissions were filed by all of the Respondents and the Claimants, together with supporting affidavits and documents. A hearing was held on 24 February 2005 at which seven of the parties were represented by legal counsel. After hearing and considering all of the arguments the claims against four of the respondents were struck out on the grounds that the Settlement had been a full and final resolution of the claims by the Claimants against these four respondents.

1.6 The hearing of the substantive claims started on 15 June 2005 and continued for a total of eleven days. Unfortunately, the originally planned four days were insufficient to conclude the evidence, so that further days had to be arranged in July and August. I conducted a site inspection on 29 November 2005, [after

several abortive attempts to carry out the inspection at an earlier date,] to see for myself the areas of concern.

1.7 At the hearing the parties were represented by the following persons:

- The Claimants (hereinafter referred to as "the Owners") by Mr William Hawken, in person;
- The First Respondents, Mr and Mrs Perry (hereinafter referred to as "the Perrys") by Mr Timothy Bates of Legal Vision;
- The Second Respondents, Jessop Architects Ltd, and the Ninth Respondent, Mr Darren Jessop (hereinafter referred to jointly as "the Architect") by Mr Mark Sullivan of Jackson Russell;
- The Third Respondent, Mr Bernie Lee, and the Tenth Respondent, Island 2000 Ltd (hereinafter referred to jointly as "the Builder") by Ms Ruth Grupen, barrister;
- The Seventh Respondent, Auckland City Council, by Ms Susan Bambury of Heaney & Co;
- The Twelfth Respondent, Stylex Ltd, by Mr Lawrence Ponniah, barrister;
- The Eleventh Respondent, Mr Coco Santana, did not file a Response, nor did he make an appearance throughout the hearing.

1.8 All of the parties who attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses. Evidence was given under oath or affirmation by the following (generally given in the order of appearance):

- Mr Steven Miles, a plasterer who has quoted to re-plaster the house, called by the Claimants;
- Mr Grant Payne, a builder who had repaired a ceiling for the Norgates at an earlier date, called by the Claimants;

- Mr Bruce Beaumont, a builder who has carried out some remedial work for the present owners, called by the Claimants;
- Mr William Hawken, one of the claimants;
- Mr Stuart Farquhar, a plasterer who carried out some repair work for the Perrys, called by the Claimants;
- Mr Maurice Smith, an engineer and estimator, called by the Claimants;
- Mr John Mitchell, a registered valuer, called by the Claimants;
- Mr Evan Gamby, a registered valuer, called by the Auckland City Council;
- Mr David Hughes, a building consultant who inspected the house in March 2004, called by the Claimants;
- Mr Bill Cartwright, a building consultant who inspected the house in June 2003, called by the Claimants;
- Mr Alan Thomas, who owns the company called Stylex Ltd, the Twelfth Respondent;
- Mr Richard Maiden, a quantity surveyor and building consultant who inspected the house in February 2005, called by the Claimants;
- Mr Neil Summers, who is a registered architect and the Weathertight Homes Resolution Service ("WHRS") assessor, called by the adjudicator;
- Mr Norrie Johnson, a registered architect, called by the Architect;
- Mr Darren Jessop, who is the Ninth Respondent, and a director of the Second Respondent company;
- Mr John Warde, a quantity surveyor who estimated the cost of repair work for the WHRS Assessor, called by the adjudicator;
- Mr Grant Ewen, a quantity surveyor, called by the Auckland City Council;

- Mr Glenn Perry, one of the First Respondents;
- Mr Bernie Lee, who is the Third Respondent, and a director of the Tenth Respondent company;
- Mr Alan Gregersen, a Council building inspector, called by the Auckland City Council;
- Mr Peter Gillingham, a building surveyor, called by the Auckland City Council.

1.9 Before the hearing was closed the parties were asked if they had any further evidence to present and all responded in the negative. I invited all parties to file written closing submissions by 11 August, and written replies by 19 August 2005. This timetable was confirmed in my Procedural Order No 11, so that any parties not present at the hearing would be aware of my invitation.

1.10 At the conclusion of the hearing on 3 August 2005, I indicated to the parties that I would like to instruct the WHRS Assessor to return to the property to carry out further tests. I had raised matters and questions from time to time with the various experts during the hearing, which could not be answered with certainty. I considered that these questions could be answered better if additional testing was carried out. However, my suggestion of further testing was not greeted with universal enthusiasm.

1.11 After considering the objections more carefully, I decided that I would not initiate further testing. It is the responsibility of the parties to determine the extent of the evidence that they wish to produce before me, and I will proceed to make the best determination that I can on the basis of the information that has been provided in the evidence.

1.12 Section 40(1)(a) of the WHRS Act requires me to issue my Determination on claims within 35 working days after the Respondent have filed their responses pursuant to s.28(1) of the WHRS Act. However, this time period may be extended with the agreement of the parties. This matter was raised at our third preliminary conference, and none of the parties objected to an extension to the 35-day period.

1.13 There have been a number of claims for costs by parties in this adjudication, but I will defer my consideration of these claims until I have determined the substantive issues.

2. THE PARTIES

2.1 The Claimants in this adjudication are Christine West and William Hawken as trustees for the Christine West Family Trust. I am going to refer to them as "the Owners". They entered into a sale and purchase agreement in April 2003 to purchase the property at 67 Crescent Road East, Ostend, Waiheke Island, although they did not take possession until March 2004.

2.2 The first respondents are Glenn and Lynda Perry, whom I will refer to as "the Perrys". They purchased the property in October 1996 and proceeded to have a house designed and built. They moved into the house in April 1998, and sold the property to Mr and Mrs Norgate and Cornwall Trustees Ltd ("the Norgates") in late 2001.

2.3 The house was designed for the Perrys by Darren Jessop. At that time Mr Jessop was a director of the architectural practice of Jessop Townsend Architects Ltd, but now is a director of Jessop Architects Ltd. The second respondent in this adjudication is Jessop Architects Ltd, and the ninth respondent is Mr Jessop. The Owners are making claims against both Mr Jessop and his present company, and I will need to determine the claims against both these respondents, but until I move into those particular issues I will refer to Mr Jessop and both of the companies by the collective name of "the Architect" for simplicity of description.

2.4 The third respondent is Bernie Lee, trading as Island 2000, whilst the tenth respondent is Island 2000 Ltd. There is no doubt that Mr Lee played a central role in the building of the house for the Perrys, although whether it was Mr Lee or Island 2000 Ltd that built the house is a matter that I will need to determine. Until I address that matter I will refer to both Mr Lee and Island 2000 Ltd as "the Builder" for ease of description.

2.5 The seventh respondent is the Auckland City Council ("the Council"), which is the territorial authority responsible for the administration of the Building Act on Waiheke Island. The Owners are claiming that the Council should not have

issued the Code Compliance Certificate in December 2001 because the building did not comply with the requirements of the Building Code.

2.6 The eleventh respondent is Coco Santana, who was the person employed by the Perrys to carry out the external solid plastering on the house. Mr Santana has taken no part in this adjudication, so that I have not had the opportunity to hear his side of the story.

2.7 The twelfth and final respondent is Stylex Ltd, a company that manufactured, supplied and fitted the handrails and balustrades around the decks. The Company was employed by the Perrys in late 2001 to do this work, which was necessary for the issue of the Code Compliance Certificate.

2.8 The Owners had originally made claims against Michael Craig Norgate and his wife, Alison Jane Norgate, together with Cornwall Trustees Ltd, from whom they purchased the property. I have described the parties collectively as the Norgates, because the property had been owned in effect by the Norgate family interests. The Norgates bought the property from the Perrys in December 2001, and sold it to the Owners.

2.9 In my Procedural Order No 4 (February 2005) I considered an application for removal from the Norgates. I found that the Owners and the Norgates had already reached a mediated settlement in March 2004, to the extent that the Owners' claims against the Norgates had been brought to an end. I ordered the removal of the Norgates from this adjudication. Therefore, the Norgates have taken no further part in this adjudication.

2.10 I will not, initially, be considering the liability of the various respondents. It will be necessary for me to firstly review the factual matters that surround the claims about defects, and make findings on the probable cause of any leaks, the appropriate remedial work and the costs. At that, I will return to the issues of liability of each of the respondents.

3. CHRONOLOGY

3.1 I think that it would be helpful to provide a brief history of the building process, and the events that have led up to this adjudication.

31-Oct-96	Transfer of property to the Perrys
07-Mar-97	Application for Building Consent
08-Sep-97	Building Consent YC/97/01785 issued by ACC
23-Sep-97	Building Contract signed by Builder and Perrys
10-Oct-97	Revised Building Consent YC/97/09081 issued by ACC
03-Apr-98	Substantial completion – Perrys move into house
24-Nov-98	Jeff Mann report on outstanding building matters
June-00	Settlement of building contract between Builder and Perrys
June-01	Perrys advise ACC that work complete
06-Jul-01	ACC notify list of work to do before CCC will be issued
31-Oct-01	Architect letter to ACC re outstanding work
14-Dec-01	ACC issue Code Compliance Certificate
18-Dec-01	Transfer of property to the Norgates
05-Apr-03	Conditional Sale & Purchase Agreement – Owners/Norgates
10-Apr-03	Valuation of property by John Mitchell
29-Apr-03	Sale & Purchase Agreement becomes unconditional
03-Jun-03	Water damage discovered by Agent in bedroom
06-Jun-03	Settlement due between Owners and Norgates
10-Jun-03	Inspection of house by Citywide Consultants (Bill Cartwright)
13-Jun-03	Report by Citywide – estimated repair costs approx $100,000
19-Jun-03	Owners purport to cancel Agreement
02-Mar-04	Mediated settlement between Owners and Norgates
23-Mar-04	Settlement of purchase of property by Owners
25-Mar-04	Inspection of house by Citywide Consultants (David Hughes)
17-Apr-04	Report by Citywide (David Hughes)
12-May-04	Estimate of repair costs by Bruce Stevens of $149,100
14-May-04	Owners application received by WHRS
Jul-04	Owners commence remedial work to ground levels around building
20-Sep-04	WHRS Assessor's report completed
19-Nov-04	Owners filed Notice of Adjudication

4. THE CLAIMS

4.1 The claims by the Owners that I am asked to consider in this adjudication are the repair costs and other losses that flow from the defects identified by the WHRS Assessor in his report of 30 September 2004, and those defects

identified by Mr Maiden in his report of 28 February 2005. The repair work has been costed by Mr Smith (Smithtech).

4.2 The Owners have already undertaken some remedial work to the ground levels around the north and east of the house, and the Owners seek to recover these costs, together with the costs of obtaining the several building consultants' reports and other associated costs.

4.3 In addition to these costs, the Owners are claiming an amount of $30,000.00 in general damages for stress; and a further $115,000.00 for losses caused by "stigma". A summary of the total amounts being claimed is as follows.

Repair costs as estimated by Smithtech				
Preliminaries			119,018.00	
Demolition			50,393.00	
Temporary works			36,391.00	
Making good			2,150.00	
Backfill & drainage to foundation walls			17,940.00	
Siteworks			4,919.00	
Water tank			8,407.00	
Carpenter	framing		78,641.00	
	linings	PC Sum	13,041.00	
	fixings	PC Sum	8,559.00	
Joinery			8,621.00	
Doors	front		480.00	
	Internal		800.00	
Kitchen and cabinetry			2,860.00	
Stopping			2,646.00	
Paint	interior		13,052.00	
	Exterior		12,495.00	
Plumbing			867.00	
Electrical			2,700.00	
Roof			15,408.00	
Rainheads and downpipes			3,571.00	
Scaffold			10,273.00	
Plasterer			71,026.00	
Handrails and metalwork			21,042.00	
General hardware		PC Sum	3,960.00	
Floor coverings	tiles		17,026.00	
	carpet		7,193.00	
Reinstate landscaping			3,980.00	
Clean-up			3,980.00	
Contingency			54,149.00	$ 595,639.00
Add GST				74,454.88

Additional remedial expenses		
Postage	38.20	
Photocoping reports and documents	603.60	
Stationery	50.00	
Photographs	120.00	
Citywide report	6,910.00	
Prendos report	3,867.19	
Smithtech report	5,025.69	
Concrete – to pay	7,290.00	
Cliffe Holdings Ltd	2,587.50	
Retaining wall costs	25,684.59	52,176.77
General damages		
For stress		30,000.00
Adjudication filing fee		
To WHRS		400.00
Stigma claim		
At 15% of $770,000 as J Mitchell		115,000.00
Interest at 7.5% pa		
On expenses	to be advised	0.00
Witness expenses		
	To be advised	0.00
		$867,670.65

4.4 Further claims were identified by the Owners in their closing submissions, which were claims for specialist reports and witness expenses, as follows.

Mitchell Keeling & Associates Valuers – Report		$ 506.25
	- Witness Expenses	1,012.50
Bruce Beaumont	Witness Expenses	182.75
David Hughes – Citywide	Witness Expenses	1,656.57
Richard Maiden – Prendos	Witness Expenses	6,600.38
Steven Miles – Stoned & Plastered	Witness Expenses	430.00
		$10,462.70

4.5 It should be noted that the Claimants are no longer claiming for the costs of temporary accommodation, removal and relocation of household effects, or storage of same. These items were mentioned in the original costings of the WHRS Assessor. However, the Claimants are now relying upon the costings provided by Mr Smith, who did not include these costs in his report. The

Claimants were asked to confirm the full extent of all claims and these costs were not included in the summary enclosed with the Owners' detailed Particulars of Claim.

4.6 The Claims against the Perrys are in tort and based on allegations of negligence. The Owners say that the Perrys as owners of the property were responsible for ensuring that all building work complied with the requirements of the Building Code. The Owners also say that the Perrys were builders in the sense that they directly engaged separate contractors to work on the site, or did some of the work themselves. They say that the Perrys owed them a duty of care, which was breached when they allowed defective work to take place.

4.7 The claims against the Architect are also in tort and based on allegations of negligence, but also are for negligent misstatement. The Owners say that the Architect was negligent in the design work, and in his administration of the building work as he failed to ensure that the work complied with the Building Code. The allegation of negligent misstatement relates to his letter and actions in late 2001, when he told the Council that certain important parts of the building work had been properly completed.

4.8 The claims against the Builder, Mr Santana and Stylex Ltd are similar to those made against the Perrys. The Owners say that these persons owed a duty of care to all subsequent owners to ensure that the building work complied with the statutory requirements. Obviously, the claims against these contractors are limited to the defects in the work for which they were responsible – although I would note that the Owners have not made any attempts to quantify these limited claims.

5. FACTUAL ANALYSIS OF CLAIMS

5.1 In this section of my Determination I will consider each heading of claim, making findings on the probable cause of any leaks, and then considering the appropriate remedial work and its costs.

5.2 I will not be considering liability in this section. Also, I will not be referring to the detailed requirements of the New Zealand Building Code, although it may be necessary to mention some aspects of the Code from time to time. Generally, I will be trying to answer the following questions for each alleged leak:

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

5.3 At the hearing I asked the Assessor to give me a list of each and every area in which he had detected that some moisture appeared to be entering the building. This became known as the "shopping list" of leaks, and was as follows:

(1) Through the Level 1 Blockwork on the north side (although it is possible this moisture is emanating from the northwest corner failure).

(2) (a) Through the Level 1 Blockwork at the northwest corner.
(b) Through the Level 1 Blockwork on the south side.

(3) Through the Level 2 Blockwork on the north side at the junction of the dining room Blockwork foundation wall and the kitchen floor slab.

(4) The absence of ventilation on the Level 2 north and south subfloor areas.

(5) (a) As a result of the substitution of timber jack studs to the south side Level 2 subfloor perimeter in place of the specified blockwork masonry.

(b) The running into the ground of the stucco cladding to the south side Level 2 subfloor perimeter.

(c) The leaking and overflow of the sealed downpipe system on the east side of the Level 2 Bedroom 2.

(6) The failure of the upstand details between the Level 2 Deck and the Living Room, compounded by the minimal clearance of 20-25mm between the tiles and the finished internal floor level.

(7) The penetration of the balustrade of the Level 2 west Deck by the Pergola columns, and the failure of the underflashing installed over the top plate. Contributed to by the flat balustrade upper face.

(8) The flat external sills to the recessed windows, with no cross fall to shed moisture, and with no jamb and sill flashings to windows or jamb flashings to doors.

(9) The construction of the roof parapets with no cross fall to shed moisture, and the failure of underflashing installed over the top plate.

(10) The extension of the stucco cladding into both paved and unpaved ground, and the inadequate clearances between the external ground level and the timber bottom plates on the north, east and south sides of Level 2.

(11) The absence of control joints in the stucco cladding.

(12) The penetration of the upper roof parapets by the fixings for the metal safety balusters, although it is difficult to know to what extent this is attributable to the balusters given the systemic failure of the parapet detail itself.

5.4 This list of the leak locations was modified slightly as other experts gave their evidence, so that some additional items were added into the list. This will be considered as I go through the entire list, but notable additions were:

- Fixing points of pergola rafters;
- East block wall in entry and laundry;
- Decorative feature bands.

5.5 I will now proceed to review each item or location on this list of leak locations, considering the evidence as to moisture ingress, and answering all of the questions mentioned in paragraph 5.2 above.

5.6 **Level 1 Blockwork – North Side (location No 1)**

5.6.1 The WHRS Assessor reported that elevated capacitance readings were found in the level 1 skirtings generally. In particular, he made a cut-out

at the mid point of the northern wall in the entry, and found a moisture reading of 30.1% in the timber strapping at skirting level.

5.6.2 As the external ground level along this wall is about 500mm higher than the internal floor level, the blockwork is acting as a low retaining wall. The external face of the blockwork is shown on the drawings as having an approved tanking and protection. The Assessor is of the opinion that this moisture could be entering in any one of three ways:

(a) it could be wicking up the external plaster and into the framing, and then flowing down into the strapping;

(b) the tanking on the outside of the blockwork may be damaged or inadequate;

(c) the moisture could be flowing from the known leak at the north-west corner of this room.

5.6.3 When Mr Cartwright visited on 10 June 2003, he noted that there was discoloration in the cladding on the north wall at level 1, which he considered to be an indication that the cladding was absorbing moisture. He recommended further investigation.

5.6.4 When Mr Hughes visited in March 2004 he found moisture readings of 25% at skirting level on this north wall, which he attributed to a lack of drainage at the base of the stucco cladding. He says that it appears that the moisture is wicking up the plaster, which is similar to the Assessor's option (a) above.

5.6.5 Mr Hughes also made a cut-out in the external plaster, under the high-level windowsill, and found that the timber framing had a moisture reading of 38%. However, as this cut-out was over a metre above external ground level, I am not satisfied that this moisture is as a result of any defects in the tanking or drainage of the lower block wall. It is too far for the moisture to wick upwards, and it is much more likely that this moisture is entering as a result of defects around the window, or above.

5.6.6 Mr Lee says that the external face of the blockwork was treated with Flintcote, and points out that there is no evidence to show that the water is getting through the block wall.

5.6.7 Photographs produced by the Perrys were very helpful, and these showed that the blockwork on this north wall was not built in accordance with the consent drawings. The block walls had been taken to about 300mm above ground level, and then changed to timber framing. The photographs also confirm that Flintcote, or similar, had been applied to the external face of the blocks on this wall.

5.6.8 I am not convinced from the evidence that the strapping is damp because the blockwork is leaking. I accept the WHRS Assessor's view that it is most likely that the moisture is tracking along the wall from the obvious leak in the northwest corner. It is also possible that some moisture is coming in from leaks around the high-level windows, but I will be considering leaks around windows later in this Determination.

5.6.9 It does not appear that a lot of damage to the north wall has been caused by this leak, although the damage in the northwest corner is severe (see next item). It will be necessary to remove the wall linings to, at least, the lower section of this wall to check whether the strapping or framing has been damaged. The evidence was that the strapping was treated to H.3, so therefore it is unlikely that the timber strapping will need to be replaced.

5.6.10 I was not given direct evidence on the costs to carry out this isolated amount of remedial work. However, I have calculated the probable quantities of work and used the rates in the WHRS Assessor's estimates. This does not mean that I am accepting these rates, but I have chosen to cost all remedial work (at this stage in my Determination) on a consistent basis. I will make any adjustments in Section 6 of the Determination.

5.6.11 Based on the Assessor's rates it will cost about $1,100.00 inclusive of GST to repair the damage and stop this particular leak. This does not include fixing the leak in the northwest corner, which I will consider in the next section of this Determination.

5.7 Level 1 Blockwork – NW Corner (location No 2A)

5.7.1 Mr Hughes had noticed dampness in the northwest corner of the entry area, to the north of the main entry doors, in April 2004. He had found that the wall framing above skirting level had a moisture reading of 70% with obvious mould and fungal growth. The WHRS Assessor, in August 2004, found that the moisture reading was even higher, with evidence of visible water. There is no doubt that there is a leak, or leaks, in this corner.

5.7.2 The consent drawings show that the walls around the main entry area are 200mm blockwork with the top of the blocks at RL 16.97. This is the level of the underside of the level 2 floor joists under the sunroom and deck. However, the blockwork to the north wall does not go up to this level, and has been taken to about RL 16.65, stepping down to approximately RL 15.30 in the northwest corner. The blockwork stops at this corner, and the east wall is timber framed with the bottom plate fixed to the top of the main entry concrete floor slab. This can be seen on photographs taken by the Perrys in about January 1998 [Perry docs. 219 and 221].

5.7.3 There is a short flight of concrete steps that have been formed *in situ* against the west wall of this northwest corner. These steps are above internal floor level, and lead to a short path and another flight of steps against the north wall. This leak is caused by water flowing from this path, onto the lower steps, and into the plaster cladding. Therefore, the change from blockwork to timber framing has been the main cause of this leak.

5.7.4 I appreciate that Mr Maiden is of the opinion that the leak in the northwest corner is caused by water flowing from above, and is probably as a result of the penetrations made by the pergola posts (refer to leak in location No 7A). He may well be partially correct, but on balance I accept the opinion of the Assessor that most of the water damage has been caused by a low-level leak – such as the water from the steps.

5.7.5 There is no reference in the Council's building file for the approval of this change from blockwork to timber framing. It appears to have happened,

but none of the parties admitted to having been the author of the change. Mr Lee told me that the change had been authorised by the Architect on site, and that the concrete steps had been poured so as to leave a gap between the cladding and the edge of the steps. Mr Jessop was aware that some blockwork had been changed to timber framing, but denied approving this particular change. Mr Perry told me that he had not been aware of any changes.

5.7.6 I will make my findings on liability later in this Determination, but the leak has been caused by firstly, changing the blockwalls to timber framing, which could not be waterproofed or used as a partial retaining wall and, secondly, by pouring the steps against the plaster cladding.

5.7.7 The damage caused by this leak has damaged the timber wall framing in this corner of the building to the extent that much of the framing will need to be replaced. I do not think that it would be necessary to replace the timber framing with blockwork, but the external steps will need to be broken out and rebuilt so that they are well clear of the timber framed wall. Based on the estimates provided by the WHRS Assessor it will cost about $10,600.00 inclusive of GST to repair the damage and stop further leaks.

5.8 **Level 1 Blockwork – South Side (location No 2B)**

5.8.1 The WHRS Assessor noted in his report that elevated capacitance readings were encountered at skirting level generally around the main entry/cellar workshop area. He made a cut-out on the inside of this wall and recorded an indication of dampness in the strapping.

5.8.2 None of the other experts was prepared to go as far as to say that there were leaks in this south wall, and I was not provided with good evidence that this block wall leaked. However, the higher readings may have been caused by inadequate draining around the base of this block wall and the downpipe.

5.8.3 As I have not been given any substantive evidence of leaks, I will not be considering this location any further.

5.9 Level 2, North Side, by Dining Room (location No 3)

5.9.1 The WHRS Assessor says that water is entering from the garden area on the north side at the change in level between the blockwork foundation wall of the Dining room and the concrete floor slab in the Kitchen. This, he says, has led to the moisture content in the adjacent floor joists rising to 19.5% and the growth of mould on the joists.

5.9.2 There is a partially open joint in the foundation wall at this junction, which had been covered (on the inside) by a short length of boxing timber. I am satisfied that moisture does flow through this open joint and into the sub-floor area.

5.9.3 Mr Sullivan submits (on behalf of the Architect) that there is no evidence of water ingress by which, I presume, he means that water is not leaking into the house. I disagree. There is water that is entering the sub-floor area and is then migrating into the floor joists. This is encouraged by the fact that there is a complete lack of ventilation in this area, and I will consider the lack of ventilation in the next section. I consider that if moisture is getting into the floor joists, whether it be by direct transfer or by excessive humidity in the air, then this is moisture penetration into the building.

5.9.4 However, the WHRS Assessor says that this leak has not permanently damaged the floor joists, and there are minimal repair costs associated with stopping the leak. The repair work would consist of filling the open joint in the blockwork, exposing and repairing the waterproofing on the exterior of the blockwork and making good.

5.9.5 Based on the rates used by the WHRS Assessor in his estimates this repair work would be completed for about $400.00, inclusive of GST.

5.10 Ventilation to Sub-floor Areas (location No 4)

5.10.1 Mr Hughes says that there is no ventilation at all to the sub-floor areas beneath the Dining/Living areas (north side) or beneath Bedroom 2 (south side of stairs). He says that this results in moist air being able to transfer moisture to the timber framing and linings, which is in contravention of the requirements of the Building Code.

5.10.2 Mr Cartwright had noticed that the sub-floor area (south side of stairs) was excessively wet in June 2003. He took photographs of water ponding on the polythene sheeting, and running over the surface of the soil. The WHRS Assessor considered that some water was coming from a leak in the sealed downpipe system, but was also seeping in from the groundwater by Bedroom 2. He recorded that the floor joists had moisture readings of between 17.0% and 19.5%.

5.10.3 The experts are in general agreement that these sub-floor areas need to have some ventilation to comply with the Building Code. The polythene layer over the soil does reduce the amount of moisture coming out of the ground and into the air space, but some method of moving the air to the outside is essential. Vents can be formed in both the north wall and the south wall, although the north wall is in blockwork and the adjacent ground is relatively high.

5.10.4 Mr Lee told me that, provided that a vent hole of 162 x 216mm was installed, the ventilation would comply with the BRANZ bulletin 457. However, the location of the vent holes is also important, and the ability to create a reasonable cross-flow of air to the sub-floor area.

5.10.5 The lack of ventilation to these sub-floor areas had been brought to the attention of the Perrys and the Builder and the Architect in the middle of 1998. It was on the Perrys' list of "work to be completed" in November 1998, and was raised in the reports from Dave Buckle and Jeff Mann in late 1998 to early 1999. And yet it never got done.

5.10.6 Mr Maiden says that none of the floor joists or flooring has been damaged and that it will not be necessary to replace any timbers as a result of the ventilation problem. I accept that evidence. Mr Maiden is also of the opinion that the absence of ventilation is not a cause of leaks, suggesting that the matter does not come within the jurisdiction of WHRS. As mentioned in the previous item, I do not accept that this is correct.

5.10.7 In section 5 of the WHRS Act a leaky building is defined as "a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction …" In this case, as a result of there being a

lack of ventilation in the sub-floor areas, moisture has penetrated into the floor joists and caused their moisture content to rise above normal ambient moisture levels. If this situation were to be left unattended, the floor joists would undoubtedly start to deteriorate and rot as a result of the high moisture levels.

5.10.8 At this stage of my Determination I have used the WHRS Assessor's estimate as the basis for calculating remedial costs. His allowance was $4,000.00 for this work, plus margins and general costs, or a total of $8,700.00 inclusive of GST.

5.11 **Level 2 – South Side by Bedroom 2 (locations Nos 5A, 5B and 5C)**

5.11.1 The WHRS Assessor found that the south side sub-floor area (beneath Bedroom 2) had a major water penetration problem at the south-east and south-west corners and along the full extent of the south wall. He found that these external walls were shown on the building consent plans as being in concrete blockwork on a strip foundation, but had been built as a timber-framed wall off piles and bearers. The framing was clad with stucco, which extended below the ground level.

5.11.2 He concluded that the cause of the leaking and damage was a contribution from several factors:

- Extension of cladding into the ground;
- Leakage from the downpipe system;
- Absence of sub-floor ventilation;
- Inadequate control of groundwater.

5.11.3 In this part of my Determination I will consider the damage in this area as a whole, but will return to review the contribution by the alternative causes in the next two sections (locations 5B and 5C).

5.11.4 None of the experts disagreed with the WHRS Assessor's general description of the leaks and water damage to this part of the building. Most of the evidence was directed at liability, which I will return to later.

5.11.5 The extent of the damage in this area is widespread. Mr Cartwright noticed that the wardrobe in Bedroom 2 had a section of badly decayed

carpet and swollen skirting boards. He did not bother to take moisture readings as the signs of serious leaking were obvious. He noticed other signs of dampness on the southern wall of Bedroom 2.

5.11.6 When the WHRS Assessor visited in August 2004 he found that the full extent of the bedroom sub-floor perimeter framing had rotted, and this had extended into the floor joists and the particle board flooring. He noted the consistently high moisture readings, and concluded that the complete east wall and at least 1.5 metres of the south wall would need replacing. In his view, blockwork needs to be laid up to the level 2 floor and the timber framing above needs replacing.

5.11.7 I accept that the Assessor's opinion as to the extent of the remedial work is reasonable. It requires the removal of the stucco and damaged framing from the walls of Bedroom 2. A new strip footing will need to be constructed, and blockwork built up to the underside of the floor. Temporary propping will be needed to the structure above whilst the walls are replaced/repaired. Based on the rates used in the WHRS Assessor's estimates, this remedial work will cost about $40,600.00 inclusive of GST. This includes for all remedial work caused in this location, called 5A, 5B and 5C.

5.12 **Level 2 – South Side Stucco Cladding (location No 5B)**

5.12.1 The evidence is that the Perrys, in an attempt to reduce the amount of water flowing beneath Bedroom 2, built up the ground at the base of the stucco cladding in order to deflect the groundwater away from the building.

5.12.2 When the Council was asked to issue a Code Compliance Certificate (in June 2001), the Perrys were told to remove this soil as it was causing water to wick up the plaster. The soil was removed to the extent that Council required. This did not solve the main problem of water getting into the sub-floor area, but it would have reduced the amount of water being absorbed by the stucco and the framing.

5.12.3 In my view this build-up of soil against the plaster cladding would have increased the amount of water damage that was occurring in the Bedroom 2 walls, floor and sub-walls. Mr Cartwright saw the damage

without looking very hard, which indicates that the damage was continuing after the soil levels had been reduced. However, I do not think that it is possible to accurately assess how much this contributed to the damage that has been caused in this part of the building. If I need to put a figure on it, I would assess that the backfilling of soil probably caused 30% of the damage, meaning that the damage was increased by that percentage as a direct result of burying the plaster below the outside ground level.

5.12.4 Therefore, I find that the costs of the remedial work for this cause will be 30% of $40,600.00, or $12,180.00 inclusive of GST.

5.13 **Level 2 – Downpipe System by Bedroom 2 (location No 5C)**

5.13.1 The WHRS Assessor raised the matter of leakage from the sealed downpipe system located on the east wall of Bedroom 2, which drains into the water storage tank. He points out that the rainwater head at the top of this downpipe is at the same level as the overflow from the water storage tank, so that the downpipe is always full of water, particularly when the storage tank is full. The resultant hydrostatic pressure imposed on the PVC downpipe system was causing constant seepage onto the south-east corner under Bedroom 2 and into the sub-floor space.

5.13.2 When Mr Cartwright visited in June 2003 he noted that the rainwater head was blocked and overflowing, but he had not realised at this time that it was simply a fully charged rainwater system which overflowed when the water storage tank was full. As the evidence was presented at the hearing, it became apparent that the rainwater heads were meant to have overflow slots cut in to avoid the water backing up into the gutter discharge outlet. I am satisfied that this "backing-up" has caused leaks around the gutter outlets at Bedroom 2, which will have contributed to some of the water damage in and around the wardrobe area.

5.13.3 The building consent drawings show that the difference in level between the rainwater heads (outside Bedroom 2) and the overflow to the water storage tank should have been about 1.8m. The drawings show the tank set down into the ground by 1.7m, but this was not done. If the tank had been set down into the ground, this would have resulted in some

pressure on the downpipe system, but nowhere near the pressure of fully charged downpipes. The tank was not set down, possibly to save money and the costs of the additional retaining walls. None of the witnesses could recall why this change took place or who authorised it. The Architect must have noticed it on site, and it would have been obvious to the Council's building inspector, so I am inclined to conclude that everyone knew about the change and was happy with it.

5.13.4 I do not see that the level of the water storage tank has caused this problem. The Assessor told me that he did consider the changed location (height) of the water tank to have caused water ingress, but I think that this is because the downpipe system leaks. The downpipe system was designed to remain full of water, albeit not to the level that it now is, and if the PVC pipes had been properly joined it should not have leaked. I am not satisfied that the height of the tank has contributed to any leaks in this building, and I will not take that matter any further.

5.13.5 Mr Lee told me that the number and location of the rainwater heads was in accordance with the Architect's plans. I think he is mistaken. There are considerable differences between the building consent drawings and what is on site. In fact, I could only find one downpipe that was in the position shown on the drawings. Mr Lee also told me that an overflow slot would not make any difference, as the tops of the rainwater heads are positioned low enough to allow water to spill over the top. Once again, I think he is mistaken. The inlet to the rainwater heads is perilously close to the level of the top of the hopper/gutter, and water will flow back into the gutter.

5.13.6 It is my conclusion that the leaks in this area (around Bedroom 2) have been contributed to by two matters. Firstly, the failure to insert an adequate overflow slot or pipe in the two rainwater heads. I would assess that this has caused about 20% of the damage in this area.

5.13.7 The second failing relates to the leaks from the downpipe system, which have increased the amount of water flowing under or around the external walls. Ms Grupen submits that the leaks cannot be too bad or the water would not remain in the rainwater head for any length of time.

I think that this is a valid observation, and must mean that the leakage is small. However, I am satisfied that there is some seepage or leakage, and I assess that this has caused about 5% of the damage.

5.13.8 Therefore, I find that the costs of the remedial work for these two causes will be 20% and 5% respectively of $40,600.00, or:

- No overflows in rainwater heads $ 8,120.00
- Leaks in downpipe system $ 2,030.00

5.13.9 **Conclusion** to location 5. I find that the cost of the remedial work in and around Bedroom 2 should be allocated as follows:

• Change from blocks to timber framing (5A)	$ 18,270.00
• Burying stucco below ground level (5B)	12,180.00
• No overflows in rainwater heads (5C)	8,120.00
• Leaks in downpipe system (5C)	2,030.00
	$ 40,600.00

All figures are inclusive of GST.

5.14 **Deck to Living Room (location No 6)**

5.14.1 When Mr Cartwright visited the house in June 2003 he noticed that the ceiling in the level 1 entry foyer showed considerable signs of moisture ingress in the area beneath the balcony doors to the sunroom. When he looked at the deck, he noted that attempts had been made to remedy the problem comprising extensive use of silicone sealant around the doors and window frames.

5.14.2 Mr Hughes told me that he opened up a sizeable inspection hole in April 2004, and found that Aqualine gibraltar board had been used in the repairs. Aqualine is a water-resistant board that is used in wet areas, such as bathrooms. He also found that a series of holes had been drilled through the nogs and joists to encourage air movement, and ceiling vents had also been installed on either side of the stairs. This indicates that the repairer was trying to provide ventilation for drying-out purposes, but was clearly concerned that the leaks may not have been permanently solved.

5.14.3 The Owners also called evidence from Mr Payne, who is a builder working on Waiheke. In January 2003 he says that he repaired the downstairs foyer ceiling, which had become damaged by leaks from the deck and doors above. He told Mr Norgate (the owner at that time) that the damage was serious and the deck area should be reconstructed. He confirmed that he had used Aqualine board as a replacement ceiling lining and removed all evidence of the leaks.

5.14.4 The Owners called evidence from Mr Farquhar, a plastering and waterproofing contractor on Waiheke Island. Mr Farquhar told me that, sometime in 2000, he was asked by Mr Perry to carry out repairs to this ceiling in the entrance foyer which, I understand, had been damaged by some leaks. All of this evidence shows that these leaks had existed from the time of construction, and were never properly fixed.

5.14.5 The WHRS Assessor is of the opinion that this water damage had been caused, and was still being caused, by a failure of the upstand detail between the level 2 deck and the sunroom. He says that this is probably being compounded by the minimal clearance of 20-25mm between the top of the tiled deck and the finished internal floor level.

5.14.6 At the hearing Mr Bates introduced a diagram, which indicated that the dimensions shown on the building consent drawings would not allow a step-down between deck levels and internal finished floor levels. He submitted that, to achieve the minimal step-down of 20-25mm, the fall across the deck had been seriously compromised. This would allow water to be blown across the deck and under the door threshold under certain weather conditions.

5.14.7 After making a relatively minor adjustment of 10mm (1° over 3.7m – 64mm) most of the experts accepted that Mr Bates' diagram was accurate. However, the drawings also gave finished floor levels (FFL), showing the sunroom as FFL 17.24 and the deck as FFL 17.15 maximum. This showed a minimum step-down of 90mm, which was inconsistent with the figured dimensions relied upon by Mr Bates. Mr Lee told me that he had picked this discrepancy up during construction, and had sought clarification from the Architect. He says he spoke to a female

architect. Mr Jessop says that he did not become aware of this ambiguity until the deck had been built, and Mr Lee mentioned it to him during one of his site visits. He says that it was too late to do anything about it.

5.14.8 Mr Lee told me that he had used a hose to test the threshold of D.3, and discovered a sizeable hole at the end of the sill. He says that this caused the leak, and it should have been noticed earlier. I find it strange that none of the other (five) experts who have inspected this building have seen this hole, and it does not explain why there is extensive water damage beneath both D.3 and D.5. There was no similar hole seen by D.5.

5.14.9 When this deck was constructed by the Builder, the step-down at the doors was about 35mm before the tiles were laid. After the Perrys had laid the deck tiles, this step-down was down to 20-25mm. Mr Perry told me that he had not appreciated the importance of maintaining a reasonable step-down, but that cannot be accepted as an excuse.

5.14.10 The expert evidence on this matter was reasonably extensive, so I will attempt to summarise the key points. The Building Code does not specify any particular requirement for a step-down at interior/exterior junctions. BRANZ does recommend a minimum of 100mm, and 50mm is generally accepted in the industry as the absolute minimum in protected situations. This is not a protected situation as it is exposed to the north-east with no overhangs.

5.14.11 There is a minimum slope requirement for a deck surface of 1.5°, which is in the Acceptable Solution. This deck has a slope of less than that, and hardly has any fall at all. Some experts say that this minimum fall was fatal, whilst others say that the inadequate step-down was the major problem. I am inclined to think that both have contributed equally to the serious and consistent leaking that has occurred at the junction of this deck to the sunroom.

5.14.12 During the hearing I raised the matter of the integrity of the waterproof membrane under the deck tiles. Two of the experts have suggested that there well may be defects in this membrane that are causing some of

the leaks. There is no evidence to show that the membrane had been badly laid, or that it may have been damaged when laying the tiles. However, there are problems in or around this membrane because the water is getting into the framing. This strongly suggests that there are defects in the waterproofing membrane.

5.14.13 The Assessor says that extensive reconstruction of the floor joists, flooring and deck will be necessary as the rotted timber extends back into the main floor construction. At the hearing he did amend his scope of remedial work, after learning that there was a steel beam running across the centre of the deck. This beam should have prevented the rot from travelling beyond the line of the steel beam, so he says that his remedial costs would be reduced by between $4,000.00 and $5,000.00.

5.14.14 Using the rates included in the WHRS Assessor's remedial costings, and based upon the reduced scope of the remedial work mentioned in the preceding paragraph, the remedial work in this location will cost about $33,200.00 inclusive of GST.

5.15 **Pergola Posts and Balustrade (location No 7A)**

5.15.1 The pergola over the sunroom deck is supported by four columns, each column comprised of twin railway sleepers that are bolted together. These columns penetrate the top of a solid balustrade wall, which is framed by timber framing and clad with solid plaster or stucco.

5.15.2 The WHRS Assessor cut out sections of the plaster cladding and told me that water was tracking down the sides of these sleeper columns and into the timber framing to the extent that the framing was wet and the damage extensive. He says that the cracked and split irregular surface which is typical of old railway sleepers is such that it would never be feasible to effectively seal between it and the balustrade cladding. He says that it must have leaked from the time that it was built.

5.15.3 In his report the Assessor gives the results of his comprehensive tests and concludes that the fibreglass reinforced waterproofing membrane used on the solid balustrades and parapets throughout this building has failed. I will consider the other balustrades and parapets later in this Determination, but it is relevant to mention this part of the Assessor's

report at this stage because he considers that the leaks into this balustrade are not only caused by the penetration of the sleeper columns, but also by this generic failure by the waterproof membrane where it was used on the tops of balustrades, parapets and nibs.

5.15.4 My attention was drawn to a note on the drawings, which read "coloured plaster on mesh on compressed sheet on timber framed seat – leave gaps between column 60mm high." Mr Jessop says that he had anticipated that the columns would be supported on a bracket, so that the bottom of the sleepers was held 60mm above the top of the seat balustrade. This bracket would penetrate the plaster so that a solid fixing could be obtained to the timber framing. Mr Lee told me that he had assumed the reference to 60mm to be the gap that was to be retained at the bottom of the seat.

5.15.5 There is documentary evidence to show that the Builder was concerned about the waterproofing of this solid balustrade and seat, and how to seal around, and between, the railway sleepers. He asked the Architect for instructions. The Architect's written response was that, if needed, then a flashing was to be used with a lot of silicon sealant before applying the waterproofing. That does not seem to be a very helpful answer, as it does not explain the type or location of the flashing and how it should be installed.

5.15.6 Mr Jessop explained that when he answered the Builder's query, he thought that the 60mm gap had been left as required by the drawings. However, subsequent correspondence must throw doubt on that statement, and I am satisfied that Mr Jessop was made aware that the railway sleepers did penetrate the plaster when he gave the instruction to flash and seal with sealant.

5.15.7 I was shown an invoice from the waterproofing contractor, claiming for extra payment for two cartridges of Sika 11FC and some PEF rod to seal around the columns, which are these railway sleeper columns. Mr Hughes says that he found no evidence of sealant, but the Assessor did locate traces of sealant around the columns and beneath the plaster.

5.15.8 All of the experts who were asked how they would seal around these penetrations told me that it would be extremely difficult, if not impossible. None of them was prepared to provide a method that would not leak at some time. I take from this that the proper course of action would have been to take the columns down and re-fix them with stand-off type brackets – as intended by the Architect in the first place.

5.15.9 I find that there are leaks into this balustrade, and that the leaks are caused by the failure to properly seal around the column penetrations, and a general failure of the waterproofing membrane on the top surfaces of this balustrade and seat.

5.15.10 The damage that has been caused by these leaks is extensive. The Assessor says that much of the timber framing has rotted, and he believes that moisture has passed through the floor framing and into the walls beneath. None of the experts contested his opinion on this matter. Therefore, I find that the extent of remedial work is that outlined by the Assessor in this part of the building.

5.15.11 Based on the rates in the estimates provided by the WHRS Assessor, it will cost about $52,300.00 inclusive of GST to repair the damage caused by these leaks.

5.16 **Pergola Rafter Penetrations (location No 7B)**

5.16.1 Mr Hughes notes that the pergola rafters (joists) had been fixed to the timber wall framing and then plastered around, allowing water to track along these joists and into the framing. He found moisture readings of 35% in the timber framing immediately below these joist connections. He also noted that the plaster behind the nogs had not been painted.

5.16.2 Mr Maiden also noted the cracking that had developed in the plaster around these joist connection points. He attributes the cracking to the moisture entering around the joist ends and causing the timber to swell. The WHRS Assessor's conclusions are slightly different. Although he initially recorded some high moisture readings by non-invasive methods, when he removed a cut-out of plaster he found the plywood and framing timber to be reasonably dry. He concluded that, whilst the detail

appeared to be allowing moisture in, and will probably do so in the future, it was not leaking at the time of his inspection.

5.16.3 This matter is probably more academic than of major concern. I have found that it will be necessary to remove the pergola framing under the previous section, so that the pergola column penetrations and the balustrade/seat can be rectified. Therefore, these joists will need to be re-fixed to the building, and these penetrations will no longer exist.

5.17 **Window Sills (location No 8)**

5.17.1 In this section of my Determination I will only be considering the flat windowsills to the deeply recessed windows in this house. I will consider the much more widespread problems that have been noted in or around the windows generally when I review the cracking and leaks found through the plaster around this house.

5.17.2 The WHRS Assessor noted in his report that the deeply recessed windows had no jamb or sill flashings in place, and the sills were plastered without any noticeable fall to the outside. The windows that he was reviewing were W.8 and W.9 in the sunroom, W.7 in the Dining room, W.3 in Bedroom 2, W.6 in the Kitchen, and W.13 in the Main Bedroom. His testing found that three of these windows showed definite signs of leaking into the framing (W.9, W.7 and W.13), although he later did record a leak around W.6.

5.17.3 I was provided with a surfeit of evidence about these flat sills, but I have generally found it to be unhelpful in the consideration of these problems. I have found no direct evidence to support a conclusion that the flat sills have actually caused any leaks. Whilst they may not have helped the situation, as they would allow water to collect and pond on the sills, there is inconclusive material to show that the construction of the sills caused any leaks.

5.17.4 The information shown on the drawings is quite inadequate to explain how the Architect intended these wide sills to be formed. The drawings do state that the sills were to be tiled and, as the Perrys were organising the tiling work, the Builder formed the sills flat, assuming that the plasterer, or tiler, would create a suitable fall to the outside. The

plasterer plastered them flat, and that is how they were left. It was suggested that the sills had been waterproofed prior to plastering, but I am left not knowing whether that is correct.

5.17.5 However, based on the evidence, I find that it has not been shown that the flat sills to these windows have caused any leaks, and the claim must fail.

5.18 **Parapets and Balustrade Nibs (location No 9)**

5.18.1 The problems with the upper parapets were noted by Mr Cartwright when he visited in June 2003 and he recorded moisture content readings of 50% to 60%. These were associated with the extensive cracking visible on the parapets.

5.18.2 Mr Hughes, the next expert to look at this property, visited in April 2004. He described the roof deck parapets as being in very poor condition with uncontrolled cracking to all elevations. He cut out a section of the plaster on a parapet and noted that there was a waterproof membrane applied to the hardibacker prior to plastering, but the membrane had been punctured by the plasterer when stapling his reinforcing mesh in place. He recorded consistently high moisture content readings in the timber framing to the parapets, and could see water droplets on the building paper of the cut-out section of plaster.

5.18.3 The parapets are framed up with timber frames covered with a layer of building paper. The Builder has then applied hardibacker sheet as a rigid backing for the plaster. A waterproof membrane has been applied over the hardibacker, then another layer of building paper. The solid plaster, reinforced with wire netting was applied over this second layer of building paper, and the final process was the acrylic paint. The top surfaces of the parapets are flat, being about 150mm wide.

5.18.4 The WHRS Assessor, in his report, provides a comprehensive list of moisture content readings around all of the parapets. There is little need to dwell on these statistics, other than to say that they show that all the parapets are leaking, and have probably been leaking for a considerable period of time.

5.18.5 What has been the cause of the widespread failure of the parapets? The Assessor is of the opinion that a 15° slope on the top of all parapets would probably have solved the problem. However, he says that there must have been a general failing by the waterproof membrane. Some water would have been admitted by the inappropriate use of staples by the plasterer, but he thought that the membrane must have failed for other reasons, such as workmanship problems.

5.18.6 Most of the other experts were not particularly forthcoming with reasons for the failures. Mr Gillingham did suggest that hair cracks could admit some moisture which would find its way through the fixing points of the reinforcing mesh, thus swelling the timber, which increased the size of the gaps. This is certainly a normal explanation for the gradual deterioration of features such as parapets which have flat surfaces which allow water to lie around. In the absence of a better answer, I will accept this line of reasoning from Mr Gillingham and the Assessor.

5.18.7 The extent of the damage is serious. There are parapets or balustrade nibs around the top roof (over level 3) and around most of the main roof (over level 2). These will all need to be uncovered, repaired and made good. The Assessor was under the impression that the parapet framing was built as an extension to the main wall framing, so therefore he predicted that much of the main wall framing will have rotted as a consequence of the water ingress at the parapets. However, photographs taken by the Perrys during construction show that most of the parapets were framed off the plywood roof linings, so that moisture would not travel so readily down into the main wall framing.

5.18.8 I think that this is a significant factor and, although water has undoubtedly leaked past the plywood, the amount of water must have been considerably reduced – which should have reduced the amount of consequential damage. It will still be necessary to cut back the stucco cladding to below parapet level to enable full inspection of the framing beneath. It is probable that some main wall framing will need to be replaced due to rot. The extent of this replacement can only be estimated from the information available, and I would assess this as being about 30% of the parapet area.

5.18.9 Based on the rates in the estimates produced by the WHRS Assessor, I would assess that it will cost about $143,400.00 inclusive of GST to completely replace all parapets and balustrade nibs, and to repair all consequential damage caused by these leaks.

5.19 **Stucco Taken Below Ground (location No 10)**

5.19.1 I was given generally uncontested evidence that the ground levels on the north, east and south sides of the eastern end of the house were either higher than, or only slightly lower than, the internal floor levels. The stucco had been taken down past the junction with the floor slab, and finished well below ground level. There was an absence of either drainage or suitable falls to the ground so that the surface water was being trapped against the building.

5.19.2 Mr Beaumont, who carried out the remedial work around this building for the Owners in July 2004, told me that it was necessary to remove up to 400mm of soil from around the house so that external levels were 150mm below the timber bottom wall plates. He has given me a good explanation of the work that he had done, together with photographs.

5.19.3 Whilst this remedial work was underway, the WHRS Assessor visited the property prior to preparing his report. In his opinion, the ground levels needed to be reduced to provide adequate clearance between the bottom edge of the wall cladding and the exterior ground surfaces. The need to lower the ground resulted in the undermining of the adjacent retaining walls on the north and east sides, which had to be demolished and replaced.

5.19.4 The moisture content readings taken by Mr Hughes and the Assessor clearly show that moisture was wicking up or passing through the solid plaster and into the bottom of the wall framing. The Assessor has established that the wall plate was rotten in both cut-outs that he took, and has extrapolated these to the areas where he recorded similar readings. It is his opinion that much of the level 2 wall framing in this part of the building has been damaged to the extent that there will need to be large areas of wall framing replaced.

5.19.5 None of the experts challenged these conclusions of the Assessor. I find that there are leaks around this part of the perimeter of the dwelling – a length of about 27 metres, and that these leaks have been caused by the combination of the following:

- ground levels that were too high in relation to the internal floor levels and/or the timber wall framing;
- taking the stucco below ground without installing suitable drip or wick preventative measures;
- inadequate drainage to carry ground water away from, or around, the building.

5.19.6 When Mr Gregersen visited the house in 2001 for the purpose of seeing whether the Council could issue its Code Compliance Certificate, he says that he advised the Perrys that he was unhappy with the lack of differential between the interior of the dwelling and the exterior ground level at certain positions. After several discussions he became aware that a plastic slot drain was installed, and his recollection was that this detail was probably accepted as being a suitable and acceptable alternative solution to the problem. It is a matter of record that Council issued its Code Compliance Certificate shortly after these discussions, and that a 5.0m length of plastic slot drain remained along the east wall some two years later. There was no evidence to indicate that more slot drains had been installed (and subsequently removed), or that adequate sub-soil drains had ever been laid around this part of the building.

5.19.7 I am satisfied that the work needed to fix these leaks and the resultant damage, was to lower the surrounding ground levels, and then replace all damaged timber wall-framing.

5.19.8 The first part of these costs has already been incurred by the Owners, and does not form a part of the Assessor's estimate. I will be considering this later in this Determination, when I review the complete list of remedial work and remedial costs. The second part of the costs is within the Assessor's estimates. Based on the rates in these estimates,

it will cost about $37,800.00 inclusive of GST to completely repair the damaged wall framing in these parts of the building.

5.20 **Cracking in Stucco Cladding (location No 11)**

5.20.1 The first expert (who gave evidence at the hearing) to visit this house was Mr Cartwright, in June 2003. He noticed that there were considerable areas of discoloration to the paint finish and cracking to the plaster cladding. In his opinion, the cladding in general was in poor condition, suffering badly from discoloration, which is an indication of excessive dampness within the plaster. He says that the entire surface of the plaster was extensively cracked and crazed – with each crack being a potential source of leaking.

5.20.2 Mr Hughes, in April 2004, spent longer on site than Mr Cartwright had done, and carried out a number of destructive and intrusive tests, by cutting out small panels of the stucco plaster. He was critical of the apparent absence of control joints and the random positioning of the mesh reinforcing, which was found to be often at the back of the first coat of plaster, rather than embedded within the plaster. He also noted the widespread uncontrolled cracking on virtually every plaster surface.

5.20.3 The WHRS Assessor (in August 2004) confirmed the widespread random cracking, and recorded the main cracks on a Crack Map – which has proved to be an extremely useful record during this adjudication. The Assessor did not see any evidence of control joints, and was of the opinion that the absence of control joints had caused some of the cracking. However, he attributes the water ingress at parapets as being the principle cause of the cracking.

5.20.4 In Mr Maiden's opinion the extreme crazing of the plaster was probably caused by poor curing of the stucco and the inappropriate positioning of the reinforcement. He noted the absence of control joints, but did not consider that this was a significant factor in the deterioration of the stucco.

5.20.5 The cracking in the stucco had been noticed in June 2001 when the Council inspected the house, after being asked to issue the Code

Compliance Certificate (CCC). In his letter of 6 July 2001, Mr Gregersen said:

> The plaster cladding system has cracks in it. It has become apparent that cracks in the plaster systems can be a major cause of leaking. Council needs to be shown that your cladding system is waterproof. There are various ways of repairing cracked plaster systems, and we suggest that you get expert technical advice on this problem. It would be helpful if the repairer gives the Council a written report on the remedial work, and how it will enable the cladding to meet the requirements of the Building Code B1, Durability and E2, External Moisture. (Doc. Perry 166)

5.20.6 Despite being sent a Producer Statement, which appeared to have been given by the plasterer, and an assurance from Mr Jessop, the Council was not satisfied that the cracks were harmless and could be overlooked. Mr Gregersen seems to have been asking for the cracks to be repaired before he would agree to issue a CCC. However, after receiving a letter expressing satisfaction from a local plasterer (Doc. Jessop 942) the CCC was issued in December 2001. I mentioned these events simply to indicate that the plaster was already cracked in mid 2001 – to the extent that it concerned the Council's inspector.

5.20.7 The experts do agree that the cracking in the stucco is now allowing moisture to get into the building structure, so that the cracks themselves are the source of leaking. They also agree that the extent of the cracking is so widespread that the entire plaster cladding needs to be replaced. They are not completely in agreement as to the cause of this cracking, although their differences are more directed at the degree of contribution of each underlying cause, rather than disagreeing about the range of probable causes.

5.20.8 I find that the cracking and general deterioration in the solid plaster external cladding has been initially caused by the absence of control joints in both horizontal and vertical directions. Defects and leaks in the parapets have allowed moisture to get into the structural timber framing, which has caused swelling in the timber, and thus more cracking in the plaster. Other leaks, such as those caused by the pergola column penetrations and those around windows, have also contributed to increasing the amount of the cracking.

5.20.9 I accept the expert's evidence that the entire plaster cladding needs to be replaced. However, as I have already allowed for the replacement of areas of exterior cladding as a consequence of the damage caused by other leaks, I have attempted to avoid obvious duplications when calculating the cost of the repairs to the stucco. Based on the rates in the Assessor's estimates, the cost of replacing the remainder of the external plaster cladding will be about $107,200.00, inclusive of GST.

5.21 **Handrail Fixing Points (location No 12)**

5.21.1 There are aluminium and glass balustrade frames installed around the roof deck (about 350mm high); and also around the main bedroom deck (about 850mm high). It is alleged by the Owners that the fixing points for the posts have caused leaks into the building.

5.21.2 Mr Hughes told me that the posts were fixed by base plates on top of the plastered balustrade, or the tiled nibs around the deck. He says that the coach screws have been drilled directly through the waterproof membrane protecting the top of the balustrade or nib.

5.21.3 Mr Maiden, in his report, said that the base plates did not sit firmly on the plaster surface, so that water could gain free access in and around the fixing holes and into the structure beneath. He pointed to a crack beneath the corner post and a large hole which, he said, must be allowing water free access into the framing. Like Mr Hughes, Mr Maiden says that there are leaks by virtue of the handrail fixing points, but neither of them has offered any evidence to show that water is actually getting into the building at the handrail fixing points.

5.21.4 The WHRS Assessor did take moisture readings in the framing beneath the nib around the main bedroom deck and found no evidence of moisture penetration. All readings were normal. However, he also took readings around the roof deck balustrade and some of these were under (or close to) base plate fixing points. Most of these readings indicated a level of moisture penetration, but there was no real difference between readings taken under the fixing points and those taken elsewhere in the top of this solid balustrade. In other words, the base plate fixing points did not appear to be creating any increases in the levels of moisture penetration.

5.21.5 The metal balustrades were not installed at the time when this house was first built in 1998. They were installed in late 2001 when the Perrys were trying to obtain the Code Compliance Certificate (CCC). The Council required these balustrades (or some form of protective barrier) around the decks as the Building Code requires safety barriers of 1 metre in height to all trafficable areas.

5.21.6 Mr Thomas gave evidence for Stylex Ltd, which was the company that installed the metal balustrades in December 2001. He produced four photographs taken immediately after the balustrades had been installed, which clearly showed that the plasterwork was cracked before the metal balustrades were fixed. Of particular interest is the photograph taken of the large crack beneath the corner post, which Mr Maiden has assumed had been caused by the leaks through the base plate fixing points. It shows that this large crack existed before the handrails were fixed. Mr Thomas told me that the method adopted by Stylex on this job was to fill around the fixing screws with a Sikaflex MS type sealant before screwing the base plate down. The sealant is forced up around the screw shank, in and around any penetration, and around any gap between the base plate and the plaster. Evidence of this sealant can be seen around the fixing points on site, which I was able to confirm during my site inspection.

5.21.7 I am not convinced that it has been shown that these balustrade fixings are causing leaks into the building. Therefore, I find that the fixings are not the cause of any leaks.

5.22 **East Block Wall in Entry/Laundry (location No 13)**

5.22.1 It is claimed by the Owners that the concrete block retaining wall on level 1, built along the east side of the entry/laundry, has leaks through it which are damaging the stopping and lining to that wall.

5.22.2 Mr Hughes in his report noted a swollen skirting in the entry. This was caused, in his opinion, by water entering the ceiling cavity, tracking across the gibraltar board ceiling and down the internal wall framing. This damage was beneath the doors from the sunroom onto the deck. This has already been considered in section 5.14 of this Determination,

under location 6. However, Mr Hughes thought that it could have been associated or linked with the leaking retaining wall, so I have also considered it as a possibility under this heading.

5.22.3 He noted increased moisture levels at skirting height on the east wall in the laundry, and suggests that this indicates a problem with the tanking of the blockwork retaining wall. The WHRS Assessor noted that the readings in this cut-out were 14% to 18%, which is normal (not unduly damp) and he is of the opinion that this leak was either coming from above (location 6) or spillage from the adjacent laundry.

5.22.4 I have considered the evidence on this matter, and I prefer the view offered by the Assessor. There is no good evidence to show that the block wall is leaking, or has been leaking. It is much more probable that water from the leak at the sunroom doors (location 6) has tracked down the wall framing, or the laundry sink has accidentally overflowed in the past and soaked into the bottom of the timber wall framing and strapping. I do not find that the retaining wall is leaking.

5.23 **Decorative Feature Bands (location No 14)**

5.23.1 The Owners are claiming that there are leaks in or around the decorative feature bands, either due to the manner in which they were fixed or installed, or the method of protection used.

5.23.2 Mr Cartwright noted that some of the paint or coating to the decorative polystyrene bands was deteriorating due to exposure. Mr Hughes was critical of the fact that the polystyrene bands had been glued to the stucco before the stucco surface had been sealed. This allows moisture to be absorbed into the plaster, which can then permeate into the timber structure.

5.23.3 In Mr Maiden's words, the junctions of the polystyrene bands to the stucco plaster are suspect. He points to cracks on the top of the decorative bands and at the junction lines with the stucco, and says that this can cause moisture transfer into the stucco. He concludes that these decorative bands are causing leaks and facilitating decay.

5.23.4 None of the other experts agreed with Mr Maiden's conclusion that this was a cause of leaks. They could see no direct evidence to show such a failure, and attributed the high moisture readings to other causes, such as parapets, cracks and other leaks that I have already considered.

5.23.5 There is no evidence to show that these decorative polystyrene bands are causing leaks into this building. The claims are, in my view, speculative. I find that they are not leaking or causing leaks.

6. REPAIR COSTS

6.1 I will be considering the remedial or repair costs in five sections, which are:

- Costs associated with lowering ground levels;
- Estimated future repair costs to the building;
- Additional remedial expenses;
- Betterment;
- Allocation to each leak location.

It should be noted that most of the arithmetical calculations in this Determination have been carried out in electronic spreadsheets, where calculations are computed to many decimal places. This will sometimes result in apparent discrepancies when the figures are rounded off at two decimal places or at whole numbers. For example 1 + 1 = 3, because the full calculation is actually 1.45 + 1.45 = 2.9. As these apparent discrepancies are of very small value, they have no material effect on the calculations as a whole.

6.2 Costs of Lowering Ground Levels

6.2.1 In this section of my Determination I will review the claims made by the Owners for work carried out around the building to lower the ground levels. These claims are:

Retaining wall costs	$25,684.59
Cliffe Holdings Ltd	2,587.50
Concrete – to pay	7,290.00
	$35,562.09

6.2.2 The first claimed item of $25,684.59 is the total of the costs paid by the Owners for the work to lower the ground around the top end of the

house. This work has already been outlined in section 5.19 of this Determination, and not only included the costs of lowering the ground levels, but also included for replacing the timber retaining walls around this side of the house.

6.2.3 Some of the respondents submitted that the remedial costs of building a new retaining wall should not be allowed on the grounds that the existing retaining wall was falling over and in need of replacement. I do not accept that submission. I have photographs of the existing retaining wall and can see its general condition. Mr Beaumont was critical of its condition, and said it was under-strength, and bowed and leaning out from the weight of earth behind it. I would accept that it was not built as well as it should have been built, but I do not see that it was in danger of collapsing and it probably would have continued to retain the soil for many years.

6.2.4 Another submission from some of the respondents is that the Owners had created a generous increase in the flat area adjacent to the house, so that they have benefited by an increased outdoor living space. Once again, I do not find that this submission is supported by the facts. The photographs show the areas before and after this remedial work. If there is an increase in outdoor useable living area, it is insubstantial and does not come close to being considered as "betterment"

6.2.5 I see no reason to reduce the amount claimed by the Owners for the work that they have already carried out in lowering the ground levels and replacing the retaining walls.

6.2.6 The next claimed cost is for $2,587.50 from Cliffe Holdings Ltd. I have been shown an invoice that describes the work carried out as:

> Inspecting site and drainage, removing paving tiles, stacking, removing sand and metal, excavating and removing clay from site and lowering ground level by at up to 400mm and levelling. Exposing foundations and eroded areas. Realigning and extending downpipe on dining room north wall. Drainage to north boundary. Connecting drainage from retaining wall and north wall of building and installing to north boundary. All manual labour including clay removal.

6.2.7 I have been provided with no supporting evidence for this invoice and, as it appears to be a duplication of the work already included in the previous item, I am not satisfied that it should be allowed. The work appears to include for drainage, and yet no evidence was produced to show that the drainage work had been checked and approved by the Council. This claim will be disallowed.

6.2.8 The last item claimed is for 92m² of exposed concrete paving, which I presume the Owners intend to have laid around the house. However, the photographs of the house show that these areas were not finished with concrete paving, but were generally metal with some paving slabs. I presume that the existing paving slabs would be able to be re-used, so that the Owners would then be left with the areas in the same condition as they were when they purchased the property. The laying of extensive areas of exposed-aggregate concrete paving would be an improvement to the property, and cannot be properly claimed as remedial work. I will disallow this claim.

6.2.9 In conclusion, I find that the costs of lowering the ground levels should be included as a total of $25,684.59, which is inclusive of GST.

6.3 Future Repair Costs

6.3.1 As I have already mentioned, the Owners are claiming that the estimated future remedial costs will be $595,637.00 plus GST, as estimated by Mr Smith. I have been given a number of other estimates from various experts and these can be summarised as follows. All figures are exclusive of GST, unless otherwise noted.

(i) In the WHRS Assessor's report, he provided an estimate of his suggested scope of remedial work, prepared by Project Economics, totalling $306,200.00, as at September 2004.

(ii) Mr Smith's estimate, totalling $595,637.00 was prepared in April 2005.

(iii) Mr Ewen, a quantity surveyor with Rider Hunt, compared the Project Economic and Smith estimates. In his opinion the appropriate overall figure was $328,251.00, being $242,327.00

less than Mr Smith's figures. However, there were a couple of substantial arithmetic errors in his summary, which means that his overall estimate was $361,151.00, as at May 2005.

(iv) I asked the WHRS Assessor to update his estimates, and these were provided at the hearing in July 2005. Project Economics' updated overall estimate was $383,500.00.

(v) Mr Ewan revised his own figures after receiving the updated Project Economics estimates, and his new figure was $317,595.00.

(vi) Mr Maiden, who is a quantity surveyor but had not given any estimates, told me at the hearing that he thought the remedial costs would be in the order of about $330,000.00.

6.3.2 By the end of the hearing it had become clear that these estimates were not entirely comparable, as they included differing scopes of work. I had asked the experts to attempt to allocate their own estimates against the items on the "shopping list" of leaks but, as time was running out, I attempted to provide an allocation of the Project Economics estimates for the parties to consider.

6.3.3 One example of why these estimates are not completely compatible is the issue regarding untreated timber. Mr Maiden noticed that a piece of timber, in the sub-floor area beneath the dining room, appeared to be untreated. He said:

> The incidence of untreated timber within any part of the structure must render the whole of the structure to be untreated. Untreated timber will readily and easily be infected by fungal decay, and once established they will then have a greater ability to infect and decay treated timber. Untreated timber, if present on a building site will, historically, but unfortunately be used as packers or noggins for fixtures and fittings. This practice significantly diminished the effectiveness of timber treatment.

6.3.4 This statement was interpreted by others to mean that Mr Maiden was recommending complete replacement of all structural timbers as being a necessary part of the remedial work. Certainly Mr Smith took it that way. However, when questioned at the hearing Mr Maiden confirmed he

had only found one piece of untreated timber, but was fearful that this indicated that other parts of structure would probably have included some more untreated timber.

6.3.5 This piece of untreated timber has already been mentioned in this Determination. It was the short length of boxing timber mentioned in paragraph 5.9.2. It was not being used as a part of the structure, or structural framing. Mr Lee was prepared to produce all the invoices to prove that the structural timber was all treated. I accept his evidence, and find that the claim that untreated timber has been used will be dismissed.

6.3.6 I have carefully considered all of these estimates and compared the quantities and allowances made by the experts. I have found that Mr Smith's costings did include several items that indicated that Mr Smith had taken an excessively cautious approach to the remedial work. For example, he decided to allow for the complete replacement of all timber wall framing, which I consider to be an unrealistic allowance under the circumstances. It may be remotely possible that all the timber has rotted or been damaged to the extent that it needs to be replaced, but I do not consider it a realistic assumption.

6.3.7 I have another problem with Mr Smith's estimates. My understanding of his costings has been hampered by his inability to provide his back-up calculations for many of his figures. He was unable to tell me what had been included (or excluded) from some items, and could not explain how he had arrived at some of the quantities. Under these circumstances, when there is an unexplained difference between his figures and those provided by Mr Warde or Mr Ewen, I have preferred to use the latter persons' estimates.

6.3.8 Based upon its logical method of presentation, I have tended to use Mr Warde's format as the basis for my breakdown of quantum. For each item I have compared the figures and opinions provided by the experts who have given the various estimates. Where appropriate, I have adjusted the estimates, rates or the scope of work for the following matters.

(i) The steel beam in the floor construction under the sunroom deck would reduce the amount of remedial work, as the entire floor would probably not need to be replaced.

(ii) The waterproof membrane to the sunroom deck does appear to have been applied before the balustrade/seats were built, so that the amount of damage caused to the structure beneath would have been reduced.

(iii) The parapets at levels 2 and 3 were built as separate frames from the main wall structure, and this must have significantly reduced the amount of water penetration into the main wall structure.

(iv) I have adopted the method as suggested to show allowances for "market conditions" and for contingencies as separate items, which means that the bulk of the estimates can be prepared at standard rates without the need to constantly try and allow for these factors in the individual costs.

(v) I accept that an allowance must be made for market conditions, to reflect the reluctance that many builders will have for becoming involved in this type of work. Generally speaking, builders find this work messy and frustrating, which tends to cause them to increase their rates. They also find it impossible to price with any degree of precision.

(vi) I accept that an allowance must be made for contingencies, as the scope of remedial work is always relatively unknown until it has been completed. The amount of the contingency allowance will need to be adjusted so that it is compatible with the allowances made when scoping the work. In other words, if the scope of work had already assumed a worst-case scenario, then the amount of this contingency sum must be reduced accordingly.

(vii) The quantities of solid plaster and cavity allowed by Mr Warde need to be increased to 344m², to be consistent with his allowance to re-clad the building.

(viii) Most windows and doors should be able to be reused, and the rates need to be reduced for this reason. However, new linings will probably be needed.

(ix) The metal and glass balustrading should be able to be substantially reused, albeit modified for face fixing.

6.3.9 As a result of these adjustments, I find that the probable repair costs for work that still needs to be done will be a total of $362,013.10 inclusive of GST, built up as follows:

Demolition	$ 37,269.00
Excavation and groundworks	1,500.00
Blockwork	4,620.00
Metal windows and doors	8,205.00
Carpentry	54,630.00
External cavity work	12,040.00
Metal work	2,100.00
Plumbing	2,615.00
Drainage	1,850.00
External works	700.00
Electrical	2,400.00
Plasterboard and stopping	10,900.00
Floor coverings	8,220.00
Solid plaster	34,400.00
Painting	19,220.00
Market conditions - allowance	30,000.00
P & G – lump sum	25,000.00
Contractor's margin (10%)	20,066.90
Contingency (at 8%)	16,053.52
Design and compliance	30,000.00
Subtotal	$ 321,789.42
GST 12.5%	40,223.68
	$ 362,013.10

6.4 Additional Remedial Expenses

6.4.1 The Owners are claiming for reimbursement of a number of costs, which have already been listed in section 4 of this Determination. I have

considered all of the costs that are for remedial or repair work, and now need to consider the other expenses claimed by the Owners.

6.4.2 The following claims have not yet been considered:

Remedial Expenses		
Postage		$ 38.20
Photocopying reports and documents		603.60
Stationery		50.00
Photographs		120.00
Reports		
Citywide	$ 6,910.00	
Prendos	3,867.19	
Smithtech	5,025.69	
Valuer	506.25	16,309.13
Witness Expenses		
Beaumont	$ 182.75	
Citywide	1,656.57	
Prendos	6,600.38	
Miles	430.00	8,869.70
		$ 25,990.63

6.4.3 All of these costs appear to relate to expenses incurred as part of preparing and presenting claims to this adjudication. The WHRS provided a comprehensive assessment and report, at no cost to the Owners, which identified the problems with the house and the extent of remedial work that was required. The Owners are entitled to obtain their own advice and experts' reports, but these have only been used as evidence to support their claims. Therefore, they must be treated as a part of the costs of this adjudication. I have allowed for consultants' costs associated with the repairs as a part of the repair costs.

6.4.4 The Owners have not made any submissions to indicate how, or if, they consider any of these costs should be treated as not being adjudication costs. I intend to treat them as adjudication costs, which will be considered in section 21 of this Determination.

6.5 **Betterment**

6.5.1 Counsel for each of the respondents all made submissions on the need to reduce the remedial costs on account of the Owners being the beneficiaries of betterment. Specific submissions were made on the need to adjust the external painting costs and the carpet costs, and I will address these matters below.

6.5.2 Betterment was also raised in connection with other costs in the evidence of some of the experts, and was the subject of some cross-examinations. I have mentioned these, and will do my best to address them, but as they were not raised in either the Responses or explained fully by way of submissions (opening or closing), I am put at some disadvantage.

6.5.3 The issue of betterment is often raised in building disputes and WHRS adjudications. The arguments from both sides are often finely balanced, and I believe have been excellently outlined in the judgment of Fisher J in *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99. After covering the authorities, he concluded on page 108:

> I accept the logic of an approach which makes a deduction for betterment only after allowance for any disadvantages associated with the involuntary nature of the plaintiff's investment eg interest on the premature use of capital to replace a wasting asset which would at some stage have required replacement in any event.

6.5.4 I propose to adopt the logic of Fisher J and apply it, as best as I can, to the situation in this dwelling.

External Painting

6.5.5 The total cost of the external painting on stucco is estimated to be $9,100.00, plus margin and general costs, plus GST, or a total of $16,417.00. It is claimed by the respondents that the house was due to be repainted in any event, so that all of the external painting costs should be deducted as betterment.

6.5.6 The house was completed and first occupied in April 1998. The respondents say that the house had never been repainted prior to the Owners purchasing it. However, when I inspected the house in

November 2005 it was obvious to me that substantial parts of this house had been repainted – possibly several years ago. The original colour could be seen in several parts of the building, usually in difficult-to-access areas.

6.5.7 However, this does not alter the general position that the exterior of this house is due for a repaint. It was 7½ years old when I inspected. The experts seem to agree that this type of paint will usually last up to 8-10 years, but in an exposed location such as this house, the realistic life expectancy can be reduced to 6-8 years. Therefore, I accept that the house would have needed to have been repainted as a part of ongoing maintenance.

6.5.8 This matter was considered by me in the WHRS adjudications known as "Ponsonby Gardens'. I found that to paint an existing previously painted surface in good condition would be less than painting a new and previously unpainted surface. There would be no sealer coat, and probably one less top coat. I concluded that the Owners were entitled to recover the extra cost of painting on the new plasterwork over and above the cost of repainting after a normal life. I assessed these extra costs as being 55% of the total costs.

6.5.9 I can see no reason for coming to a different conclusion in this adjudication. Therefore, I will allow the Owners to recover 55% of these painting costs, and the remaining 45% I assess as being the betterment gained by the Owners.

$16,417.00 x 45% = $7,387.51 deduction.

Replacement of Carpet

6.5.10 The total cost for removing and relaying carpet is estimated to cost $6,240.00, of which $3,630.00 is the cost of new carpet.

6.5.11 It is submitted by two of the respondents that the carpet had probably been in use for seven years, when its normal life expectancy would be only ten years. Not a lot of expert evidence was given on the matter of the carpet, although several people mentioned that they had noticed water damage in up to four locations.

6.5.12 Based on this limited evidence, I would assess that it would be necessary to replace about 50% of the carpet, which is the figure provided by the WHRS Assessor and included in my adjusted estimates. The carpet had been damaged and had to be replaced. Therefore, there is no element of betterment in the estimates, as the remaining carpet has simply been taken up and re-laid.

Increased Remedial Costs

6.5.13 Mr Gillingham, in his evidence, raised two issues about increased remedial costs. Firstly, he was of the opinion that little if any maintenance had been carried out on the building to reduce ongoing moisture ingress, so that the extent of the damage was being allowed to increase. I will address this matter later in this Determination under the section entitled "Contributory Negligence".

6.5.14 The second point made by Mr Gillingham was that, if the repairs had been carried out at the time of purchase (June 2003), then the building costs would have been substantially less. He refers to the Statistics New Zealand's price indices, which indicate a rise of 15.5% from June 2003 to July 2005.

6.5.15 I do not see that this increase in the level of building costs can be seen, or treated, as betterment. If the Owners had spent their money on remedial work in June 2003, they would now be pursuing the respondents for interest on these monies. The rate of interest allowed under the WHRS Act is up to 2% higher than the 90-day bill rate, which would equate to about 15% over the two-year period. The Owners have not received any better product by delaying this work, nor have they saved any money.

Stucco Claddings

6.5.16 Mr Gillingham says that the external stucco cladding is only required to have a 15-year durability, so that to replace this cladding after eight years will mean that the Owners will gain an extra eight years of life from the cladding. He also points out that the remedial work will include a drained cavity between the framing and cladding, which is a superior system.

6.5.17 The Owners will not be allowed to re-clad without a cavity. They will not have the alternative of re-cladding in the same manner as that in which the house had been originally built. The cavity is a non-divisible part of the remedial work, and they are entitled to be put back into the same position, or as close as practically possible, as if the breach had not occurred. The inclusion of the cavity is not betterment.

6.5.18 As to his first point, he is correct that the Owners will get eight more years of life from the cladding. However, the 15-year durability requirement is no more than a minimum durability requirement under the Building Code. I do not recall receiving any evidence to the effect that it would be normal for house owners to have to re-clad their stucco homes every 15 years. I was given no expert evidence as to the normal life expectancy of stucco, but I am aware of stucco houses that were built over 50 years ago, and are not looking in need of being replastered. I would be surprised if an extra eight years would be seen as gaining any distinct benefit or betterment.

Improvements to Retaining Walls

6.5.19 This matter was raised by Counsel at the hearing, and two experts gave their opinion that the Owners had finished up with a larger clear area around the house, as well as higher and more substantial retaining walls. This matter has already been mentioned, when I considered the Owners' claims for the costs of these retaining walls (see section 6.2 above).

6.5.20 I am not satisfied that the Owners have increased the areas around their house by a meaningful amount. There may have been an increase in some dimensions, but they are *de minimus*.

6.5.21 The retaining walls have needed to be higher than originally constructed, because the ground around the building had to be lowered to create the separation distance between ground levels and internal floor levels. There was no evidence to show that the new retaining walls were over-engineered or excessive in construction detailing. I do not accept that the retaining walls have been constructed in such a way as to provide the Owners with any betterment.

6.6 **Allocation of Remedial Costs**

6.6.1 I have found that the following costs should be accepted as remedial cost for the various leaks that have occurred in this house.

• Costs already spent (see paragraph 6.2 9)	$ 25,684.59
• Future repair costs (see para 6.3.6)	362,013.10
• Additional costs (see para 6.4.4)	0.00
• Less betterment on painting (see para 6.5.9)	7,387.51 CR
	$ 380,310.18

6.6.2 These costs now need to be allocated to each item on the "shopping list" of leaks, as it is quite likely that liability may be found to lie differently against the various respondents.

6.6.3 As I have reviewed and considered all the alleged leaks in this building, I have assessed the probable remedial costs for each leak location. These estimates were included at the end of each section in this Determination, and can be summarised as follows:

1	Level 1 blockwork - north side	$ 1,100.00
2A	Level 1 blockwork – NW corner	10,600.00
2B	Level 1 blockwork – south side	0
3	Level 2, north side by dining room	400.00
4	Ventilation to sub-floor areas	8,700.00
5A	Level 2 – south side by bedroom 2	18,270.00
5B	Level 2 – south side stucco cladding	12,180.00
5C	Level 2 – overflows to RWH	8,120.00
5C	Leaks in downpipes	2,030.00
6	Upstand at deck to living room	33,200.00
7A	Pergola posts into balustrade	52,300.00
7B	Pergola rafter penetrations	0
8	Window sills	0
9	Parapets and balustrade nibs	143,400.00
10	Stucco taken below ground	37,800.00
11	Cracking in stucco	107,200.00
12	Handrail fixing points	0
13	East block wall in entry/laundry	0
14	Decorative feature bands	0
		$ 435,300.00

6.6.4 It is not possible to precisely allocate the remedial work for the damage caused by each and every leak separately. When assessing the remedial work for each leak location, it is almost inevitable that some overlaps will occur. Therefore, it is not surprising to find that the sum of the individual estimates (total of $435,300.00) exceeds the total estimated amount of the remedial work ($362,013,10 in paragraph 6.3.6).

6.6.5 I will need to reduce the individual estimates by similar proportions so that the sum of the individual estimates does equal the overall total. Also, I will need to reduce those estimates that include external painting, to reflect the assessment of betterment that I reached in paragraph 6.5.9 above. The other figure that needs to be added in so as to complete the exercise is the costs of $25,684.59 that have already been spent by the Owners, which I allowed in paragraph 6.2.9 above.

1	Level 1 blockwork - north side	$ 914.80
2A	Level 1 blockwork – NW corner	8,610.26
3	Level 2, north side by dining room	332.66
4	Ventilation to sub-floor areas	7,235.27
5A	Level 2 – south side by bedroom 2	14,840.52
5B	Level 2 – south side stucco cladding	9,893.68
5C	Level 2 – overflows to RWH	6,752.92
5C	Leaks in downpipes	1,688.23
6	Upstand at deck to living room	27,610.46
7A	Pergola posts into balustrade	42,482.70
9	Parapets and balustrade nibs	116,482.21
10	Stucco taken below ground	56,389.11
11	Cracking in stucco	87,077.36
		$ 380,310.18

7. GENERAL DAMAGES

7.1 The Owners are claiming an amount of $30,000.00 for stress. In his evidence Mr Hawken explained that there are leaks in the house that need to have strategically placed buckets to catch the water when it rains. I think it will be helpful to quote Mr Hawken's own words regarding the causes and levels of this stress, rather than attempt to précis or paraphrase.

The house has a strong odour caused by the dampness and rotting timber. The smell can be reduced only partially by constant airing in warmer weather and heating in colder weather. The health of both trustees has been affected by the stress of living in the building and by the presence of fungi. We have been warned the fungi are damaging to our health. We do not have the resources to live elsewhere. The trust will have great difficulty in meeting any other costs involved in the process. The trust cannot afford legal representation on a full time basis and is using all its time and resources to advance this claim to the exclusion of all other work. I have been working on this claim virtually full time since October 2004 and foregone all income as a self employed business consultant. Some pressing personal matters have intervened at times such as my father and mothers ill health and hospitalisation.

We became aware of the leaking problem in June 2003. The leaking was known to the Norgates and the Perrys and they had covered it up and sold it on. The land agent, Clive Lonergan worked with Linda Perry and sold the property to the Norgates. Mr Lonergan in my presence told us it was not leaking as far as he knew in answer to a direct question by my wife. He told us he was very familiar with the building. We were outraged. We tried to get the deposit back and move on with our lives. Norgates denied everything and refused to refund the deposit. We had to sue Norgates. They were smug and intractable. The continued and continue to deny a coverup in face of overwhelming evidence to the contrary. We suffered anger, stress and disillusionment. The Trust was advised that there was no guarantee of success in a courtroom. Legal advice to settle and the Norgates stated intention to keep us in Court for three years rather than pay back the deposit with all the attendant legal fees was too much for us to endure. The Trust settled rather than place itself in danger of huge legal costs and the possibility of attendant damages if we lost.

The extent of the damage and the problem was revealed by the various reports over time. Each report uncovered new problems and our initial hopes that it could be resolved with lesser remedial work disappeared. Ongoing stress is chronic and unabated. It actually gets worse. The worry of making sure that we are complying with the requirements of the WHRS is constant.

We have not had a day off the case since October 2004 and see no foreseeable respite until the house is completely reinstated. That is a formidable prospect given our current fragile state.

The relationship between the Trustees has suffered due to the stress and uncertainty of the process. The Trustees are a married couple but have spent time living apart in 2003 and 2004 due to this issue. The matter has been going since June 2003 and will conservatively continue into 2006. The situation was made worse when the press became aware of the Court proceedings. There was a photograph of the house and an article on the front page of the NZ Herald on 6 December 2004. Craig Norgate published his continued false statements and accused us of going public. The Claimant made no comment. It was Craig Norgate who went public.

The Court Mediation process was again extremely stressful. Norgate and his lawyer Kevin Gould were cynical and superior in their attitudes and yet we were the wronged party. We

> were devastated and felt that Norgates walked away leaving the mess they had inherited to us. The settlement with Norgates was chosen as what appeared as the lesser of two evils. That comparison was not made lightly. It has been an extremely taxing experience particularly for my wife who has no prior direct experience of denial in the face of evidence to the contrary motivated by monetary advantage.
>
> We felt aggrieved again when we found that the Norgates had sold the house to us without a functioning septic tank. Then it was his lawyer that advanced the argument that the settlement was in respect of all water ingress problems. This was another lie. It was a settlement because of the Norgates fraudulent misrepresentation. All this took a toll on us but we are trying to deal with the issue at hand with as little emotional content as we can. It is difficult.
>
> Christine West became a grandmother for the first time on 11 March 2005. Her granddaughter was born in England and it was always intended that we would be there for the birth. This has not been possible and it has been a source of enormous loss to the family. My family relationships have suffered due to the sheer volume of work required to deal with all these lawyers.

7.2 Mr Sullivan, in his closing submissions, says that any stress that has been experienced by the Owners was as a result of the protracted legal battle with the Norgates. Furthermore, he says, when the Owners eventually decided to buy the property they did so with full knowledge of the leaks and any associated problems attending to the remedial work, so that there is no justifiable basis for an award of general damages for stress.

7.3 Ms Bambury submits that there was no evidence from Ms West so that there can be no evidence upon which to make a finding in her favour. She also submits that any stress that Mr Hawken may have suffered was due to the litigation with the Norgates and the current adjudication proceedings, rather than the leaks.

7.4 Adjudicators have the power to make awards of general damages, as has been confirmed by Judge F W M McElrea in the Auckland District Court in *Waitakere City Council v Smith* (CIV 2004-090-1757, dated 28 January 2005). I am aware of awards for general damages that have been made by adjudicators in previous WHRS determinations. I will refer to the comments made in one of the earlier determination by Adjudicators Carden and Gatley in *Putman v Jenmark Homes Ltd & Ors* (WHRS Claim 26 – 10 February 2004). In paragraph 14.12 they said:

> The availability of general damages for pain and suffering, humiliation, distress and loss of enjoyment has been part of our law for some time. In the context of house construction there was $15,000.00 awarded to the plaintiffs in *Chase v de Groot* [1994] 1 NZLR 613. That was a case of defective foundations requiring complete demolition of the house following a fire. The recorded judgment does not include Tipping J's detailed consideration of issues of damages but in *Attorney-General v Niania* [1994] 3 NZLR 98 at page 113 l22 he refers to his earlier judgment in *Chase* and the fact that the award in that case (and another in 1987, *Dynes v Warren* (High Court, Christchurch, A242/84, 18 December 1987)) had been made after a detailed examination of a number of comparative authorities. On the basis of what he said there the authors of Todd, *Law of Torts in New Zealand* 3rd edition page 1184 said that his remarks indicated "these amounts [in *Chase* and *Dynes*] were considered to be modest". We do not read those words into His Honour's judgment in *Niania*. We were also referred to *Stevenson Precast Systems Limited v Kelland* (High Court, Auckland, CP 303-SD/01: Tompkins J; 9/8/01) and *Smyth v Bayleys Real Estate Limited* (1993) 5 TCLR 454.

7.5 The Owners cannot succeed with a claim that relies upon stress or anxiety caused by litigation, and the stress must be as a direct consequence of a breach of a duty of care, whether the claim is based in contract or in tort.

7.6 A claim for general damages for stress or anxiety can only be advanced by a real person who can show, and prove, that the stress or anxiety is more than people encounter in their normal daily activities. The fact that Ms West did not provide evidence must mean that I have no direct evidence upon which to make a finding in favour of her. Therefore, I dismiss any claim for general damages by Ms West on the grounds of lack of evidence.

7.7 I have carefully considered the evidence from Mr Hawken. His evidence, much of which I have reproduced above, does show that most of his stress and worry have been caused by the unfortunate events associated with the purchase from the Norgates. However, at the bottom of all that was the leaks. The litigation with the Norgates would probably not have happened if the building had been leak-free. Therefore, I do not accept the submissions that all the stress has been caused by litigation or adjudication.

7.8 Having reviewed the situation I am satisfied that Mr Hawken is entitled to a modest award of general damages, but I must make sure that it is an amount that reflects the distress caused by the leaks and not that caused by the ensuing dispute proceedings. I will set the amount of general damages at $5,000.00.

8. STIGMA CLAIMS

8.1 The Owners are claiming an amount of $115,000.00 for damages for stigma attached to this property. This claim is calculated at 13% of the value of the property. It is based upon the grounds that this house has been publicly identified as being a "leaky building", which will cause a depreciation in the value of the property.

8.2 Mr Hawken, in his closing submissions, relies upon research data reported in the March 2004 issue of the *NZ Property Journal* in which, he says, is a comprehensive review of material available to date. It concludes with a statement that there is conclusive evidence among property professionals that there is a residual stigma after a leaky home has been remediated in the range of 10%-15% of value.

8.3 He also says that a survey, completed in September 2003 by Professor Hargreaves and Song Shi of Massey University, found that 95% of those surveyed thought that there was a residual loss in value from leaky home stigma. Unfortunately, Mr Hawken did not provide me with copies of the article in the *NZ Property Journal* or the survey done by Massey University, although I certainly am familiar with a research paper prepared by Song Shi as a part of her studies towards a Masters Degree at Massey University.

8.4 The respondents all submit that there is no proof of any loss due to stigma caused by leaks in this house, and generally rely upon the expert testimony from Mr Gamby on this matter.

8.5 Claims for loss as a result of stigma have been considered in WHRS adjudications, and I was referred to two of my own determinations – in *Millar-Hard v Stewart & Ors* (WHRS Claim 765, 24 April 2004) and in *Gray v Lay & Ors* (WHRS Claim 27, 11 March 2005). In the *Millar-Hard* decision I said:

> The Owners are claiming that their house has suffered a diminution in value due to the stigma that has attached to "leaky homes". The Owners referred me to a research paper by Song Shi prepared as a part of her studies towards a Masters degree at Massey University. The conclusion was that there was clear evidence of a "stigma" directed at monolithic-clad houses, and that an average loss in value of about 13% was being experienced.

Mr Tomaszyk also referred me to *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, where he tells me that Hardie Boys J (as he then was) allowed a reduction on account of stigma of approximately one third. I am familiar with this case, but I think that the Court allowed $5,000.00 as a loss on a property worth $47,500.00 in total. This equates to a 10.5% diminution of value.

A similar argument was raised before the Adjudicators Carden and Gatley in *Putman v Jenmark Homes Ltd & Ors* (WHRS claim 26 – 10 February 2004) and their conclusions were as follows:

> We have considered all the evidence carefully and are of the view that there is no sufficient evidence of "stigma" value loss. As Mr Farrelly indicates, the repair work which we have considered appropriate does include a cavity, treated timber, and full compliance with the Building Code and Harditex Technical Information. That will be known and that information can be available to any purchaser. If there is any "stigma" then we suspect this will rather be because of the significant adverse publicity that dwellings of this nature have attracted and nothing that the claimants can do by way of repair will alter that. Indeed we consider it a significant prospect that if remedial work is done thoroughly and comprehensively as proposed that may well reassure purchasers even to the extent of possibly enhancing the value as compared with the property, had it been properly constructed in the first place, and the worries and misgivings that prospective purchasers may have had not knowing whether the building was suspect or not.

It would appear that the Adjudicators in *Putman* were not referred to the Song Shi research paper, and I appreciate that the background history and evidence in the *Putman* case could well differ from the instant case. However, this is a substantial claim and I prefer to have all the assistance that is available to give it a fair and thorough consideration.

Mr Tomaszyk has made helpful submissions on this claim. He accepts that there is a degree of uncertainty associated with allegations of stigma, which mean that any damages must be made conservatively. He also concedes that the Owners have no legal obligation to tell prospective purchasers that the building has had to be repaired, or that it has been the subject of a claim under the WHRS Act.

The only other submission received about this particular claim is brief, and points out that the claim is highly speculative, with no evidence to show that this house has, or would, suffer a loss in value.

The Owners have shown me a valuation of the property prepared by R J Hills in January 2003. Mr Hills is a registered valuer and prepared the valuation for mortgage finance purposes. He mentions that "the dwelling has been finished to

a very high standard …", but makes no mention of its history of repairs or it being a leaky home.

The Owners had carried out extensive remedial work to the outside of the house in February 2001. I have been shown a photograph taken at the time, and there are no signs that any steps were being taken to conceal the fact that the outside was being re-plastered. The problems with leaky homes in New Zealand had been well publicised by January 2003 and legislation had already been passed to address the problems. If Mr Hills had considered that there was any substance to the suggestion that the value of this house should have been discounted or diminished, then I would have expected to see a reference to this fact in his valuation.

I have carefully read the Research Paper by Song Shi, and I would have preferred to have had her figures and table in colour (for easier comprehension) and to have been able to review the Appendices (which were not attached), but this has not prevented me from grasping the essential points. However, I feel that her conclusions and analysis appear to show that the marketplace stigma is more pertinent to monolithic clad dwellings in general, rather than individual and identified leaky homes.

For this claim to succeed, the Owners have not only got to show that there is a public resistance to purchasing houses that might be known or perceived to be 'leaky homes', but also that the problems with their house would probably lead to a loss in value. Furthermore, if the stigma is of the type that will diminish with time, the stigma will only translate into a loss if the Owners sell within the period that the stigma still attaches to the property. The only evidence that I have about the value of this property is that the registered valuer saw no stigma or loss in value. The valuer would be in the same position as a prospective purchaser, and I would have expected him to send a warning to a mortgagee if the value of the house was affected by the stigma.

8.6 The evidence produced by the Owners was an opinion of Mr Mitchell, a registered valuer. He valued the land and improvements at $770,000.00 and was of the opinion that the reduction in value on account of stigma associated with the subject property was about 15% of $770,000.00, or $115,000.00. In his view, this loss in value would apply to both the land value and the value of the improvements.

8.7 Mr Gamby, also a registered valuer, gave a contrary opinion. In his view, if the correct remedial work was carried out (as claimed by the Owners) then no residual stigma would attach to the property.

8.8 Ms Bambury and Mr Sullivan both made submissions that Mr Mitchell was not an expert on stigma and his opinion had no reasoned basis. Therefore, they say, the Owners have produced absolutely no evidence to support this claim.

8.9 This is a substantial claim, and yet the Owners have not provided any solid evidence to prove the claim. In Mr Hawken's closing submissions he referred to material that had not been produced in evidence, and if it had been, it was no more than hearsay evidence. Mr Mitchell, with all respect, is not an expert on stigma, and he accepted that was the case. He is a professional valuer, who has adopted a percentage figure for stigma that had been opined by others.

8.10 The Owners may have shown that their house has achieved some form of notoriety because it was displayed on the front page of the *NZ Herald*, but that does not mean it would suffer a drop in value as a result of this exposure. I was not told what was in the *Herald* article. The Owners have not come close to proving that the value of their house will be diminished on account of the leaks, particularly after it has been properly rectified. I will dismiss this claim for damages due to stigma.

9. INTEREST

9.1 In the Owners' detailed particulars of claim, they claimed interest at 7.5% per annum on "expenses, to be advised". I have not been given any further information, so I must presume that the claim relates to monies that have already been spent on remedial work.

9.2 I have found that the Owners are entitled to reimbursement of a total of $25,684.59 inclusive of GST (refer paragraph 6.2.9 above). This work was carried out in June to August 2004.

9.3 An adjudicator has the power to award interest pursuant to clause 15 in the Schedule to the WHRS Act, which reads:

> (1) Subject to subclause (2), in any adjudication for the recovery of any money, the adjudicator may, if he or she thinks fit, order the inclusion, in the sum for which a determination is given, of interest, at such rate, not

> exceeding the 90-day bill rate plus 2%, as the adjudicator thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.
>
> (2) Subclause (1) does not authorise the giving of interest upon interest.

9.4 I can exercise my discretion as to the rate and the period in accordance with the normal accepted principles. The majority of the Owners' costs for which they are claiming reimbursement had been incurred prior to 31 August 2004. I do not think that there will be any injustice in setting 1 September 2004 as an appropriate starting date. The 90-day bank bill rate has varied over the period from September 2004 to the present from 6.64% to 7.70%. Therefore I will allow the Owners' claim for 7.5% per annum simple.

9.5 Interest will be allowed on the remedial costs of $25,684.59 at the annual rate of 7.5% from 1 September 2004 to the date of this Determination. I have calculated this interest as being a total of $3,594.08. This interest will continue to accrue up to the date of payment.

10. LIMITATION DEFENCE

10.1 It is alleged by some of the respondents that, in relation to a number of the defects that exist in this house, claims cannot be pursued as they are time-barred.

10.2 Ms Bambury submits that this situation applies to three particular problems, which are:

- Inadequate fall on decks;
- Ventilation to sub-floor areas;
- Pergola construction.

10.3 She says that s.4 of the Limitation Act 1950 provides that a cause of action in tort may not be pursued more than six years after the cause of action has arisen. It has been held in New Zealand that the cause of action in relation to building defects arises when the homeowner discovers, or should have reasonably discovered, the building defect. This was confirmed in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

10.4 Ms Bambury goes on to submit that it is clear that case authorities support the proposition that time runs against **all** subsequent owners once a defect is discovered, or ought to have been discovered, by one owner alone. Unfortunately, Ms Bambury has not given me any references to these authorities, and this submission does not accord with my own understanding of the situation.

10.5 The Owners were first made aware of the leaking problems with this house in or around June 2003, when Mr Cartwright carried out his inspection and wrote his report. It may be argued that the Owners should have realised that the house had defects when they first visited the house. Even if I did accept that suggestion, April 2003 would be the earliest that the Owners would have had knowledge of the leaks.

10.6 The Owners' cause of action for these building defects, therefore, could not have arisen before April 2003. Section 55(1) of the WHRS Act states that, for the purposes of the Limitation Act 1950 and any other provision that imposes a limitation period, the making of any application under s.9(1) of the WHRS Act is deemed to be the filing of proceedings in a court. The Owners made their application under s.9(1) in May 2004. The claim that some of the Owners' claims are statute-barred cannot succeed under these circumstances.

10.7 Mr Sullivan has made similar submissions to those of Ms Bambury, except that he relies on the fact that some of the defects were patent at the time of construction, and before May 1998 (being six years before the Owners filed the claim with WHRS). He lists the following items:

- Absence of sub-floor ventilation;
- Leak in master bedroom dressing room;
- Rainwater heads;
- Drainage to road non-existent;
- The penetration of the pergola into the balustrade.

10.8 Whilst some of these defects may have been capable of being seen by any person carrying out a visual inspection, it does not automatically follow that they all would be considered as "defects" by lay persons. Also, Mr Sullivan does not explain why the Owners, who certainly did not see these things in May

1998, should be held to an accrual date for their claims that is entirely unconnected to their own personal knowledge of this dwelling.

10.9 The submissions made by Ms Grupen appear to rely upon the start date being the actual date that building work took place. This may well apply to actions for breach of contract, but does not apply to actions in tort for negligence. As I have already accepted, the start date is the date when the defect is discovered, or should reasonably have been discovered, **by the Owners**. In the case of building defects, of course, there is the alternative limitation imposed by the 10-year long-stop provision in the Building Act, being 10 years from the date on which the construction work was carried out or completed.

10.10 In conclusion, I am not persuaded that any of the respondents' submissions that some, or all, of the claims are time-barred can succeed. I will dismiss them.

11. OTHER DEFENCES

11.1 In this section of my Determination I will consider a number of defences that have been raised by the respondents. These defences include claims concerning causation, latent as opposed to patent defects, and whether the Owners have already received compensation for the leaks.

Causation - General

11.2 The respondents have each raised issues relating to causation, and the need for the Owners to show that their losses can be directly linked to the failings of the respondents. Ms Bambury has cautioned me against applying the issues of causation in a manner that allows responsibility to be apportioned between all parties. I accept that the Owners have independent claims against each of the respondents, and that the submissions relating to causation may not apply to all respondents.

11.3 I will be considering these particular defences under the headings of:

(i) the Owners failed to defend the actions brought by the Norgates – called "Action by Norgates";

(ii) the Owners failed to ascertain the true extent of the problems and damage before concluding the agreement to purchase – called "True Extent of Leaks";

(iii) the Owners purchased a building when they were aware that it leaked – called "Aware of Leaks".

Causation – Action by Norgates

11.4 The Perrys have raised an affirmative defence to the claims being made against them, on the grounds that the Owners have caused their own losses as a result of their failure to defend the action brought by the Norgates against them. As Mr Bates submitted the argument to me, the causal nexus between the Perrys' actions and the losses that the Owners have suffered does not exist. In the alternative, he submits that the Perrys have a clear affirmative defence available to them of *novus actus interveniens* (intervening cause).

11.5 He says that the onus is on the Owners to establish a causal nexus between the actions of the respondents and the losses that the Owners have suffered. To do this, he says the Owners must first dismiss the overwhelming evidence to the effect that the true cause of the Owners' losses was their decision not to defend the action brought by the Norgates to enforce the sale and purchase agreement for the house. Instead, he says that the Owners entered into a compromise with the Norgates, and agreed to buy the property for a reduction in the price of $45,000.00.

11.6 Mr Sullivan says that the Owners contributed to their losses by failing to properly cancel the sale and purchase with the Norgates, but rather entering into subsequent negotiations, which resulted in their buying the property at a reduced price. He says that Mr Hawken offered his solicitor the correct legal advice in mid 2003 when he said that the agreement could be cancelled under the provisions of the Contractual Remedies Act 1979, but failed to follow through with the cancellation.

11.7 Before I consider these particular submissions, I think that it is necessary to recite the events that occurred at the time when the Owners purchased this property from the Norgates.

11.8 In March 2003 the Norgates put this property on the market and on 5 April 2003 the Owners entered into a sale and purchase agreement ("the Agreement") with the Norgates. This Agreement was for a purchase price of $620,000.00, with a $30,000.00 deposit becoming payable when the Agreement became unconditional. There were two conditions. The first was a financing condition, which would be satisfied if the Owners obtained "sufficient funds to complete the transaction" within 10 working days from the date of signing. In other words, the Owners had until 22 April 2003 to secure the funds needed to purchase the property.

11.9 The second condition related to another property that the Owners were selling in Onehunga. It gave them until 1 June 2003 to make unconditional their existing agreement to sell the Onehunga property. Both of these conditions had been satisfied by 29 May, so that the Agreement became unconditional on that date.

11.10 The Agreement had originally had a settlement date of 1 June 2003, but this was varied by consent to 6 June 2003. However, on 3 June 2003 a leak was discovered in the master bedroom by a cleaner, who notified the real estate agent. The Owners were reluctant to settle until an investigation could take place and the damage could be repaired. They engaged a Mr Cartwright of Citywide Building Consultants to inspect the house on 10 June and he provided a report on 13 June which stated that the dwelling was suffering "a severe case of leaky building syndrome", with extensive problems of moisture ingress which would require a complete inspection with destructive testing to determine the extent. He considered that the remedial costs could be up to, and possibly in excess of $100,000.00.

11.11 It appears that, whilst the Norgates agreed to pay for the repair of the leak and the resultant damage, they still insisted on settlement on the agreed date of 6 June 2003. There followed an unfriendly exchange of allegations and demands, which culminated in the Owners purporting to cancel the Agreement.

11.12 The Owners commenced proceedings in the District Court against the Norgates, seeking to recover the $30,000.00 deposit, together with other losses and damages. The grounds for cancellation were stated in their Statement of Claim as fraudulent misrepresentation by the deliberate concealment of defects; or in layman's language, that the Norgates had known the house was a 'leaky home'

and had deliberately concealed this fact from the Owners. The Norgates counterclaimed for specific performance and the proceedings were transferred into the High Court.

11.13 Before the matter had reached the stage of the hearing in the High Court, the parties attended a mediation conference with Mr D S Firth on 2 March 2004. Mr Derek Firth is a barrister and experienced mediator, and with his help the parties reached a negotiated settlement. The terms of this settlement were recorded as follows:

> Agreement dated:
> Between [the Owners], first part
> AND [the Norgates], second part
>
> The parties have reached agreement on all issues arising in the proceedings.
>
> The agreement is:
>
> 1. The first part shall settle the sale and purchase agreement referred to in the proceeding by a further payment of $545,000.00.
>
> 2. (1) is subject to:
>
>   a. finance within 14 days that finance to be secured over the subject property (16 March 2004);
>   b. settlement to be on or before 23 March 2004.
>
> 3. Following settlement as above the first part shall discontinue and the second part shall discontinue the counterclaim and no question of cost arises.
>
> 4. The agreement is in full and final settlement of all claims between the parties.
>
> Signed by the parties.

11.14 The Norgates were cited by the Owners as respondents in this adjudication when they filed their Notice of Adjudication. The Norgates applied to be removed on the grounds that the Owners were estopped from proceeding against the Norgates as all disputes between them had been settled at the mediation. The details of this application were included in my Procedural Order No 4, on 25 February 2005. My findings were as follows:

> I think that the agreement reached at mediation was reasonably clear in its terms. It brought to an end the claims for fraudulent misrepresentation and the counterclaims for specific performance because that is what must have been meant by the opening words

that "The parties have reached agreement on all issues arising in the [High Court] proceeding."

It also confirmed that an amendment had been agreed to the purchase price, and to the settlement date. I do not need to know what was in the minds of the parties when they negotiated towards the terms of their agreement. The words of the written agreement are clear as to price and dates. It is also clear that the parties finished their agreement with the term that it was "in full and final settlement of all claims between the parties". The message is unambiguous, in that the agreement was the end of all actions or claims relating to the transaction of the property. It was closing the door and locking it from both sides, so that it could not be opened again.

The words of Lord Denning in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 122 seem to be relevant to the situation that exists in this adjudication:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

The Owners originally agreed to purchase this property on the assumption that it was not a 'leaky home'. When they received the report from CityWide Building Consultants, they not only were told that the house was a severe case of leaky building syndrome, but also were told that there had been several cases of previous leaks, repairs and deliberate concealment of the problems. They chose to cancel the sale and purchase agreement on the grounds of fraudulent misrepresentation.

When the Owners and the Norgates went into the mediation, both parties were aware of the CityWide report, and that the house was a leaky building. They reached agreement with that knowledge in their minds. It would be completely unfair and unjust to allow the Owners to continue with their "leaky building" claims against the Norgates in this adjudication. I accept Mr Gould's arguments that the Norgates should be removed as parties from this adjudication.

11.15 I will now return to the claim that the Owners brought these losses on themselves by failing to defend the actions brought by the Norgates. Mr Sullivan says that the owners were fully entitled to cancel the Agreement and walk away from the property. Ms Bambury has made similar submissions along the lines that the Owners should not have reached a resolution to the effect, or in the manner that they did with the Norgates.

11.16 The Owners' response to this claim is that they say that they had a legal contract, as at 29 May 2003, which committed them to purchase this property. They deny that the mediation gave them an opportunity to avoid the purchase, as it was mainly concerned with settling the issue of the "fraudulent conduct of the Norgates".

11.17 Ms Bambury submits that, at the mediation, the Owners entered into a fresh sale and purchase agreement with the Norgates. She says that it was conditional upon them obtaining finance and contained the standard terms and conditions relating to the vendors' warranties as to the state of the building.

11.18 Mr Hawken says that the settlement agreement reached at mediation was not a new agreement for sale and purchase. At most, he says, it was a variation of the original agreement, which only took into account an allowance for the wrongful actions of the Norgates. Mr Hawken goes further and says that the Norgates were "cheats", who had covered up the leaks to avoid the stress of dealing with, and living in, an unhealthy and degraded property.

11.19 Based upon the evidence I have been given, I think that Mr Hawken is correct about the mediated agreement. It was not a fresh sale and purchase agreement. It was an agreement to reduce the amount that had been due for payment on the settlement – from $590,000.00 to $545,000.00. It agreed upon the date for settlement. It also agreed to discontinue the Court proceedings with no question of costs and was "full and final settlement of all claims between the parties".

11.20 Did the Owners have the right to cancel the Agreement? Mr Hawken thought that he did when he wrote to his lawyer in June 2003. Counsel for the respondents all submitted that there were good grounds for cancellation, and the recovery of damages. The Norgates clearly did not agree, and were prepared to argue their case in the High Court.

11.21 In my view, it is too speculative to conclude that the Owners could have litigated or negotiated a deal that was better or different from the mediated outcome. There is nothing to indicate that the Owners did not advance all arguments in their favour, or that there was an issue of uneven representation at the mediation. On the contrary, the Owners were represented by Counsel at the mediation, as were the Norgates, and the mediator was a respected and experienced lawyer. I accept that there is a strong argument to support the view that the Owners were committed to buying this property pursuant to their Agreement with the Norgates. They may have obtained a judgment in their favour from the Court, but they also may have been on the losing side.

11.22 I am not persuaded that it has been shown that the Owners failed to defend themselves against the Norgates, or that the losses that they are now claiming in this adjudication were caused by their failing to reach a better settlement with the Norgates.

Causation – True Extent of Leaks

11.23 It is alleged that the Owners failed to ascertain the true extent of the leaks and defects in the building before finalising their agreement to purchase the property.

11.24 As I have already mentioned, the Owners engaged Mr Cartwright of Citywide Building Consultants to inspect the house immediately after the leak had been discovered by the cleaner on 3 June 2003. He visited on 10 June, and sent in a written report on 13 June. His conclusion was:

> It is obvious that this dwelling is suffering from a <u>severe case of 'leaky building syndrome'</u>. There are indications that this house has been leaking for a considerable period of time. It appears that remedial works have taken place both prior to and post 2001. Signs such as liberal applications of silicon to cladding fractures and joinery junctions, silicones have a tendency to discolour (cloudy) with exposure to the weather. The silicon that has been applied around some of the windows/doors is still reasonably clear giving the impression that these attempts at preventing moisture ingress have been made of recent (these have been overpainted in areas). The decaying of the carpet in the wardrobe is a process that takes time and would be both visible and the musty odour associated with the damp conditions noticeable (as it was at the time of this review).
>
> A large area to the north wall has been leaking, remedial attempts have been made. This is visible by the poorly mismatched paint. The placement of May 5-6 2001 newspapers in the wall cavity proves that destructive type remedial attempts have been made to the wall

> in the lounge. Finally the placement of black polythene over the ground in the subfloor area and the presence of water indicates an ongoing problem.
>
> The design construction methods and materials used categorizes this dwelling as a 'high risk' type home. We noted the lack of control joints in the exterior cladding. James Hardies Technical manual clearly states these requirements. The cladding has been extended below ground level. This is not an acceptable practice and again is referred to in James Hardies manual.
>
> The problems of moisture ingress to this dwelling are extensive. To fully assess the extent of damage <u>a complete review will need to be undertaken</u>. This type of review would entail destructive testing to all exterior surfaces. This testing would enable a costing to be established and a programme of works to be established.
>
> This report is based on <u>a brief overview of this dwelling</u> however I feel it fair to assume that remedial works could be up to and possibly in excess of one hundred thousand dollars (opinion only).

[The underlining is mine.]

11.25 Mr Bates submits that it was negligent of the Owners not to have sent Mr Cartwright, or another building surveyor, immediately back to the property to prepare a more comprehensive report. The Owners were clearly alerted to the fact that this house was leaking badly, and that the full extent of the damage would not be known until a comprehensive schedule of testing had taken place. However, they did not instruct further testing until after the mediation in March 2004.

11.26 Mr Hawken told me that the Owners had good reasons for not sending Mr Cartwright back to carry out further testing. He says that it would have been necessary to carry out extensive destructive testing to ascertain the extent of the problem. This would have included cutting holes through the exterior cladding and internal wall and ceiling linings, and the Norgates' permission would have been needed for this work to have gone ahead. He told me that, not surprisingly, permission was not forthcoming from the Norgates.

11.27 Mr Hawken did concede that his initial reason for not commissioning further testing was because he intended to cancel the Agreement. He had no reason for wanting to know any more about the leaks, because the Owners did not intend to go through with the purchase.

11.28 Mr Bates submits that the Owners were negligent. I do not accept that submission. I am satisfied that Mr Hawken's actions, at the time, were quite

reasonable under the circumstances. Furthermore, he could not have carried out these further tests without the consent of the Norgates, and it would have been foolhardy to have tried to get further site information without consent.

11.29 Based upon this reasoning, I do not accept that the Owners interrupted or broke the causal chain by failing to take further steps to determine the full extent of the leaks.

Causation – Aware of Leaks

11.30 The third line of argument raised by the respondents concerning causation is the allegation that the Owners purchased the property when they were aware that it leaked. The foundation for this argument or submission is similar to that used in the previous submission. The Owners had received the Cartwright report when they entered into the mediation. Therefore, they finally agreed to purchase the property with the knowledge that it was a "severe case of leaky building syndrome".

11.31 I have already found that the Owners were unconditionally committed to purchase the house on 29 May 2003. The mediation did not result in a fresh sale and purchase agreement. The Owners certainly knew that the house had serious leaking problems when they attended the mediation and it must be assumed that they came to the negotiated settlement knowing that they would need to fix the leaks.

11.32 Mr Hawken says that the Owners left the mediation in the belief that they would be claiming for rectification of the leaks from the original owners, the Council and the builder. This confirms that they knew of the leaks and that they realised that they would need to fix the leaks without any assistance from the Norgates.

11.33 All of the respondents are claiming that the Owners negotiated a reduction in the price of the property because the Norgates were forced to concede that the house had serious leaking problems. The Owners strongly deny that the price reduction had anything to do with the leaks.

11.34 Mr Bates submits that the evidence indicates that the Owners were able to negotiate a reduction of $98,100.00 off the purchase price, which is very close to the Cartwright estimate of $100,000.00 given in his June 2003 report (see

paragraph 11.24 above). He points to a letter from the Norgates' Counsel (Mr Gould) to Norgates' solicitor, dated 3 March 2004, the day after the mediation. This letter was produced by Mr Hawken as a part of his brief of evidence, so that although it may have been considered to have been privileged, any privilege that the Owners may have claimed has been waived. I think the contents of the letter need to be quoted in full, rather than selected sentences.

Re: **Norgate – The Christine West Family Trust**

I advise that on 2nd inst., this matter was mediated before Mr D S Firth.

In attendance were Mr J Mather, Counsel for the Plaintiffs, together with Ms West and Mr Hawken, the writer and Mr Norgate.

The opening position of the above was that they demand refund of their deposit, together with $10,000.00 damages. The opening position of our clients was that they demanded settlement in accordance with the Agreement for Sale and Purchase, together with penalty interest of $53,100.00.

By 4.15 pm, it became apparent that the above were trying to effect settlement of the Agreement for Sale and Purchase at a discounted price and then come to an arrangement with the original owners of the property (a Mr and Mrs Perry) and the builder and, possibly, sue the Auckland City Council in an attempt to profit from the transaction.

After further negotiation, settlement was effected upon the following bases:

1. The above are to pay our clients $545,000.00, subject to arranging finance on or before 16th March, 2004.

2. Settlement to be effected on or before 23rd March, 2004.

I enclose herewith copy Settlement Agreement.

The effect of the settlement is that our clients have forgone the sum of $45,000.00 on the sale price and the further sum of $53,100.00 for penalty interest. Both sums are claimable as against Mr and Mrs Perry, the Builder and the Auckland City Council.

It is the intention of our clients to issue proceedings in that regard.

Furthermore, I enclose herewith copy letter I have forwarded to the solicitors to Bayleys Real Estate Limited in an attempt to obtain the full deposit, which would correspondingly reduce the damages that will be claimed in the intended proceedings.

The settlement, as effected is, in my opinion, most favourable to our clients, as it does not involve any retention of funds and/or supervision of remedial works and is a "clean break".

I will report following a response from Baileys Real Estate Limited but, in the interim, enclose herewith a note of my costs.

Yours faithfully,
KEVIN F GOULD

11.35 Mr Bates says that this letter clearly indicates that Mr Gould thought that the Norgates could now seek compensation of $98,100.00 by bringing proceedings against the Perrys, the builder and the Council. The letter shows that at least one party to the mediated settlement thought that the reduction in sale price had been caused by water ingress issues, for which the Norgates were entitled to recover from these other parties.

11.36 Mr Sullivan makes a submission along very similar lines, saying that the Owners received a discount of $100,000.00, being a reduction of $45,000.00 from the purchase price and/or the increased value of the property in the year it took to re-negotiate the agreement. He says that the $100,000.00 was clearly intended to compensate the Owners for the expected cost of the repair work.

11.37 I should make it clear that Mr Sullivan was not promoting this submission on the issue of causation, but as a part of an argument that any damages awarded to the Owners should be reduced by $100,000.00. This also applies to the submissions made by Ms Grupen, when she suggests that the Owners are attempting a double recovery. However, I will consider these submissions at this point in my Determination as they are relevant.

11.38 Mr Hawken told me that the mediated settlement did not consider the costs of remedial works, nor was the price adjustment considered to be a contribution towards the costs of the remedial works. He says it was an adjustment to the purchase price because the Norgates had covered up defects and had been dishonest. He agrees that there was a reduction made to the purchase price, as the original price had been $620,000.00, of which $30,000.00 had already been paid by deposit. The mediated settlement was that a further $545,000.00 would be the final payment, which was $45,000.00 less than the $590,000.00 which had originally been agreed.

11.39 Mr Hawken strongly denies that the Owners agreed to pay the Norgates any interest for late settlement. He has repeatedly said, both in his briefs of evidence and in his submissions, that the reduction in purchase price had

nothing to do with repairs. He told me that the Norgates indulged in fraudulent misrepresentation which, he says, is not encouraged at law, and a reduction in the purchase price was negotiated to compensate for that misrepresentation. Later, he told me that the Norgates paid the price of unconscionable and illegal acts, and that the Norgate settlement was not for repairs, but for covering up the leaks.

11.40 At the hearing, I asked Mr Hawken to explain how he had calculated the figure of $45,000.00 if it was for damages for fraudulent misrepresentation. How did he measure such losses? I asked him to convince me that there had been no concessions as to price to compensate for the inevitable costs to fix the leaks. The best answer that he could give me was that he found it difficult to explain how the figure of $45,000.00 was arrived at, other than to say that Mr Norgate agreed to it.

11.41 Mr Hawken did tell me that the $45,000.00 was $5,000.00 less than the amount that the Owners were claiming from the Norgates for fraudulent misrepresentation. However, on checking the Statement of Claim filed by the Owners in the District Court, I see that they were only claiming $25,000.00 for fraudulent misrepresentation. It appears that the Norgates were agreeing to pay $20,000.00 more than was being claimed against them. Furthermore, Mr Gould recorded that the Owners opened at the mediation for $10,000.00 in damages, which does indicate that Mr Hawken's memory is not good on this matter.

11.42 Mr Hawken, as mentioned above, does not accept that there was any allowance made for penalty interest. This, of course, is in conflict with Mr Gould's view as indicated in his letter (see above). Mr Sullivan drew my attention to a hand-written note written by Mr Hawken on the day after the mediation and addressed to his solicitor. He wrote:

<u>Norgate</u>

To: Tony Thomas 4/3/04

Settlement is to be strictly in terms of the agreement. In particular the setting out of the settlement agreement should record the purchase price as $620,000.00

Deposit	$ 30,000.00
Amount required to settle	545,000.00
Amount Discounted by Agreemt	45,000.00
Adjustments for rates as at Settlement date	

> It is important that the statement does not include any reference to penalty interest for late settlement – charged then credited without pointing it out this reference could/would affect the amount we can claim through the WEATHERTIGHT HOMES RESOLUTION SERVICE against the AC Council, the Architect, the Builder/Developers

11.43 I have carefully considered all of the evidence about the reduction in the purchase price. On balance, I prefer the submissions made by Mr Sullivan. I find that the Owners negotiated a reduction of $100,000.00 off the original purchase price of $620,000.00, and had to concede an amount of $55,000.00 for penalty interest. The reduction of $100,000.00 was as compensation for the leaks and defects in the house.

11.44 The Owners have already received $100,000.00 as compensation for the leaks, and this amount must be taken into account when calculating the amount of damages that may be awarded to the Owners. The Owners must bear the costs for the penalty interest, as this is a part of the cost that must be paid as a consequence of having a dispute with the Norgates, and for the benefit of not having to hand over the purchase price in June 2003.

11.45 I will now return to the claim that is at the beginning of this section of my Determination – that is, that the Owners were the authors of their own losses as they concluded the purchase of this property when they were fully aware that it leaked.

11.46 It is possibly obvious, based on my considerations above, that I am not persuaded that there has been a break or interruption in the causal chain. The Owners did not know that the house leaked when they were unconditionally committed to purchase the house, but did manage to negotiate a discount on account of the leaks. This discount was entirely reasonable based on the knowledge that they had at the time of the mediation, and it was not a practical proposition for them to obtain further information. However, this does not affect the fact that the cause of the leaks, and the resultant repairs, must flow directly from the actions of those who were involved and may be found to have a liability for the design and construction work.

Latent v Patent

11.47 It is submitted by Ms Grupen that the alleged defects claimed against the Builder were obvious on reasonable inspection and cannot in any real sense be described as latent. She says that the Builder has no liability for economic loss resulting from negligent construction where the defects are patent, and the English authorities highlight that the evil is in the defects' latency. I am referred to the case of *Zumpano & Anor v Montagnese & Anor* [1997] 2 VR 535.

11.48 Mr Sullivan has raised a similar submission, saying that many of the defects were patent, and should have been obvious to the Owners. He refers me to the Determination of Adjudicator Green in *Smith v Waitakere City Council* (WHRS Claim 277, 12 July 2004). I think it would be helpful to quote the passage from this Determination (para 169-172).

> [169] Ms Bambury and Ms Grant submit that a Council officer should not be responsible for costs associated with patent (obvious at the time), as opposed to latent (hidden and not obvious at the time, but which develop later) defects, but accept that many of the cases considered by New Zealand courts are concerned solely with the issue of latent as opposed to patent defects and a prime example of which is the list of authorities concerning houses with defective foundations. Generally that is because of the application of the principle of caveat emptor, or buyer beware, in circumstances where a building defect is obvious upon inspection. In other words if a defect is plain to be seen it will be presumed that a purchaser of a property will have taken the defect into account when agreeing to pay the purchase price.
>
> [170] Counsel advise that the Australian courts have considered the issue in *Zumpano & Anor v Montagnese & Anor* [1997] 2 VR 525 where a homeowner sued his builder in respect of losses to repair numerous defects in his home and the court gave consideration as to whether the decision in *Bryan v Maloney* [1995] 182 CLR 609, was restricted to latent defects and in addition whether it was restricted to defects that impacted upon the value of the home (*Bryan v Maloney* was a landmark Australian case which marked the high water mark of the doctrine of reliance and its twin – assumption of liability – in establishing duty of care claims relating to economic loss in relation to negligent construction). The court held in *Zumpano* that the decision in *Bryan v Maloney* was clearly confined to latent defects.
>
> [171] I am aware that in the more recent case of *Leonard Charles Goulding and Anor v Robert Raymond Kirby* [2002] NSWCA 393 the New South Wales Court of Appeal refused to grant leave to appeal the decision of Certoma AJ of the New South Wales District Court where the plaintiffs claimed damages of $100,000 for economic loss based on diminution in the value of the house by reason of the condition of the negligently effected paint work which had a cosmetic function. The Court found that the defect was small and correctable by re-painting albeit at

a cost to the appellants, the factual circumstances of the case did not point to the appellants being unable to take reasonable steps for their own protection, and the Court should not attempt to extend *Bryan v Maloney* beyond cases of structural defects or defects that could not reasonably be discovered by inspection. It should be noted that the plaintiffs were aware that the house had a dampness problem at the time of purchase, they did not have a pest or building inspection report carried out before signing the contract, and one of the plaintiffs (the husband) was an experienced architect and principal of a home building company, and it was apparent from the evidence before the Court that he was aware of the problem with the paint at the time of purchase.

[172] It seems clear to me that the present case is clearly distinguishable from the Australian cases in a number of respects. Notably, the evidence in this case (as distinct from the factual circumstances in *Goulding v Kirby*) has been that there was no damage (mould and degradation of plasterboard) or dampness evident in the subfloor, at the time of Mr Smith's inspections of the property (at the end of the summer) prior to purchase. I am satisfied that the defective drainage was a latent defect, and not a patent defect that was obvious to a vulnerable and unsophisticated purchaser such as Mr Smith, and therefore did not evoke the degree of caution that it might have done from someone with Goulding's expertise. Moreover, in both *Zupano* and *Goulding*, the claims related to defects that did not affect the structural integrity of a dwelling and where there was no danger of physical damage or loss, or indefinite use of a dwelling.

11.49 I accept the conclusion of Adjudicator Green, in that it will depend upon the evidence in each case as to whether particular defects are patent or latent. In this case, I will need to consider the matter further, under the heading of Contributory Negligence. In the event that I decide that any of the defects were patent (obvious after reasonable inspection), then I will consider making a finding of contribution against the Owners.

12. THE PERRYS

12.1 The claims being made against the Perrys are based on the allegation that they were negligent. It is claimed that the Perrys owed a duty of care to the Owners, as subsequent purchasers, and that they were in breach of that duty by failing to ensure that the building work was properly carried out.

12.2 The Perrys deny these allegations, and their defence to the claims falls under three main headings. Firstly they say that they do not owe a duty of care to the Owners. Secondly, they say that, although they accept that they did pay some of the contractors directly, they are not liable for work carried out by these independent contractors. Thirdly, they say that, although they did do

some of the finishing work in and around the house this work did not cause or contribute to the leaks in this house.

No Duty of Care

12.3 Mr Bates submits that the Perrys, as owners of this property, owe no duty of care to subsequent purchasers. He says that as owners, who employed contractors to carry out building work, the Perrys did not become builders or developers and that there is no legal authority to support the claims that they owed a non-delegable duty of care to all subsequent owners for any defects in the building work.

12.4 He relies upon the judgment of Robertson J in *Mowlem & Mowlem v Young* (Tauranga High Court, AP 35/93, 20 September 1994) as authority for the proposition that just because an owner pays contractors to carry out building work for them, it does not make the owner a developer or builder.

12.5 I think that I need to consider a number of points that arise as part of my consideration about the overriding issue of whether the Perrys owe a duty of care to the Owners in this adjudication. I will consider:

- Were the Perrys developers?
- Were the Perrys builders?
- Did the Perrys control any part of the building work?

Were the Perrys Developers?

12.6 It is claimed by the Owners that the Perrys were developers, in that they owned and developed this property by arranging for the house to be built to their requirements. The Owners say that the Perrys were not only involved as the organisers of the various contractors who actually built the house, but also as persons who did some of the work, such as the exterior painting.

12.7 The reason for claiming that the Perrys were developers was that it has been held that developers have a non-delegable duty of care to subsequent owners, as outlined by Cooke J in *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 at page 240:

> The second reason, as we see it, is that the duty of Sydney [the development company] to purchasers of the flats was non-delegable. It is not easy to state clear principles about when an employer will be held liable in tort for the negligence of an independent

contractor, as witness the difference of judicial opinion in the progress through Australian Courts of *Stoneman v Lyons* (1975) 8 ALR 173. Lord Reid's observations in *Davie v New Merton Board Mills Ltd* [1959] 1 All ER 346, 367-368, in a cognate field testify to the difficulty of evolving hard-and-fast rules. In *Clerk and Lindsell on Torts* (14th ed, 1975) para 262, Professor Jolowicz says, after reviewing the authorities, that in the result it seems that no general principle can be stated and that the various types of case must be dealt with individually.

In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially – as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in *Anns* may prove of guidance on questions of non-delegable duty also. There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.

12.8 Mr Bates submits, on behalf of the Perrys, that the Perrys were normal residential property owners who engaged contractors to build a house, which was intended to be their home. He goes to some lengths to provide a definition for the term "developer", and refers to the definition in the Building Act 2004. I think that the normal understanding of the word "developer" is a person or company that carries out development work in the course of normal business. Although there was evidence that the Perrys used this dwelling as a home-stay – which I am assuming means that they rented the property or rooms on a commercial basis – I am satisfied that the Perrys did not undertake the construction of this house primarily as a commercial operation. They cannot be classified as residential property developers, and I think that it is misleading to categorise them as developers.

Were the Perrys Builders?

12.9 It is established law that builders owe a duty of care to subsequent purchasers to take reasonable care to ensure that their work complies with the standards required by the Building Code. This has been clearly established in New Zealand, and I will refer to two of the relevant cases:

- Greig J in *Lester v White* [1992] 2 NZLR 483, at pages 492-493

> The law here, so far as it is applicable to the duty of builders and of a borough council to derivative owners of land, has been well and long established and has been reaffirmed. Reference needs only to be made to *Bowen v Paramount Builders (Hamilton) Ltd* [1997] 1 NZLR 394, *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Brown v Heathcote County Council* [1986] 1 NZLR 84 to show that this is a reasoned maintained approach of local authorities, builders and others who have been involved in claims which have been settled and in conduct which has anticipated and perhaps prevented the damage which this kind of case examples.

- Tipping J in *Chase v de Groot* [1994] 1 NZLR 613 at pages 619-620

> I look first as [the Builder's] position. In this respect the law can be stated as follows:
>
> 1. The builder of a house owes a duty of care in tort to future owners.
> 2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.
> 3. The position is no different when the builder is also the owner. An owner/builder owes a like duty of care in tort to future owners.
>
> The council's position can be more simply stated, again without prejudice to the scope of its duty of care in the present case. Subject to further discussion of that point the legal principles applying are:
>
> 1. A council through its building inspector owes a duty of care in tort to future owners.
> 2. For present purposes that duty is to exercise reasonable care when inspecting the structure to ensure that it complies with the permit and all relevant provisions of the building code and bylaws.

12.10 It is claimed that the Perrys were "builders" of their own house and, as such, had a clear duty of care to all subsequent owners. This claim is based upon allegations that the Perrys were closely involved with the building work, that they employed the plasterer, roofer and tiler directly, and that they actually carried out some of the building work.

12.11 This leads me into the consideration of what is a builder? It is not suggested that Mr and Mrs Perry were actively involved doing the physical construction work (except doing painting and landscaping at the end) but it is submitted that

they were organising and controlling the work, or at least substantial parts of the work. Before I take this consideration further, I think that I need to make some findings about the actual involvement of the Perrys in this building process.

12.12 The Perrys purchased an empty section. They employed an architect to prepare designs, so that the house was planned to their own requirements. The architect applied for the Building Consent, and they then looked around for suitable builders. Mr Perry told me that he knew nothing about building, and relied on his architect to select suitable materials, nominate builders and contractors and to organise the building work. This does not entirely fit in with the evidence, as the first letter on file from Mr Lee was addressed to Glen Perry, and not to the architect, but I am not going to place too much significance on that one letter.

12.13 After a period of negotiation the Perrys entered into a contract with the Builder. At this point I am going to refer to both Island 2000 Ltd and Mr Lee as the Builder but, as I have noted earlier, I will need to determine whether Mr Lee or Island 2000 Ltd should be held to be liable for the building work.This contract was based upon the NZIA Standard Conditions of Contract (SCC1:1996). The contract sum did not include for the cost of windows and exterior doors, plastering, waterproof membranes, tiling and internal fixtures and fittings. Under rule 54 of this contract, the Perrys were entitled to enter into separate contracts for any of the work not in the Builder's contract, under the following conditions:

> 54.1 The Principal must notify the Contractor as soon as practicable of the Principal's intention to enter into separate contracts and must give the contractor all relevant information.
>
> 54.2 The Principal must make sure each separate contractor complies with the reasonable requirements of the Contractor.
>
> 54.3 The Principal must make sure each separate contractor complies with legislation.
>
> 54.4 The Contractor must co-operate with all separate contractors and co-ordinate their activities with the Contractor's work. In particular, the Contractor must allow each separate contractor to have access to the Site subject to rules 54.2 and 54.3.

54.5 The Contractor must notify the Architect about any matter that may hinder the Contract Works being properly completed as a result of a separate contract.

54.6 The Principal must:

(a) reimburse the Contractor for all the Contractor's reasonable Costs incurred because of the separate contracts; and

(b) compensate the Contractor for any expense, inconvenience, disturbance or delay caused by the separate contracts.

The reimbursement and the compensation or any time delay must be claimed by the Contractor and valued in the way stated in Section G (Variations) and Section H (Times for starting and completing the Contract Work).

54.7 The Contractor is not liable for any work done, materials or fitting supplied, damage or loss caused by the carrying out of a separate contract.

12.14 The Perrys entered into several separate contracts, including one with Coco Santana for exterior plastering and internal painting; and another with Topline Waterproofing Ltd for waterproof membranes on all roofs, decks and shower cubicles. I am satisfied that the evidence showed that these were separate contractors within the meaning of rule 54.

12.15 It was claimed that the Perrys also engaged separate contractors to carry out the foundations and site works, and in particular the concrete blockwork in the foundations to the house. I find that the concrete blockwork, although it was initially excluded from the Builder's contract, was included by way of a variation to the contract. The foundation work was organised and supervised by the Builder, as a part of the Builder's contract.

12.16 It is submitted by Mr Bates that the Owners appear to be missing the important distinction that should be made between a Head Contractor/Subcontractor scenario, and an Owner/Independent Contractor situation. In the former he concedes that a Head Contractor will be responsible for the poor performance of its subcontractors, but in the latter situation he says that no liability will exist with the owner for negligent acts of its independent contractors. He refers me to the following passage in *Hudson's Building and Engineering Contracts*, 11th edition, by I. N. Duncan Wallace:

> A contracting party will always, in the absence of express provision, be liable *in contract* to the other party for the acts or omissions of his servants or independent contractor agents while acting within the scope of their employment or authority respectively. In tort, however, while a defendant without personal negligence will be vicariously liable for the negligent acts or omissions *of his servants* while acting within the scope of their employment, the general rule is that he will not be vicariously liable in this way for those of *an independent contractor agent* while the latter is performing his contract. There are, however, a number of cases where this is not so, and where the employer of the independent contractor will nevertheless be liable in tort. It is in fact difficult to rationalise these apparent exceptions, except perhaps in terms of social policy. It has been suggested that they depend on a finding that in such cases the employer is himself in breach of a "non-delegable" duty personally owed by him to the plaintiff, but this seems a largely semantic distinction. Examples where the principal is not liable include the employment of competent motor engineers to repair a lorry, re-wiring of premises by a competent electrician, and removal of a tree adjoining a highway by a competent tree-feller.
>
> On the other hand "inherently dangerous" processes or projects, such as the burning of scrub, or the thawing out of pipes with blow-torches, have been held to be non-delegable, as also roofing work at the dividing line of a roof over adjoining houses, and main contractors may be liable for sub-contractors where danger to third parties from their operations is foreseeable (obstruction by sub-contractor's beam to highway users).

[Footnotes and references not included.]

12.17 In the process of building a house there are a number of trades that must work together to ensure that the end product is properly built. By traditional methods, a new house is built by a "builder" who employs workmen, off-site fabricators and specialist tradesmen to carry out the work. This led to the use of the terms Head Contractor, Subcontractor and Supplier to describe the contractual relationships. The owner enters into one contract with the Head Contractor, who is responsible for organising, managing, co-ordinating and supervising the complete building process.

12.18 Many houses in New Zealand are not built under such traditional methods. It has become very common for owners to employ labour-only carpenters to carry out the bulk of the work that used to be done by the builder's own labour, and to purchase materials direct. This method was initially used by group housing companies who wanted to reduce the burden of having a labour payroll, and was quickly embraced by other developers who saw it as a method of eliminating the Head Contractor margin. Of course it did not eliminate any margins, but simply re-deployed the margins and redistributed the associated

risk. It has also led to a reduction in the actual supervision provided on site, which has been to the detriment of building standards and overall quality.

12.19 Nowadays it is much more difficult to accurately define the term "builder". The boundaries of responsibility are blurred by the uncertainties created by these changes. This was reflected in the case of *Riddell v Porteous* [1999] 1 NZLR 1, when a building owner contracted with a labour-only carpenter to construct a new house. The labour-only carpenter was referred to as the "builder", although he did not pay for any of the materials, and did not organise any of the subcontractors. It was a case that was decided on the basis of its particular facts. The builder was found to be liable for the leaking deck because the Court found that he had deviated from the plans and specifications, which was a breach of the contract. Furthermore, the Court of Appeal found that the builder would also have been found liable in tort, but once again this was a finding that arose from the particular facts of the case.

12.20 As mentioned earlier, Mr Bates relies upon the judgment of Robertson J in *Mowlem* as authority for the proposition that just because an owner pays contractors to carry out building work for them, it does not make them a builder.

12.21 That case concerned a Mr Young, a chartered accountant, who built a house for himself in Tauranga in 1982. As the house was on a relatively steep property, Mr Young also constructed some substantial retaining walls to enable flat outside living courts to be formed. In 1987 Mr Young sold the property to the Mowlems, who later discovered that some of the retaining walls were failing. Substantial remedial work was carried out to stabilise the walls and the ground around them. The Mowlems sued Mr Young for the costs of the remedial work.

12.22 The case was heard in the District Court, where it was found that Mr Young did not owe a duty of care to the Mowlems, so that their claims were dismissed. The Mowlems appealed that decision. Robertson J identified the main issue as being whether Mr Young as the effective builder or constructor of the defective retaining walls had a duty of care to subsequent owners of this property. He found that Mr Young was not the builder or head contractor and accordingly was not the constructor of the retaining walls. This was a finding of fact based upon the particular circumstances of the case. In conclusion, his Honour stated that -

> This appeal can be decided on its factual position as an application of the existing law. There is nothing novel about what was going on that would lead the Court to have to consider extending boundaries in this case.

Did the Perrys Control any of the Building Work?

12.23 Under the Building Act 1991 which applied at the time when this building work was carried out, an owner must obtain a building consent for any building work carried out on the property (s.33 of the Building Act 1991). This is a legal obligation placed upon the owner of the property.

12.24 Under s.80 of the same Act, it is an offence to do building work, or permit any other person to do any building work, without a building consent, or not in accordance with the building consent. This must mean that the owner of a property has some responsibility for taking reasonable steps (or precautions) to ensure that all building work is completed in accordance with the consent and to the standards set by the Building Code. This is not quite the same situation as that which existed under the building permit regime that existed prior to the introduction of the Building Act in 1991. *Mowlem v Young* was a case that was dealing with building work done in 1983, and the new deck in *Riddell v Porteous* was constructed in 1986. Both of these were under the building permit regime.

12.25 In this particular case the Perrys entered into a contract with the Builder to carry out much of the building work. I find that the Perrys should not be liable for any defective work that may have been done by the Builder. However, should the Perrys be liable for any defects in the work carried out by the separate contractors? Clearly, in accordance with rule 54.7 of the contract (see para 12.13 above), the Builder should not be liable for any work done by these separate contractors. Mr Perry told me that the Builder was supervising the entire building project, but that is not what his contract said. Furthermore, in accordance with rule 54.3, the Perrys were responsible for making sure that any separate contractors built in accordance with the Building Code.

12.26 The Perrys decided to employ two key subcontractors as separate contractors. It was their responsibility to arrange for adequate management and supervision of these key trades. It was not in the Builder's contract, and they did not add it in as a variation to the Builder's contract. They did not organise anyone else to carry out this management and supervision role. Therefore, they must retain the responsibility for ensuring that these tradesmen carried out their work in

accordance with the building consent, and for taking reasonable steps to ensure that the work was properly done.

12.27 I think that I must conclude that it would be inaccurate to describe the Perrys as "builders" in the traditional sense, but they did have a considerable amount of control over some parts of the building work. They assumed the responsibility of organising and paying for the manufacture of aluminium windows and external doors, external plastering, application of the waterproof membranes, and the internal painting and other internal finishing work. The Perrys must therefore accept liability for any problems that arise out of these parts of the work.

Negotiated Settlement with Builder

12.28 The building contract between the Perrys and the Builder encountered stormy weather towards the end of the building work. The architect issued a Certificate of Practical Completion in May 1998, at which time the Perrys took possession and moved into the house. Under the NZIA Conditions of Contract, practical completion is when the building has reached the stage where it can be reasonably used, although some work of a minor nature may still remain to be completed.

12.29 After practical completion there is a defects liability period, often referred to as a maintenance period. During the defects liability period the Builder must return and rectify any defects found in his work and he must do this at his own cost. It is important to note that practical completion does not mean total completion of the building work, and does not mean that a Code Compliance Certificate ("CCC") will be issued immediately.

12.30 The Builder was not responsible for obtaining a CCC on this project, athough all work done by the Builder had to comply with the requirements of the Building Code. The Perrys had taken responsibility for organising and paying for some trades (as I have already mentioned), and until those trades had properly completed their work the Council could not, and would not, issue the CCC.

12.31 The disputes between the Perrys and the Builder dragged on into 1999, well after the defects liability period had finished. The Perrys employed a building consultant to prepare a list of defective or incomplete work, whilst the Builder was reluctant to return to site to do anything as he considered that payments

for many items had not been made. This stand-off continued until May 2000, when they managed to reach a final settlement. The background to the agreement was explained as:

> 1. Certain disputes have arisen between the parties in relation to the work undertaken at 67 Crescent Road, Waiheke Island pursuant to the construction contract of 23 September 1997.
>
> 2. For the purposes of settling disputes arising from the agreement and as detailed in the reports and all correspondence, the parties wish to enter into an agreement in writing setting out the terms upon which those differences have been settled.

12.32 The Agreement was for the Builder to pay the Perrys $9,000.00 provided that the Perrys provided the necessary information for the Builder's insurance company. This payment and co-operation was a Final Settlement:

> This agreement shall be in full and final satisfaction of all rights that each may have against the other in Law, equity or otherwise howsoever, in respect of the disputes referred to in Clauses 1 and 2 of the background to the agreement.

12.33 As at the date of this settlement, there were a number of items that the Perrys had claimed were defective or incomplete. These items were in lists that had been exchanged between the parties in 1998 and 1999. There are references to three items that are relevant to this adjudication.

(i) Ventilation underneath house – non-existent, and is required on both sides;

(ii) Drainage to road – not completed – end of drainage pipe exposed halfway down slope;

(iii) The Perrys have piled up soil against side of house, to the extent that bearers are underground.

Code Compliance Certificate

12.34 The Perrys did not apply for a Code Compliance Certificate until June 2001. It is my understanding that the Perrys were aware that the Council would not be able to issue the CCC until all work shown on the building consent drawings had been completed. One obvious omission was that there were no handrails or balustrades of suitable heights around some of the decks.

12.35 When the Perrys wanted to sell the property, it became necessary to get the CCC. They asked the Council to carry out a final inspection, and this resulted in the Council writing them a letter, dated 6 July 2001. It identified a number of matters that needed to be resolved before a CCC could be issued. I think that the letter is of sufficient significance to be quoted:

> As requested a final inspection of the works on the above building consent was carried out on the 27th June 2001.
>
> This inspection revealed the following items that will need to be resolved before the issue of a Code Compliance Certificate:
>
> - Handrail to all stairs inside.
> - Safety from falling barriers to decks, and all areas of the building from where a person could fall more than one metre, including stairs.
> - Provide an accurate 'As Built' drainage plan.
> - Engineer's observation for the installation of the effluent treatment plant and disposal field.
> - Confirmation that a suitable maintenance programme is in place for the treatment plant.
> - The plaster cladding system has cracks in it. It has become apparent that cracks in the plaster systems can be a major cause of leaking. Council needs to be shown that your cladding system is waterproof. There are various ways of repairing cracked plaster systems, and we suggest that you get expert technical advice on this problem. It would be helpful if the repairer gives the Council a written report on the remedial work, and how it will enable the cladding to meet the requirements of the Building Code B1, Durability and E2 External Moisture.
> - Ground levels at the rear of the house are less than the required 150mm below the finished floor level. Please show how you intend to keep the building dry and prevent moisture being absorbed into the cladding from the ground. Again, I suggest that you get expert advice on this matter.
>
> Please contact inspection booking staff when the required work has been completed, telephone 372 5905 to arrange a re-inspection to finalise the above work. **Note:** the consent plans must be available for the inspection.

12.36 A further item was raised by the Council concerning the collection of potable water from the decks. The Council did not like drinking water to be collected from trafficable decks for health reasons. The Perrys were asked to resolve this problem with a Council engineer. Council eventually accepted the situation and wrote to the Perrys on 30 November 2001 to that effect.

12.37 By this time the Perrys had entered into a sale and purchase agreement with the Norgates, but it was conditional upon obtaining a CCC. The resolution of the potable water problem was one of the last matters to be solved, but as it has not contributed in any way to the leaks I do not need to mention the matter again.

12.38 Following on from the Council's letter of 6 July 2001, there was an exchange of correspondence and meetings between the Perrys, the architect and the Council. At least two contractors carried out work on the property – Manic Drainage and Stylex Ltd (the twelfth respondent in this adjudication).

12.39 A brief summary of what was done or provided in response to each matter raised in the Council's July letter follows:

- Handrails to internal stairs. These were provided and fixed by the Perrys, and have no ongoing significance.

- Handrails/balustrades to external stairs and decks. These were manufactured and fitted by Stylex Ltd. It is alleged that there are leaks through some of the fixing points of these handrails/balustrades.

- 'As Built' drainage plan. The architect provided the 'as built' plan.

- Effluent plant and field. The architect confirmed that the effluent fields had been installed in accordance with the engineer's design and report details.

- Suitable maintenance programme. This appears to also have been provided by the architect.

- Plaster cracking – this is reviewed in detail below.

- Ground levels around house – this is reviewed in detail below.

12.40 **Plaster Cracking** As can be seen from the Council's letter of 6 July, the building inspector was concerned about the cracks in the exterior plaster. Mr Perry discussed the letter with Mr Jessop and asked him to help satisfy Council. This resulted in Mr Jessop writing to the Council on 31 October 2001, and sending in a Producer Statement for the exterior stucco.

12.41 This Producer Statement stated that it was issued by Santana Plasterers and confirmed that all exterior solid plaster stucco surfaces were completed in accordance with the building consent, complied with the Building Code, and had been installed in accordance with NZS 4251: Part 1: 1998. It appeared to be signed by Coco Santana, whose address was given as "no longer in NZ."

12.42 The document was a sham. It was filled in by Mr Jessop because the plasterer was no longer available. Although I am satisfied that Mr Jessop did think that the plasterer had done a good job, and that his work probably did comply with all the requirements and it was therefore acceptable to prepare this document, it was a misleading document to produce.

12.43 In the letter that accompanied this Producer Statement, Mr Jessop made the following comments about the plaster:

> - <u>Plaster</u>
>
> The plaster cladding system has been applied to code and in the parapet area where I'm told there are minor cracks. It has a reinforced fibreglass bandage which has been wrapped fully over the top and down the face 200mm to protect against any water penetration.
>
> The system applied at the time was that similar to a Jaydex membrane systems and was requested by this office.

12.44 This did not satisfy Mr Gregerson, who telephoned Mr Jessop about one week later. According to Mr Jessop's note to Mr Perry, Mr Gregersen was not happy with the Producer Statement and explanation about waterproofing. He considered that the only way of getting a CCC would be to clean out the cracks and repair them. Mr Jessop told Mr Perry to get a plasterer back to carry out these repairs.

12.45 Mr Perry did not carry out any repairs, but obtained a report from a Mr Culbert of Creative Cladding, Plastering Services. The report read:

> To whom it may concern,
>
> After inspecting the solid plastering of the Perry Residence I am confident that the workmanship is of a very high standard. I find no cause for concern where cracking in plaster is visable, as this is normal for (stucko) solid plastering over timber frame structures.

> I am happy that from information recieved from Mr Perry, all parapit areas have been well tanked (waterproofed) before plastering commensed, making these areas functional.
>
> Should any more info be required please call me on 372 6736.

12.46 The Council accepted this as being sufficient, and proceeded to issue the CCC. Obviously, I will need to address liability of Council at a later stage in this Determination, but I do find it extraordinary that the cracks in the plaster were allowed to be forgotten under these circumstances.

12.47 The Perrys were told that the cracks in the plaster were a problem and needed to be repaired. They did not repair them. They say that they were told by the architect and a professional plasterer that the cracks were normal and of no concern. Although I think that they were given bad advice on this matter, they were entitled to accept and believe these opinions.

12.48 **Ground Levels around House** Mr Perry told me that he had left this problem to be solved by Manic Drainage, and claimed to have no knowledge of how the matter had finally been resolved. From the evidence given to me, I am satisfied that the ground levels were not reduced, but a slot drain was installed along a section of wall at the rear of the house. This slot drain was intended to prevent water collecting at the base of the wall, but in the way in which it was installed it was not very effective.

12.49 Mr Gregersen, the building inspector who carried out all of the inspections at this time, cannot clearly recollect exactly what was said on site. This is not particularly surprising as it was over five years ago, and Mr Gregersen would have visited hundreds of sites since this one. He told me that the use of small plastic slot drains to divert water away from external walls was a reasonably common detail at that time. He does not think that it would have been his suggestion, because he usually points out the problems and leaves the builders or owners to come up with suggestions.

12.50 According to the evidence, Mr Gregersen was still not happy with the ground levels, or drainage around the rear of the building on 12 November 2001. On that date Mr Jessop wrote to Mr Perry saying that he had spoken with Mr Gregersen about a drain:

> Drain Standard building practice NZS3604 states that the plaster or hardibacker should not go into the ground. The ground level should be 150 mm below the finished floor. Although a drain has gone in he requires that the ground and plaster issue be resolved also. In short you may need a builder back.

The drain that Mr Jessop was referring to was a sub-soil drain. Although Mr Jessop was under the impression that the sub-soil drain had been installed, I find that he was wrong. No evidence of a sub-soil drain was found around the back of the building.

12.51 I am not able to conclude, for certain, what caused Mr Gregersen to change his mind and accept the situation at the rear of the building. There was no sub-soil or field tile drain run around the rear of the house, although there should have been some form of drainage in place. The plaster was taken below ground level, and the differential between internal floor level and outside ground levels was less than the minimal requirement. The slot drain only ran for about one third of the rear wall, and was not installed in a manner that would work properly, being higher than the adjacent ground.

12.52 The Perrys were aware of the problem, and must have known that little remedial work had been carried out to alleviate the problem. I am not convinced that Mr Perry knew as little as he told me about the situation at the rear of his house, but the Council did eventually accept the work and issued the CCC.

Liability for Particular Defects

12.53 I have found that the Perrys do have liability to subsequent purchasers for defects in certain parts of the work over which they exercised control. It is now necessary to review the leaks that have caused damage to the building to ascertain whether the Perrys should be held liable for any or all of these leaks.

12.54 **Level 1 blockwork** (locations 1 and 2A) - $914.80 + $8,610.26 = $9,525.06
I have found that this leak was caused by the change from blockwork to timber framing which was not waterproofed, and also by pouring the concrete steps against the plaster cladding.

12.55 The Perrys were not directly associated with the change from blockwork to timber framing. They may have benefited financially, because the blockwork would probably have been more expensive, but I am not convinced that the

Perrys had any part in the decision to make the change. It was a change made by the Builder and with the approval of the Architect.

12.56 The concrete steps were formed and poured by the Builder who was following the drawings. The Perrys had no part in this work and should have no liability for the leaks that occurred in this north-west corner of the entry.

12.57 **Level 2, under dining room** (location 3) - $332.66
I have found that this leak was caused by an open joint in the foundation wall. This is not a matter for which the Perrys would have any liability, being a latent defect in the Builder's work, which was not discovered until mid 2004 when the WHRS Assessor carried out his inspection.

12.58 **Ventilation to sub-floor areas** (location 4) - $7,235.27
The Perrys were aware of this problem from mid 1998 onwards. They were claiming that the Builder was responsible for this defect and that the Builder should fix it at its own cost. When the Perrys settled all disputes with the Builder in May 2000, they accepted the responsibility of rectifying all notified defects. This included the lack of ventilation to the sub-floor areas.

12.59 I find that the Perrys were in breach of their duty of care to the Owners when they failed to rectify this known defect.

12.60 **South side by Bedroom 2** (location 5A, 5B and 5C) - $14,840.52 + $9,893.68 + $6,752.92 + $1,688.23 = $33,175.34
I have found that these leaks were caused by the change from blockwork to timber framing, extending the stucco below ground level, and leakage from the downpipe system.

12.61 I have already decided that the changes from blockwork foundation (location 5A) walls to timber framing was not a matter in which the Perrys should have any liability. However, they did build up the ground at the base of the stucco (location 5B) and this has played a significant part in the damage caused in this part of the house. They were aware, or should have been aware after being told about this problem, that their actions would be causing damage to the building. I find that the Perrys were in breach of their duty of care to subsequent owners as they firstly carried out work that was contrary to the Building Code (backfilling against the building) and secondly did not take steps

to properly correct the problem when they had been made aware of the situation.

12.62 The third cause of leaks and damage was the absence of overflows in the rainwater heads, and leaks in the sealed downpipe system (location 5C). These were defects in the work done by the Builder, but were not known to be defects at the time when the Perrys settled with the Builder, or applied for a CCC. I find that the Perrys have no liability for these problems.

12.63 **Deck to Living room** (location 6) - $27,610.46
I have found that the main causes of the leaks in this area were the inadequate step-down between the internal floor level and the deck, and the inadequate falls across the deck. However, I have also mentioned that there must be problems with the integrity of the waterproofing membrane, because water was getting either through or around the membrane into the timber framing.

12.64 I have found that the Perrys were responsible for ensuring that the waterproofing contractor carried out his work in accordance with the building consent, and the Perrys were responsible for taking reasonable steps to ensure that the waterproofing work was properly done. The waterproofing contractor should have queried the amount of the step-down – which was inconsistent with some of the information on the consent drawings, and was inadequate to prevent water being driven under the door-frames. The waterproofing contractor should also have questioned the inadequate falls. The Perrys did nothing to check that the waterproofing contractor was doing the work properly, and they failed to exercise an adequate level of supervision in relation to these two critical matters. The fact that they may not have appreciated the significance of these matters is no defence, because they elected to take on the responsibility of supervision and cannot call on ignorance as a justification for failing to properly supervise these matters.

12.65 I find that the Perrys were in breach of their duty of care to the Owners when they allowed the deck upstand and falls to be finished in the way in which it was done.

12.66 **Pergola Posts** (location 7A) - $42,482.70

I have found that these leaks have been caused by a failure to properly seal around the post penetrations, and a general failure of the waterproofing membrane on the top surfaces of the balustrade and seat.

12.67 The waterproofing contractor was instructed to seal around the posts, and sent in an invoice for carrying out this work. Furthermore, the evidence indicates that the membrane has probably failed because of application and workmanship problems. I have found that the Perrys were responsible for taking reasonable steps to ensure that the waterproofing work was properly done. They must bear the responsibility for these failures.

12.68 I find that the Perrys were in breach of their duty of care to the Owners when they allowed the waterproofing around the posts, and to the top surfaces of the balustrade and seat to be completed in the way in which it was done.

12.69 **Parapets and balustrade nibs** (location 9) - $116,482.21

I have found that the main causes of these leaks were the flat top surface to the parapets and nibs and the cracks that developed in the plaster; a general failure of the waterproofing membrane, probably as a result of application or workmanship deficiencies; and the consequential cracking caused by the swelling of damp timber framing.

12.70 These failings have largely been caused by defects in the work carried out by the plasterer and the waterproofing contractor. The Perrys were responsible for taking reasonable steps to ensure that both these contractors did their work properly, and in accordance with the Building Consent. The defects are widespread and indicate a general failure by both of these contractors to do their work properly. The Perrys must bear responsibility for these failures, and I find that the Perrys were in breach of their duty of care to the Owners.

12.71 **Stucco below ground** (location 10) - $56,389.11

I have found that the cause of the leaks in these locations was that the outside ground levels were too high in relation to the internal floor levels; that the stucco was taken below ground level; and that there was inadequate subsoil drainage to carry the water away from these areas. However, the inadequate drainage would not have caused the damage if the other two defects had not been present.

12.72 The Perrys were aware of the problems caused by backfilling too much around the outside walls of the house. The matter was raised when they were attempting to resolve their disputes with the Builder. It was also raised by the Council when the Perrys applied for a CCC in 2001.

12.73 Most of the work outside the building itself was not included in the Builder's contract. The Perrys did most of the site work and landscaping around the house. They either did, or were responsible for engaging others to do, the retaining walls and the paving around the back of the house. The amount of backfilling against the walls of the house was, therefore, under the control of the Perrys.

12.74 The Perrys must take responsibility for creating the situation of excessive backfilling, or having ground levels that were too high around this part of the house. I am satisfied that they were aware of the potential problems that could be caused by not taking action to correct the problems. They did take some corrective measures, but they were not enough. I find that the Perrys were in breach of their duty of care to the Owners.

12.75 **Cracking in stucco** (location 11) - $87,077.36

I have found that the cracking and general deterioration in the stucco was initially caused by the absence of control joints, and then accelerated by swelling of the timber framing.

12.76 It would normally be the responsibility of the Builder to create the main horizontal and vertical control joints, by installing break-lines in the substrate or flashings.

12.77 The Perrys employed the plasterer direct, and I have found that they were responsible for ensuring that the plasterer carried out his work in accordance with the building consent, and for taking reasonable steps to ensure that the plastering work was properly done. The failure to install control joints was a fundamental defect, which should have been picked up by a supervising person. The Perrys failed to exercise an adequate level of supervision in relating to the plastering work and I find that they were in breach of their duty of care to the Owners.

Conclusion

12.78 I find that the Perrys were negligent in the manner in which they carried out work, or allowed work to be carried out, on this property and thereby they were in breach of their duty of care that they owed to the Owners. Their negligence has led to water penetration and resultant damage to the following extent.

Ventilation to sub-floor areas (location 4)	$ 7,235.27
South side by Bedroom 2 (location 5B)	9,893.68
Deck to living room (location 6)	27,610.46
Pergola posts (location 7A)	42,482.70
Parapets and balustrade nibs (location 9)	116,482.21
Stucco taken below ground (location 10)	56,389.11
Cracking in stucco (location 11)	87,077.36
General damages (paragraph 7.8)	5,000.00
Proportion of interest (paragraph 9.5)	3,280.90
	$ 355,451.69

13. JESSOP ARCHITECTS LTD

13.1 The only reason that a valid claim could be made against Jessop Architects Ltd, whom I will call "JAL", must stem from the letter dated 31 October 2001 addressed to the Council. This letter was on the letterhead of JAL and signed by Darren Jessop as a director of the company.

13.2 JAL was a company that was first incorporated and listed on the Companies Register on 31 July 2001. Mr Jessop told me that he had formed this company in 1999, but I have no other evidence to show that it was operational until 2001. Furthermore, I cannot see that it could have started trading properly until it had been incorporated. Mr Jessop is the sole director of the company and the major shareholder.

13.3 It is claimed by the Owners that JAL represented to the Council that the building was fit for the issue of a CCC as the items listed in the Council's letter of July 2001 had been completed.

13.4 When the Perrys had applied to the Council for a CCC the Council visited the property and issued its letter of 6 July 2001. The contents of this letter have already been recited in paragraph 12.35 of this Determination. Mr Perry then

contacted Mr Jessop for assistance in answering some of the matters raised by the Council.

13.5 Mr Perry thought that he had sent a copy of the Council's letter to Mr Jessop. Mr Jessop told me that he did not see the actual letter, but worked from the details given to him by Mr Perry over the telephone. As a result of these discussions, Mr Jessop wrote a letter to the Council, on JAL letterhead, dated 31 October 2001. The letter read:

> RE: YC/97/01785 67 Crescent Road East, Waiheke
> In response to your letter to G & L Perry on 6th July 2001 regarding the outstanding issues to resolve the code of compliance I have been asked as the architect at the time (no supervision took place, only observation when on site) to make comment to your points in this letter.
>
> The client has taken care of the issues in your letter and attached relevant information/producer statements and carried out work required.
>
> The builder at the time Mr Bernie Lee employed various sub trades included in our list but some have either passed away or now gone abroad therefore details are listed.
>
> - Producer Statements and relevant forms attached
>   Key tradesman list.
>   Stucco P.S.
>   As Built Drainage plan
>   As built effluent layout and
>   Riley consultants report
>   Maintenance report
>
> - Drainage
>   The effluent fields designed by Riley consultants have indeed been installed as per the plans and specifications. They have been installed by a qualified drainage contractor. Copies attached for your information of as built.
>
> - Plaster
>   The plaster cladding system has been applied to code and in the parapet area where I'm told there are minor cracks. It has a reinforced fibreglass bandage which has been wrapped fully over the top and down the face 200 mm to protect against any water penetration.
>   The system applied at the time was that similar to a Jaydex membrane systems and was requested by this office.

- <u>Decks/Tank water</u>
  In our experience this is not uncommon to have the water from the roof areas discharge into the tank for house hold use. We also have a filter at both the tank outlet and the tap in the kitchen to satisfy health issues.

Regards
Jessop Architects

"D Jessop"

Darren Jessop
Director

13.6 I would note that, after the Council had telephoned Mr Jessop in early November 2001, Mr Jessop wrote back by facsimile on 12 November under the letterhead of Jessop Townsend Architects and not JAL. I think that this is a relevant detail in the resolution of the claim against JAL but, before I take that matter further, I do need to go backwards in time.

13.7 When the Perrys had decided to build on this property on Waiheke Island in 1996, they approached Mr Jessop for assistance. As a result of their discussions they engaged Jessop Townsend Ltd (called "JTL") to prepare designs and later to provide architectural services during construction. JTL was a company incorporated in April 1994 by Mr Darren Jessop and Mr Peter Townsend. They were the only two directors of this company, and each of them looked after their own projects, sharing the staff and overhead costs between them. The Perry house was one of Mr Jessop's projects, so that it was he who organised the design work, and then supervised the architectural services during construction.

13.8 JTL sent in fifteen invoices to the Perrys for architectural work. The first invoice was dated 31 July 1996, and the last invoice was dated 13 July 1999. Mr Jessop and JTL were not involved in the final negotiations with the Builder, which led to the settlement between the Perrys and the Builder in June 2000.

13.9 Mr Jessop told me that he and Mr Townsend had decided to stop working together in early 2001, and this led to Mr Jessop setting up a new company, JAL, that was incorporated in July 2001. He says that JTL slowly wound down its operations until it stopped trading in September 2001. This company was struck off the Companies Register on 1 September 2004.

13.10 When Mr Perry telephoned Mr Jessop to help reply to the Council's July 2001 letter, Mr Jessop was operating from the offices in Parnell of his newly formed company, JAL. He says that he mistakenly used the JAL letterhead when he wrote to the Council on 31 October 2001. He was not asked why he used Jessop Townsend Architects letterhead in November 2001, but Mr Sullivan made the submission that this showed clearly that Mr Jessop had realised that any discussions or correspondence on this job should be carried on in the name of JTL.

13.11 I am satisfied that Mr Jessop wrote the October 2001 letter as a person rather than as JAL. The letter starts off being written in the first person singular when he says "... I have been asked as the architect at the time ...". Thereafter, he varies between first person singular and plural, almost as if he cannot decide which it should be.

13.12 It is my conclusion that this letter was a letter written by Mr Jessop in his capacity as an architect involved with this building project. There was no evidence to show that JTL assigned the project to JAL, and no evidence to show that JAL had been engaged by the Perrys to carry out additional services. The evidence is that Mr Perry was asking Mr Jessop for help to complete work that would normally have been done in 1998. By saying that, I do not mean that Mr Jessop had failed or forgotten to do the work, but that he had been unable to complete his architectural work in 1998 because the Perrys had not arranged for the completion of the construction work. Therefore, the assistance that Mr Jessop was providing was the final touches to the architectural services work started in 1996 – by JTL.

13.13 The next letter written by Mr Jessop at the end of 2001 was the facsimile to Council dated 12 November. As already mentioned, this was on the letterhead of the hitherto unknown partnership of Jessop Townsend Architects, which was not JTL nor JAL. Without wishing to be unkind, I think that this shows that Mr Jessop was not giving a lot of attention to the notepaper on which he was sending out his correspondence. This gives support to my conclusion that the letters of 31 October and 12 November 2001 were from Mr Jessop as a person and not JAL, and could well have been in his personal capacity. I may need to return to this point later in this Determination, but at this stage it is sufficient for me to conclude that the 31 October letter was not intended to be a view or

statement from JAL, but from an architect who had been involved on this building project.

13.14 As I have found that these letters written by Mr Jessop in October and November 2001 were not letters written on behalf of JAL or by JAL, the claims against JAL must fail.

14. THE ARCHITECT – DARREN JESSOP

14.1 The Owners are claiming that Mr Jessop was the architect who was responsible for the design and overseeing the construction of this house. They claim that he was negligent in a number of matters, and thus he was in breach of his duty of care to subsequent owners. This negligence, they say, had led to the losses that they are claiming in this adjudication.

14.2 The claims being made against Mr Jessop are that:

- there were design deficiencies and/or insufficient detail in the plans, which contributed to the problems that were encountered during the construction period;

- he allowed changes to be introduced as variations which caused some of the leaks and damage;

- he failed to draw attention to construction defects that would have been noticed during his site visits;

- he misrepresented the situation to the Council when he confirmed that the work had been properly built, and that the outstanding remedial work had been undertaken.

14.3 The matters that I will need to consider are:

- the liability of architects or design professionals to subsequent owners;
- the liability of company directors;
- the extent of work carried out by the architect;
- the extent of work carried out by Mr Jessop.

14.4 I have already reviewed the background facts as to who, or which company, carried out the architectural services for the construction of this house. The Perrys engaged Jessop Townsend Ltd ("JTL") to prepare the designs, to prepare the documentation for building consent and to provide "on demand" services during construction. Mr Jessop was the principal in charge of this job.

Liability of architects to subsequent owners

14.5 It is my understanding that Mr Sullivan (on behalf of Mr Jessop) accepted that, as a general principle, architects working on residential projects owed a duty of care to subsequent owners. I think that this is a matter of settled law in New Zealand, as held by Richmond P in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, on pp 406 and 407:

> Quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work. This general principle was recognised in *A C Billings & Sons Ltd v Riden* [1958] AC 240; [1957] 3 All ER 1.
>
> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty to the owner. Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties. As regards this latter point it is, for example, obvious that a builder who agreed to build a house in a manner which he knows or ought to know will prove a source of danger to third parties cannot say, in answer to a claim by third parties, that he did all that the owner of the land required him to do. Nevertheless the nature of the contractual duties may have considerable relevance in deciding whether or not the builder was negligent. In relation to a claim made against an architect, Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 put the matter in the following way:
>
>> "... neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it."

14.6 I do accept that the architect's contract is relevant to the extent of his duty of care to others, as this prescribed the task that he had been contracted to

perform. I will consider the extent of work done by the architect on this project later in this Determination.

Liability of Company Directors

14.7 Mr Sullivan submits that the position of Mr Jessop as a company director must also be specifically considered. He says that there is a general public acceptance that when dealing with a company you are not dealing with an individual. Whilst this may be relevant to any cross-claims made by some of the respondents, I do not see this being a relevant consideration when deciding the claims being made by the Owners against Mr Jessop. The Owners had no dealings with either Mr Jessop or JTL, and their claim against Mr Jessop is for breach of his duty of care to subsequent purchasers. It is not a claim made against Mr Jessop in his capacity of a company director, it is a claim being made against Mr Jessop in his personal capacity.

14.8 Mr Sullivan has referred to the current benchmark case of *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, and submits that the legal principles arising from this case can be summarised as follows:

> 5.14.1 There is a presumption that, it is the company which is solely liable for the torts of its directors.
>
> 5.14.2 It would take clear evidence and *"special circumstances"* to displace this basic premise and impose a personal duty of care on a director.
>
> 5.14.3 To find a director personally liable, there must at least be an assumption of responsibility, actual or imputed. This may depend on the facts of the specific case and the degree of implicit assumption of responsibility, but it remains for the claimant to show that such a duty was clearly intended.

14.9 He then refers me to *Drillien v Tubberty* (Auckland High Court CIV 2004-404-2873, Faire AJ 15 February 2005) which, he says, sets out the current approach to directors' liability:

> First, where the liability of directors for breach of a personal duty of care in negligence is at issue, whether there has been a personal assumption of responsibility has particular prominence as the focus of enquiry, as held in *Trevor Ivory.* This extends to cases involving directors' liability for defective buildings. (para [41])
>
> Secondly, the case law subsequent to *Trevor Ivory …* has affirmed personal assumption of responsibility as a requirement of directors' personal liability in respect to a variety of duties of care. (para [42])

> Assumption of responsibility in negligent construction cases in respect of the task undertaken, is not, by itself sufficient to ground liability. There must be something further as was explained by Glazebrook J in *Rolls Royce* at [100]. (para [43])

14.10 In reply to this submission, Mr Bates and Ms Bambury have responded by referring to the judgment in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548. It is submitted that our Courts have accepted that the actual tort feasor can be held responsible for losses suffered by a plaintiff either independently or additionally in relation to the company that employed the tort feasor. In *Morton* Hardie Boys J found directors personally liable as joint tort feasors despite the fact that they were directors of a limited liability company. On page 593:

> *Liability of the directors*
>
> The principle of limited liability protects shareholders and not directors, and a director is as responsible for his own torts as any other servant or agent (see for example *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep 596, 619). His liability to the person injured is personal, and unaffected by any right of indemnity he may have against the company.

14.11 And then further on page 594:

> Directors play different roles in different companies. Where there are several directors, none of them exercising managerial functions, it would be most unlikely that any one of them exercises a controlling role, so that liability in tort would be unlikely to arise except on a collective basis in the kind of situation to which Lord Buckmaster referred. On the other hand it may be very different where one of the directors is also the chief executive, or where the company is no more than an incorporated trader, or small partnership, and the directors exercise managerial control themselves.
>
> Recent developments in the law of negligence show that it is wrong to categorise, to seek to fit the facts of a given case into a particular factual category.

14.12 And, finally, on page 595:

> The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control.

14.13 I have also been referred to the judgment of Speight J in *Callaghan v Robert Ronayne Ltd* (1979) 1 NZCPR 98, p 105:

> Perhaps because the plaintiff was apprehensive of the financial position of the first defendant (the building company), the second defendants have all been sued, they being the sole directors and sole shareholders of the company. As I understand the pleading it is suggested that these persons are individually liable by virtue of the same acts or omissions (and they are principally omissions) as involved the first defendant. The position is that an employer is liable to a plaintiff in tort on the basis of *respondeat superior* for the tortious acts of employees. Obviously the employee can be personally liable though in practice it is more worthwhile to sue the employer. There is no reason why the same principle should not apply with respect to directors who, in the course of acting on behalf of the company, have personally breached a duty of care owed by them to other persons by virtue of their own personal activity. It is not, however, by virtue of their status as directors but by virtue of their personal actions that such situations arise.

14.14 Mr Bates submits that individuals are responsible for their own torts despite the fact that the individual may be a director of a company, or a manager, or an employee. He refers to the decision of Christiansen AJ in *Carter v Auckland City Council* (Auckland High Court, CIV 2004-404-2192, 11 October 2004), which considered a strike-out application by Mr Bawden, who was a director of the company that carried out a building development, and also was a director of a company that was the labour-only contractor. At paragraph 33 Christiansen AJ says:

> In a company where there are several directors, none of them exercising managerial functions, it would be most unlikely that any of them exercises a controlling role and therefore liability in tort would unlikely arise. The position would be different and liability could arise where-
>
> > ... one of the directors is also the Chief Executive, or where the company is no more than an incorporated trader, or a small partnership, and the directors exercise managerial control themselves: *Morton* p (595)
>
> Obviously in that case it is people who have to and do do their company's acts. It is the fact of control, however derived, that underlies the duty of care owed by a person. Whether or not a person in that position was exercising a control is a question to be determined upon an analysis of the facts.

14.15 Mr Bawden failed in his strike-out application, and Mr Bates says that for the same reasons it must be held that Mr Jessop was involved in this project to the

extent that he must attract personal liability. I will return to this matter when I consider the extent of Mr Jessop's involvement in this project.

14.16 The legal position that is contained in the judgments to which I have been referred can, it seems to me, be summarised as follows.

(i) Where a company gives negligent advice and acts solely through its director in doing so and it is made clear to the other contracting party that it is only the company that is giving the advice and there is no representation of personal involvement of the director, it is only the company that can be held liable to that other contracting party at a substantive hearing (***Trevor Ivory***).

(ii) However, the facts may show that there has been an assumption of responsibility by an individual acting on behalf of the company (***Trevor Ivory***).

(iii) In construction cases directors of a company may owe a duty of care independently of the company and may be liable in negligence if they had some involvement in matters of construction giving rise to the owner's claims (***Morton; Callaghan***).

(iv) The fact that the company may be vicariously liable for the negligence of its employees/agents does not relieve those employees/agents from personal liability if the appropriate level of duty of care is established and that person is shown to have acted negligently (***Callaghan***).

(v) The assumption of responsibility for a statement or task, in which a respondent is found to have failed to exercise reasonable care, and it is foreseeable that the owner will rely on that statement or task, creates an assumption of legal responsibility and, subject to any countervailing policy factors, a duty of care will arise; or where it is "fair, just and reasonable" to do so, the law will deem a respondent to have assumed responsibility; but this depends on a combination of factors including assumption of responsibility, vulnerability of the owners, special skill of the respondent, the need for deterrence and promotion of professional standards and lack of alternative means of protection (***Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd***, [2005] 1 NZLR 324).

Extent of work carried out by the Architect

14.17 The original proposal by JTL for architectural services was for a "full service" option. This included sketch design and resource consent documentation; developed design and building consent documentation; tendering, contract administration including site observation, and all work done by the architect under NZIA SCC1 Standard Conditions of Contract.

14.18 The Perrys decided that they did not want the architect on full service, so a reduced fee was negotiated which included all design work and resource and building consent documentation. Any further work was to be charged at an hourly rate. Regarding this further work, it was anticipated that it would include tendering and building contract negotiations, answering site queries, certifying progress payments, administering variations and issuing completion certificates.

14.19 By and large, JTL carried out and invoiced for all of the services that were anticipated at the beginning of the project. It completed a full set of documents for both resource consent and building consent, building contracts and for construction work. It then provided post-contract services by answering the builders' queries, certifying progress payments, issuing variation and completion certificates.

14.20 It is important to note that the Architect was not engaged to supervise construction work, attend the site at regular intervals or to act in a project management role. However, for an architect to issue payment certificates and completion certificates, I think that it can be reasonably assumed that the architect must have taken the appropriate steps to ensure that these certificates were correct when they were issued.

Extent of work carried out by Mr Jessop

14.21 Mr Jessop told me that he was responsible for the sketch designs and overall planning of the building, but the actual drawing work was carried out by Thomas Zell and Stephen Crooks. This is supported by the initials marked on the working drawings, as sheets 1-7 are drawn by "TZ", sheet 9 is drawn by "SC", and the two structural drawings S1 and S2 are drawn by Chris Rose (an engineer).

14.22 I have been provided with copies of the fee accounts submitted by JTL to the Perrys. These show that most of the tender documents and negotiations were handled by Stephen Crooks (29.25 hours), with some time from Mr Jessop (3.75 hours). Therefore, up to the time that the construction started on site, Mr Jessop's involvement was predominantly on initial design and overseeing his staff.

14.23 After work started on site, Mr Jessop's time increased until, at the stage of substantial completion in May 1998, he was the only person from JTL working on this project. Mr Jessop was the person who signed the Certificates of Payment and the Certificate of Practical Completion. Furthermore, as already mentioned, Mr Jessop was the person who wrote the letter to Council (31 October 2001) and was involved in the period up to the issuing of the CCC.

Personal Liability of Mr Jessop

14.24 It is submitted by Mr Bates that Mr Jessop was named as the Architect in the building contract between the Perrys and the Builder and this must make him personally liable for any acts of negligence whilst carrying out this role. I do not think that it is quite that straightforward, but it certainly is supportive of the argument that Mr Jessop could well have assumed personal liability by accepting that he personally was required to carry out certain administrative tasks under the contract.

14.25 Having carefully listened to the evidence, I am satisfied that in this building project Mr Jessop was not closely enough involved in the preparation of the building consent documentation so as to attract any personal liability. Therefore, I would dismiss any claims against Mr Jessop for design deficiencies and/or insufficient details in the plans.

14.26 His role during the construction phase was not so remote, and I find that he owed a duty to subsequent owners of the property to use reasonable care to ensure that his advice and recommendations were not negligently given. Was he negligent and, if so, did his negligence cause any leaks in this dwelling? To answer that question I will need to review each leak location.

Liability for Particular Defects

14.27 **Level 1 blockwork** (locations 1 and 2A) - $914.80 + $8,610.26 = $9,525.06

I have found that this leak was caused by the change from blockwork to timber framing which was not waterproofed, and also by pouring the concrete steps against the plaster cladding.

14.28 Mr Jessop was aware of the request to change some of the block walls to timber framing, and he had approved the change. However, I am satisfied that he did not give approval to using timber framing as a retaining wall. He approved the substitution, provided that the timber-framing wall was always kept well above adjacent ground levels.

14.29 The problem arose in this area when it came to constructing the steps around the northern side of the entry. These were always shown as being in the builder's contract, but had been left to the end of the job before they were poured. There are sketches in facsimiles sent to the Builder in May 1998, but these were prepared on the assumption that the external walls at this point were in blockwork. I do not see that the instruction to proceed to pour these steps was negligent, bearing in mind that Mr Jessop was on site infrequently and he would not have been able to readily appreciate the limits of the substituted timber framing. The exterior plaster would look the same, regardless of the differing substrate materials, and all inside walls were lined with gibraltar board.

14.30 I do not find that Mr Jessop was negligent in his failure to notice that the steps were going to be poured against a timber-framed wall, and will dismiss these claims against him.

14.31 **Level 2, under dining room** (location 3) - $332.66

I have found that this leak was caused by an open joint in the foundation wall. This would not have been readily visible to Mr Jessop and I would not have expected him to notice this during his final inspection.

14.32 **Ventilation to sub-floor area** (location 4) - $7,235.27

This problem was identified during the construction period, and Mr Jessop had instructed the Builder to rectify the lack of ventilation. The defect still existed when the Perrys entered into their settlement with the Builder. However, Mr Jessop had not been involved in the project after July 1999.

14.33 The contract that JTL had with the Perrys did not place any obligations on JTL to be pro-active during the construction period. Other than issuing the Certificates for Payment and Practical Completion, JTL's role was reactive. Mr Jessop knew that the Perrys were aware of the lack of ventilation to the sub-floor areas. It was up to the Perrys to get the Builder to fix this defect, or to fix it themselves.

14.34 This problem was not raised by the Council in July 2001, and I do not see it as being Mr Jessop's duty to check whether the problem has been properly solved. I will dismiss this claim against Mr Jessop.

14.35 **South side by Bedroom 2** (locations 5A, 5B and 5C) - $14,840.52 + $9,893.68 + $6,752.92 + $1,688.23 = $33,175.34
I have found that there were four reasons for these leaks involving the change from blockwork to timber framing, extending the stucco below ground level and leakage from the downpipe system and rainwater heads.

14.36 The change from blockwork to timber framing was approved by Mr Jessop, but he did not approve the omission of the blockwork right down to foundation level. This may not have been a matter that he would have noticed on his infrequent visits, but he should have picked it up prior to issuing his Certificate of Practical Completion. It was negligent not to have noticed this unauthorised change, and it was capable of being seen during a final inspection.

14.37 I am satisfied that the extension of the stucco below ground level in this part of the building may not have been visible at his final inspection in May 1998, as it was probably done by the Perrys subsequently. It was noticed later, but Mr Jessop had no part in deciding who should correct this problem, or how it should be corrected.

14.38 As far as the downpipe system is concerned, Mr Jessop could not have reasonably known that there were leaks, and he had given instructions to the Builder regarding the overflows. I do not find that he was negligent by failing to check this relatively minor detail during his inspection for Practical Completion.

14.39 **Deck to Living Room** (location 6) - $27,610.46
I have found that the main causes of these leaks were the inadequate step-down between the internal floor level and the deck, and the inadequate falls across the deck.

14.40 There was an ambiguity in the information shown on the drawings, and this ambiguity was the main reason why the step-down and falls were inadequate. Mr Jessop did not draw these drawings, and I have no evidence to show that Mr Jessop checked them, or should have checked them. I appreciate that there are submissions to the effect that Mr Jessop, as the supervising principal of this project, should accept the responsibility for ensuring that the documentation prepared in his office was accurate. However, in the absence of evidence, it would be speculative to impose a liability on Mr Jessop in this instance.

14.41 Mr Jessop did not notice that there were problems with this deck when he carried out his final inspection. I think that he should have noticed these inadequacies at that stage, and yet he signed the Certificate of Practical Completion without taking any steps to ask the Builder to remedy the problems. Step-downs at decks and around the building, and falls or other methods of making sure water is carried away from the buildings, should be high up on the list of matters to be checked during an inspection for Practical Completion. It was negligent not to have noticed these inadequacies.

14.42 **Pergola Posts** (location 7A) - $42,482.70
I have found that these leaks were caused by a failure to properly seal around the post penetrations, as well as a general failure of the waterproofing membrane on the top surfaces of the balustrade and seat.

14.43 Mr Jessop was asked by the Builder how to seal around the posts, and he gave a generalised answer that did not really tell the Builder how to solve this detail. Initially, Mr Jessop understood that the posts were supported by a bracket, and it was the leg of the bracket that penetrated the top of the balustrade. However, I have found that the evidence shows that Mr Jessop was aware that the railway sleepers did penetrate the plaster.

14.44 Mr Jessop took no further action after telling the Builder to use a flashing, if needed, and lots of silicone sealant. It was Mr Jessop's job to answer site queries. It must be assumed that the answers should be helpful, rather than

vague. Site queries are usually asked only when a builder has a difficulty or a problem. They seek either clarifications or further detail. In this case the answer was unhelpful. Mr Jessop must have noticed the way these posts penetrated the plaster when he carried out his final inspection, but he took no action.

14.45 I find that Mr Jessop was negligent in the manner in which he handled this known problem, and that this negligence has led to substantial damage in the building. However, I do not think that he should be responsible for the general failure of the waterproof membrane on the top surfaces of the balustrade and seat. I would assess that the damage caused by the post penetrations has accounted for about 75% of the damage, and that Mr Jessop's liability should be 75% of $42,482.70, or $31,862.03.

14.46 **Parapets and Balustrade Nibs** (location 9) - $116,487.21
I have found that the main causes of the leaks was the flat top surface, and the cracks that developed; a general failure of the waterproofing membrane; and the consequential cracking caused by swollen timber.

14.47 The architectural drawings showed a flat top to all parapets. I have found that Mr Jessop cannot be held liable for the drawings and specifications. Even if I had found that Mr Jessop had prepared the drawings, I would not have found that it was negligent in 1996 to have a flat top to the parapet where a waterproof membrane was applied over the top of the parapets. It may have been considered undesirable by some professionals, but the expert evidence was that it would not have been considered to be a detail that was bound to fail.

14.48 The cracks that developed across or around the top of the parapets tends to suggest that the plaster mix may have been too rich, or some other workmanship failing such as inadequate curing. Mr Jessop was not employed to supervise and, as it would be unlikely that he would be on site enough, he would not have been in a position to notice these deficiencies. Likewise, he would not have been present on site to see whether the waterproofing membrane was properly applied, or whether the plasterer fixed his mesh by stapling through the membrane.

14.49 On 31 October 2001 Mr Jessop wrote to the Council, and I have already quoted the contents of his letter in paragraph 13.5 of this Determination. I have found that he filled in and sent to the Council a Producer Statement for the stucco that was a sham. He told the Council that the plaster cladding system had been applied to code, although he had not been on site enough to be able to give this assurance. I have no hesitation in concluding that this letter was misleading, and was designed to be misleading. Mr Jessop may have thought that the work had been properly done, but he had no justification for making such statements that were founded on hearsay.

14.50 It is perhaps fortunate for Mr Jessop that it appears that the Council did not rely upon his misleading assurances. In a memorandum to Mr Perry on 12 November 2001, Mr Jessop said that he had had a telephone call from the Council's building inspector which recorded:

> "Plaster cracks. He is not happy and sees only one solution to getting a CCC is to clean out cracks and repair. Too many houses on island have leaks, you will need to get a plasterer back and repair paint."

14.51 On balance, I find that the Council did not rely upon these assurances from Mr Jessop, as it sought further information or assurances from the Perrys – and was given them. I also dismiss any claims by the Owners against Mr Jessop for this misleading letter, as the evidence is that there is no casual link between this letter and the damages caused by the leaks. The Owners had offered to buy this property before they saw Mr Jessop's letter on the Council's files, so they cannot say that they relied upon this letter in any way.

14.52 **Stucco below Ground** (location 10) - $56,389.11
I have found that the cause of these leaks was that the outside ground levels were too high in relation to the internal floor levels.

14.53 This problem was identified by the Council's building inspector in June 2001. Mr Jessop wrote to Mr Perry in November 2001 and confirmed that the stucco should not go into the ground, and outside ground levels should be at least 150 mm below finished floor levels. He told Mr Perry to get a builder back to fix this problem.

14.54 There has been no negligence on the part of Mr Jessop. The consent documents (that Mr Jessop did not prepare) said that stucco must be finished

with a drip mould above ground levels, and stated the minimum allowable differences between finished floor levels and outside ground levels. Mr Jessop's subsequent advice was correct.

14.55 **Cracking in Stucco** (location 11) - $87,077.36

I have found that the cracking and general deterioration in the stucco was initially caused by the absence of control joints.

14.56 Mr Jessop issued a Certificate of Practical Completion, which stated that the building work had reached substantial completion. The exterior plasterwork or stucco had been completed. The control joints would have been visible at this stage as the stucco was a two-coat plaster job. Mr Jessop should have noticed that the stucco had been applied with no control joints.

14.57 Control joints are important and I would expect an architect to check for these joints when doing a final inspection. If an architect were on full service I would expect this sort of omission to be noticed prior to the final inspection, but Mr Jessop did not carry out full service work. He visited infrequently, but that would mean that his final inspection should have been more thorough, and taken longer to complete.

14.58 I find that Mr Jessop was negligent in this matter and was in breach of his duty of care to the Owners.

Conclusion

14.59 I find that Mr Jessop was negligent in the manner in which he carried out his work as an architect on this project, and therefore was in breach of his duty of care that he owed to the Owners. His negligence has led to water penetration and resultant damage to the following extent:

South side by Bedroom 2 (location 5A)		$ 14,840.52
Deck to Living room (location 6)		27,610.46
Pergola posts (location 7A)	75%	31,862.03
Cracking in stucco (location 11)		87,077.36
General damages (paragraph 7.8)		5,000.00
Proportion of interest (paragraph 9.5)		1,525.20
		$ 167,915.57

15. THE BUILDER

15.1 The Owners are claiming that Mr Lee is personally liable for the leaks in their house and say that the use of the company, Island 2000 Ltd, was a belated attempt by Mr Lee to divert liability away from himself. I will return to the matter of whether Mr Lee, or Island 2000 Ltd, or both should bear some responsibility for the defects in this house in a moment. Firstly, however, I need to determine whether the Builder owes a duty of care to subsequent owners.

15.2 The Owners say that it has long been established in New Zealand that the builder of a house owes a duty of care in tort to future owners, and they refer me to the decision of Greig J in *Lester v White* [1992] 2 NZLR 483 at pages 492-3, which I have already quoted in paragraph 12.9 in this Determination.

15.3 15.3 They say that this was reinforced by Tipping J in *Chase v de Groot* [1994] 1 NZLR 613 at pages 619-620, which I have also already quoted in paragraph 12.9 above.

15.4 I accept that these submissions correctly state the current position in New Zealand, which is that all those who build houses owe a duty of care to subsequent owners.

Was Island 2000 Ltd the Builder?

15.5 The parties to this adjudication do not agree about the identity of the builder, nor do they agree on who was the 'Contractor' in the building contract with the Perrys. Ms Grupen submits that it is clear that Island 2000 Ltd was the contracting party, whilst the Owners and several of the respondents have made contrary submissions.

15.6 The contract documents were based on NZIA SCC1, which is a widely used comprehensive standard building contract, and one would imagine that this would leave no doubt as to the identity of the contracting parties. The documents were prepared and put together by the Architect and sent firstly to the Perrys, and then to the Builder for signing. However, before I draw any conclusions I will cover the essential facts.

15.7 In correspondence up to the signing of the contract, the Builder used a letterhead showing "Island 2000 41 O'Brien Road Waiheke", the letters were

signed "Yours faithfully, Bernie Lee". However, costing sheets were also provided showing the build-up of the quotation, and this showed that it had been prepared by Island 2000 Ltd.

15.8 The contract documents show the following details:

- The cover sheet to the contract was filled in as:
  The Contractor: B Lee

- The Contract Agreement sheet, Addendum B shows that:
  This Contract is between G & L Perry
  and Bernie Lee of Island 2000

- The signature on the Contract Agreement sheet:
  Signed by the Contractor ... Bernie Lee

- Specific Conditions of Contract, Addendum A
  Contractor's name ... Bernie Lee
  However, Mr Lee added the words "Island 2000 Ltd" above his name, and initialled the change. It was never initialled by the Perrys.

15.9 The Perrys did not accept that Island 2000 Ltd was the Contractor until the settlement discussions in mid 2000. However, as a part of the settlement it appears that they accepted that the company was the Contractor, rather than Mr Lee.

15.10 Having looked at all the documentary evidence to which I was referred, there are relatively few occasions when the parties have used the word "Limited" after Island 2000. Obviously, the contract agreement between the Perrys and the Builder should provide a clear answer to the question as to who was the contracting party. As I have indicated in the reference made above, the contract gives a confusing reply. However, I think that this can be possibly explained by reviewing matters outside the contract documents.

15.11 As I have already mentioned, the letterhead paper used by the Builder from June 1997 until mid 1999 was the same, with "Island 2000" written above a circular stylised palm tree motif. It had the physical address, telephone, fax and mobile numbers and the email address. The letters were always signed by

Mr Lee above his name "Bernie Lee"; no mention of a limited liability company, and no reference to Mr Lee acting as a director of a company.

15.12 The Architect addressed all correspondence to Bernie Lee. All Certificates of Payment were made out to the contractor as "Island 2000". The Certificate of Practical Completion was made out in the name of "Island 2000". In fact, I could find not one single document from the Architect that indicated that the contractor was anyone other than Bernie Lee of Island 2000.

15.13 One can, as they say, count the number of references to a limited liability company on the fingers of one hand. There were:

- Costing schedule – included as a contract document – prepared on an electronic spreadsheet – which is marked as "Prepared by Island 2000 Ltd". A curious feature is that the "Ltd" is in a different font from the rest of the spreadsheet.
- One letter from the Perrys, in November 1997, is addressed to Island 2000 Ltd.
- Two receipts issued by Island 2000 Ltd to G Perry.
- The Deed of Agreement in July 2000, when the Perrys and the Builder recorded their full and final settlement.

15.14 I am in no doubt that Mr Lee intended that his company would be the contracting party, and I think that he had altered the contract sufficiently to make that point clear. Although the Perrys do not appear to have initialled the change from B Lee to Island 2000 Ltd, I am satisfied that Mr Perry at least was aware that the contract was with the company. That was why he addressed the November 1997 letter to the company.

15.15 Mr Jessop always considered Mr Lee to be the contractor. He had drawn up the contract with Mr Lee as the contractor, and I think that he considered Island 2000 to be simply a trading name. He would address correspondence and Certificates to "Bernie Lee of Island 2000".

15.16 However, I am satisfied that the two contracting parties, that is the Perrys and the Builder, were both aware that the Builder (or Contractor) was the limited liability company of Island 2000 Ltd.

15.17 It was submitted by Mr Bates, on behalf of the Perrys, that ss. 21 and 25 of the Companies Act 1993 state that a limited liability company must use the word "limited" in its name, and must ensure that its proper name is clearly stated in every written communication and legal document. The purpose of these sections in the Companies Act is to ensure that those who deal with limited liability companies must know that they are trading with such companies. In this case, I am satisfied that the party (the Perrys) who was trading with the company knew that it was trading with a limited liability company when they entered into the building contract. In my view, it does not matter that the parties then relaxed the formalities, by using Christian names or shortened names.

15.18 The Owners raised, during cross-examination, a question as to whether the company of Island 2000 Ltd had acted outside the terms of its constitution, and whether a certain Mr Thompson was authorised to sign the settlement agreement with the Perrys. I allowed the question, and I allowed further documentation to be produced relating to the constitution and records of Island 2000 Ltd. Ms Grupen, in her closing submissions, says that her application for an adjournment for time to consider this new "claim" was refused. I think that I may not have been as clear with my directions as I could have been, as I did not see this question by Mr Hawken being elevated to the status of a new claim by the Owners. It was for this reason that I advised Ms Grupen that she did not need to spend any further time considering her reply.

15.19 This adjudication is about the Owners' claims for damages caused by leaks, against a number of respondents. The Owners' claim against Mr Lee is because they say he was the builder. The Perrys applied to have the company of Island 2000 Ltd joined, and as there was an arguable case that Island 2000 Ltd may also be found to have some liability, I allowed the joinder application. If the Owners had wished to make a claim that Island 2000 Ltd could not be held liable on the grounds that it has acted improperly or illegally, then they should have raised the claim well before the hearing. They knew the rules that were set down for this adjudication, or should have known the rules, as they were written down in the *Guidance Notes* attached to Procedural Order No 1, and had been repeated by me on several occasions.

15.20 In his closing submissions for the Owners Mr Hawken made the comment that:

> The company has never had 4 Directors as required by its Constitution and has never been properly constituted. It could not enter contracts particularly major transactions as a separate legal entity and could not settle any claims with the First Respondent.

15.21 If this was intended to signal a new item of claim, then I will not be allowing its introduction at such a late stage in this adjudication. I do appreciate Ms Grupen's concern, but I think that she has mentioned a more extensive and articulate claim in her closing submissions than was outlined by Mr Hawken at the hearing. I accept that little hard evidence was produced to support the allegations of impropriety, improper conduct or unconstitutional actions, there was no such evidence produced when witness statements and documents were exchanged prior to the hearing. I am proceeding on the basis that Island 2000 Ltd was a properly constituted and run small building company that was entitled to enter into a building contract with the Perrys. Furthermore, I find that there was nothing improper about it entering into a legally binding, full and final settlement with the Perrys in July 2000.

15.22 Having reached the conclusion that Island 2000 Ltd was the contracting party with the Perrys, it must follow that this company was the builder of this house. I will now address each of the leak locations and decide whether the company has any liability for the leaks and the consequential damage.

Liability for Particular Defects

15.23 **Level 1 blockwork** (locations 1 and 2A) - $914.80 + $8,610.26 = $9,525.06
I have found that this leak was caused by the change from blockwork to timber framing which was not waterproofed, and also by pouring the concrete steps against the plaster cladding.

15.24 The suggestion that some of the blockwork could be changed from blockwork to timber framing came from the Builder. I understand that it was a suggestion that was believed would save money, but it would be of no financial benefit to the Builder as the saving would be passed on to the Perrys. The extent of the substitution was decided by the Builder on site.

15.25 When the Builder came to pour the steps at the north-west corner, it knew that they were to be poured adjacent to a section of timber-framed wall. Mr Lee told me that a gap had been left between the end of the steps and the plaster. I am not convinced that the gap was an adequate precaution, particularly as there was no waterproofing on the wall. The Builder knew this. I find that the

Builder was negligent in the way in which the steps were poured, and this has caused the damage in this location.

15.26 **Level 2, under dining room** (location 3) - $332.66

I have found that this leak was caused by an open joint in the foundation wall. This was a small defect in the work done by the Builder, and it should have been sealed properly to prevent water from entering the sub-floor area. I find that the Builder was negligent in this matter.

15.27 **Ventilation to sub-floor area** (location 4) - $7,235.27

This problem was identified during the construction period, and Mr Jessop had instructed the Builder to rectify the lack of ventilation. The defect still existed when the Perrys entered into their settlement with the Builder.

15.28 It was a term of the settlement between the Perrys and the Builder that the Perrys accepted the responsibility for rectifying all notified defects, which included the lack of ventilation to the sub-floor areas. However, it was negligent of the Builder to fail to provide proper sub-floor ventilation, and this was a breach of the Builder's duty to subsequent owners of the property. The fact that the Builder had entered into an agreement with someone else to fix this defect does not alter the Builder's liability to the Owners.

15.29 I find that the Owners' claim against the Builder for the damages caused by this defect should be allowed. I appreciate that the Builder will be entitled to claim full indemnity from the Perrys, and I will address that matter in the section on contribution between respondents.

15.30 **South side by Bedroom 2** (locations 5A, 5B and 5C) - $14,840.52 + $9,893.68 + $6,752.92 + $1,688.23 = $33,175.34

I have found that there were four reasons for these leaks involving the change from blockwork to timber framing, extending the stucco below ground level and leakage from the downpipe system and rainwater heads.

15.31 I have already decided that the changes from blockwork foundation walls to timber framing (location 5A) was done at the instigation and under the control of the Builder. It was negligent to omit a section of the foundation footing without engineer's approval, and it was negligent to carry the stucco down over the skant timber framing that spanned between the piles.

15.32 The Builder did not backfill soil against this section of stucco, although it did take the stucco down close to the ground levels. I do not find that the Builder was negligent in this matter (location 5B), as it was known that the Perrys were to carry out landscaping or paving around the building. If the ground had been left as the Builder had left it, this damage would probably not have occurred.

15.33 The third cause of leaks and damage was the absence of overflows in the rainwater heads, and leaks in the sealed downpipe system (location 5C). These were defects in the work done by the Builder, and I find that the Builder was negligent in these matters.

15.34 **Deck to Living Room** (location 6) - $27,610.46
I have found that the main causes of these leaks were the inadequate step-down between the internal floor level and the deck, and the inadequate falls across the deck.

15.35 The Builder constructed the step-down and laid the substrate for the deck, so that both of these problems resulted from work done by the Builder. I have already mentioned the ambiguity in the information shown on the drawings, but that does not relieve the Builder from its responsibility to build in accordance with the Building Code. I find that the Builder was negligent in the manner in which it carried out this work.

15.36 **Pergola Posts** (location 7A) - $42,482.70
I have found that these leaks were caused by a failure to properly seal around the post penetrations, as well as a general failure of the waterproofing membrane on the top surfaces of the balustrade and seat.

15.37 The Builder did identify the problem of sealing around the posts and asked the Architect for a detail. It was told that the waterproofing contractor should do it. I have already considered the Perrys' responsibility for work done by the 'separate contractors', in paragraphs 12.13 to 12.27 above. I found that the Builder should not be liable for any work done by these separate contractors (pursuant to clause 54.7 of the building contract), although the Builder was required to co-operate with all separate contractors and co-ordinate their activities with the Builder's own work.

15.38 The leaks in the location have resulted from deficiencies in the work carried out by the waterproofing contractor, and I find that the Builder should not be held responsible for the consequential damage.

15.39 **Parapets and Balustrade Nibs** (location 9) - $116,487.21
I have found that the main causes of the leaks was the flat top surface, and the cracks that developed; a general failure of the waterproofing membrane; and the consequential cracking caused by swollen timber.

15.40 These failings have largely been caused by defects in the work carried out by the plasterer and the waterproofing contractor. Both of these trades were separate contractors and I have found that the Builder should not be held liable for any defects in their work. The claims against the Builder for these defects will be dismissed.

15.41 **Stucco below Ground** (location 10) - $56,389.11
I have found that the cause of these leaks was that the outside ground levels were too high in relation to the internal floor levels, and that the stucco was taken below ground level.

15.42 Most of the work outside the building itself was not included in the Builder's contract, as the Perrys did most of the site work and landscaping around the house. The ground levels around the rear of the house would have been finalised after the construction of the timber retaining walls. These were built after the Builder had left the site.

15.43 It has been submitted that the Builder fixed the Hardibacker, and this was taken below ground level. I have looked at earlier photographs taken during construction, and I do not find that this was so. I find that the claims against the Builder for the leaks in this location must fail.

15.44 **Cracking in Stucco** (location 11) - $88,077.36
I have found that the cracking and general deterioration in the stucco was initially caused by the absence of control joints, and then accelerated by the swelling of the timber framing.

15.45 The formation of control joints is the joint responsibility of the builder and the plasterer. Normally, the main horizontal and vertical control joints are created

by the trade that fixed the substrate backing sheets. In this case that was the Builder. However, they can be formed by purpose made beads or flashings installed by either the builder or the plasterer. It was the Builder's responsibility to co-operate and co-ordinate with the plasterer, and the Builder cannot simply stand back and blame the plasterer for the complete absence of control joints.

15.46 I find that the Builder was negligent in this matter and should be held liable to the Owners for the consequential damage.

Conclusion

15.47 I find that Island 2000 Ltd was negligent in the manner in which it carried out its work as the company carrying out the building work on this project, and therefore was in breach of its duty of care that it owed to the Owners. Its negligence has led to water penetration and resultant damage to the following extent:

Level 1 blockwork (locations 1 and 2A)	$ 9,525.07
Level 2, under Dining room (location 3)	332.66
Ventilation to sub-floor areas (location 4)	7,235.27
South side by Bedroom 2 (locations 5A and 5C)	23,281.67
Deck to Living room (location 6)	27,610.46
Cracking in stucco (location 11)	87,077.36
General damages (paragraph 7.8)	5,000.00
Proportion of interest (paragraph 9.5)	1,465.40
	$ 161,527.88

Is Mr Lee personally Liable?

15.48 Ms Grupen submits that Mr Lee should have been removed as a party from this adjudication at the time when Island 2000 Ltd was joined. She says that the only reason that Mr Lee was not removed at that time was on the basis that there may have been some confusion due to material on Council's files indicating that Mr Lee may have been the builder.

15.49 Mr Bates takes issue with this in his reply submissions. He says that the reason Mr Lee remained a party was that claims were being made against Mr Lee in his personal capacity. Even if it was found that the Builder was the company, then it was quite foreseeable that Mr Lee had been so close to the construction work

that he may attract personal liability on the basis of the *Morton* and *Trevor Ivory* decisions.

15.50 I think that Mr Bates is correct. The claims against Mr Lee are for liability for his own negligence. There may have been some comments in the Owners' claims about reliance upon material in the Council's files, but the fundamental claims are not based upon reliance.

15.51 Ms Bambury submits that Mr Lee's responsibility arises as a result of his personal involvement in the events that could be said to have given rise to the Owners' losses. It does not arise from his role as a director of Island 2000 Ltd.

15.52 Mr Bates submits that Mr Lee was involved on this project as the builder and not as a company director. He says that to claim that Mr Lee was on site only as a company director is a convenient and somewhat strained description of his role. He submits that Mr Lee was in a similar situation to Mr Bawden in *Carter v Auckland City Council*, a case to which I referred when considering the Architect's liability. Mr Bates points out that, like Mr Bawden, Mr Lee was constantly on site; selected, co-ordinated, supervised and arranged payment for the subcontractors; selected merchants and ordered materials; liaised with the Council for inspection; and generally was in complete control of the building process.

15.53 The case law cited in my consideration of the liability of company directors of the architect's company equally apply to Mr Lee and Island 2000 Ltd. Therefore, I see no need to repeat them again here.

15.54 The evidence strongly supports the conclusion that Mr Lee was the person who was in control of the work being undertaken by the Builder. It was Mr Lee who organised all the labour, materials and subcontractors for the work, and was personally involved on site for most of the work. He owed a duty to subsequent owners of this property to use reasonable care in his work and in his supervision of others directly under his control.

15.55 As I have found that Mr Lee was in control of all of the work being done by the Builder, it must follow that my findings on liability for each of the leak locations for the Builder will be the same for Mr Lee. Therefore, I do not need to repeat

paragraphs 15.23 to 15.46, but I will adopt those findings as being applicable to Mr Lee.

Conclusion

15.56 I find that Mr Lee was negligent in the manner in which he carried out or supervised the building work on this project, and therefore was in breach of his duty of care that he owed to the Owners. His negligence has led to water penetration and resultant damage to the following extent:

Level 1 blockwork (locations 1 and 2A)	$ 9,525.07
Level 2, under Dining room (location 3)	332.66
Ventilation to sub-floor areas (location 4)	7,235.27
South side by Bedroom 2 (locations 5A and 5C)	23,281.67
Deck to Living room (location 6)	27,610.46
Cracking in stucco (location 11)	87,077.36
General damages (paragraph 7.8)	5,000.00
Proportion of interest (paragraph 9.5)	1,465.40
	$ 161,527.88

16. THE PLASTERER – COCO SANTANA

16.1 The Owners claim that Mr Santana was negligent in a number of ways, and that his negligence has led to a number of leaks in the house. Mr Santana took no part in this adjudication. He did not file a Response to the adjudication claim, he did not participate in any of the preliminary conferences and he did not attend the hearing or site inspection.

16.2 Mr Santana was joined as a respondent in this adjudication on the application from Mr Bates (on behalf of the Perrys) on 3 March 2005 – refer Procedural Order No 5. I was advised that Mr Santana was the person employed to carry out the external plastering work and the interior plastering work. Mr Perry showed me a copy of his quotation dated 6 February 1998, which became an agreement and was signed by both Mr Perry and Mr Santana.

16.3 I am aware that Mr Santana was served with the documents on 10 March 2005 in Pakuranga, Auckland, and this was confirmed when WHRS received a letter from Mr Goddard of Duggan & Murphy dated 29 March 2005. Mr Goddard stated that he was instructed to represent Mr Santana. However, only a week later, WHRS received another letter from Mr Goddard saying that

> "We advised by our letter of 29 March that we had been instructed by the 11th respondent, Mr Coco Santana. We must now advise that Mr Santana has elected to take no steps in the proceeding, and we are accordingly without instructions.
>
> "Effectively we are no longer acting. Please advise the other respondents and their representatives accordingly, and remove this firm's name for [sic] your mailing lists in relation to this claim."

16.4 All documentation has continued to be sent to Mr Santana and I am advised by the Case Manager that she has spoken with him on approximately four occasions on the telephone, the last time being on 1 August 2005. I am satisfied that Mr Santana has been given every opportunity to participate in this adjudication, but has decided to remain silent. It is unfortunate that I have not been given his side of the story, as I would have appreciated his views on the reasons for the problems with the stucco.

16.5 A plasterer owes a duty of care to all subsequent owners of a property in the same way that the builder does. Mr Santana had a duty to exercise reasonable skill and care when carrying out his work on this dwelling, and if he breached that duty by failing to properly carry out his plastering work, he will be liable for any damages that flow from that breach.

16.6 **Level 1 blockwork** (locations 1 and 2A) - \$914.80 + \$8,610.26 = \$9,525.06
I have found that this leak was caused by the change from blockwork to timber framing which was not waterproofed, and also by pouring the concrete steps against the plaster cladding. This is not a problem caused by the plastering, and Mr Santana has no liability for the damage.

16.7 **Level 2, under dining room** (location 3) - \$332.66
I have found that this leak was caused by an open joint in the foundation wall. This is not matter for which Mr Santana would have any liability, being a latent defect in the Builder's work.

16.8 **Ventilation to sub-floor areas** (location 4) - \$7,235.27
The Perrys were aware of this problem from mid 1998 onwards. The absence of ventilation is not a matter for which Mr Santana would have any liability.

16.9 **South side by Bedroom 2** (location 5A, 5B and 5C) = \$14,840.52 + \$9,893.68 + \$6,752.92 + \$1,688.23 = \$33,175.34

I have found that these leaks were caused by the change from blockwork to timber framing, extending the stucco below ground level, and leakage from the downpipe system. This is not a problem caused by the plastering and Mr Santana has no liability for these damages. He did not carry the plaster below ground level as this situation was created when material was backfilled.

16.10 **Deck to Living room** (location 6) - $27,610.46
I have found that the main causes of the leaks in this area were the inadequate step-down between the internal floor level and the deck, and the inadequate falls across the deck. Once again, this is not a problem caused by the plastering or Mr Santana, and he has no liability for the damage.

16.11 **Pergola Posts** (location 7A) - $42,482.70
I have found that these leaks have been caused by a failure to properly seal around the post penetrations, and a general failure of the waterproofing membrane on the top surfaces of the balustrade and seat. There was no evidence to show that these leaks were caused by problems with the stucco. None of the experts has given any opinions that would lead me to conclude that Mr Santana should have some liability for these leaks. I will dismiss the claims against Mr Santana for the damage caused by these leaks.

16.12 **Parapets and balustrade nibs** (location 9) - $116,482.21
I have found that the main causes of these leaks were the flat top surface to the parapets and nibs and the cracks that developed in the plaster; a general failure of the waterproofing membrane, probably as a result of application or workmanship deficiencies; and the consequential cracking caused by the swelling of damp timber framing.

16.13 Mr Santana should have known that flat top parapets and nibs in these exposed situations were not in accordance with BRANZ recommendations in *Good Stucco Practice*. The specifications required all plastering work to comply with these recommendations (refer Specification PO1:3101). Furthermore, the extent of the cracking in the stucco strongly suggests a failure to cure in accordance with Specification PO1:3151 – protect with wet hessian for four days, and so on.

16.14 The failings in the parapets and nibs have been caused by workmanship problems with the solid plaster, and Mr Santana is responsible for creating these problems. I find that he was negligent in the manner in which he applied

the plaster, particularly in these areas, and that this negligence has caused these leaks.

16.15 **Stucco below ground** (location 10) - $56,389.11
I have found that the cause of the leaks in these locations was that the outside ground levels were too high in relation to the internal floor levels; and that the stucco was taken below ground level.

16.16 The main problem is that the final ground levels were too high, rather than the stucco taken too low. If the backfilling and paving had been kept to 150 mm or more below internal floor levels, there would probably have been no permanent damage caused to the framing. However, the decision to install the small slot drain, rather than remove the soil, did cause moisture to soak up the plaster. A water stop (or flashing) should have been cut into the plaster at this stage, to prevent ground water soaking up the plaster. Mr Santana was not involved with this work (in October 2001).

16.17 I cannot find that Mr Santana was negligent in taking the plaster down to the levels that he did, as they were not below ground at that stage. I will dismiss these claims against him.

16.18 **Cracking in stucco** (location 11) - $87,077.36
I have found that the cracking and general deterioration in the stucco was initially caused by the absence of control joints, and then accelerated by the swelling of the timber framing. It is the joint responsibility of the builder and the plasterer to form the control joints, as some of these should be formed by creating break-lines in the substrate, or by installing flashings. A plasterer should not carry on with his work if inadequate control joints have been created by the builder.

16.19 Control joints were a requirement in the Specification by way of NZS 4251 and the BRANZ *Good Stucco Practice*. Mr Santana should have installed, or made sure that the Builder had formed, adequate horizontal and vertical control joints. It was negligent to have omitted them, and I find that he was in breach of his duty of care to the Owners.

Conclusion

16.19 I find that Mr Santana was negligent in the manner in which he carried out his work on this property and thereby he was in breach of his duty of care that he owed to the Owners. His negligence had led to water penetration and resultant damage to the following extent.

Parapets and balustrade nibs (location 9)	$ 116,482.21
Cracking in stucco (location 11)	87,077.36
General damages (paragraph 7.8)	5,000.00
Proportion of interest (paragraph 9.5)	1,923.72
	$ 210,483.29

17. STYLEX LTD

17.1 The Owners are claiming that the balustrades that were supplied and installed by Stylex Ltd (called "Stylex") were defectively installed, thus causing damage to the parapet framing and below.

17.2 It is accepted by the Owners that their claims against Stylex are restricted to the alleged leaks from around the bolts holding down the base plates to the balustrades. I considered these claims in section 5.21 of this Determination, under location No 12. It was my conclusion that it had not been shown that these balustrade fixings were causing leaks into the building.

17.3 This must mean that the claims against Stylex must fail.

18. AUCKLAND CITY COUNCIL

18.1 The Owners are claiming that the Council was negligent in that it failed to properly carry out its duties and responsibilities under the Building Act 1991, and that these failures resulted in the defective construction of the house.

18.2 They have provided details of the matters in which they say the Council was negligent, but I think that these can be summarised under the following headings.

(i) The Council failed to ascertain that the work shown in the plans and specifications provided for a building consent would meet the requirements of the Building Code – more particularly that there were inadequate details of requisite waterproofing measures.

(ii) The Council failed to carry out inspections in such a manner as to ensure that the building work was done in accordance with the building consent.

(iii) The Council failed to enforce the provisions of the Building Code and regulations, as required by s.24(e) of the Building Act 1991;

(iv) The Council failed to properly inspect and check that its own requisitions listed in July 2001 had been met, but proceeded to issue the Code Compliance Certificate ("CCC") for a non-compliant building that was already leaking.

18.3 I will be addressing all of the particular allegations when I consider each separate leak location, so that it is unnecessary to recite them all at this point in my Determination. However, some of the claims will not be addressed, as they either relate to defects that have not resulted in leaks, or are outside the jurisdiction of WHRS. For example, the Owners are claiming that the Council was negligent in not insisting on the treatment of potable water collected from trafficable deck areas. This is a claim that is not associated with leaks, and is outside my jurisdiction. Other claims which are not specifically mentioned are, therefore, dismissed for these reasons.

18.4 The Owners allege that the Council failed to detect alterations to the plans provided for building consent and allowed variations to the building that did not comply with the Building Code, trade practice or plain common-sense. They have listed a number of these items which have contributed to water ingress, and say that these were not small oversights, but amounted to gross negligence on the part of the Council, which suggests incompetence.

18.5 It is my understanding that it was now well established in New Zealand that both those who build houses, and those who inspect the building work, have a duty of care to both the building owners and to subsequent purchasers.

18.6 This has been established, not only by the cases that I have mentioned when considering the Builder's liability (see paragraphs 15.2 and 15.3 above), but also by court cases such as:

- Cooke P in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, at p 519

> A main point is that, whatever may be the position in the United Kingdom, homeowners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the byelaws. Casey J illuminates this aspect in his judgment in this case. The linked concepts of reliance and control have underlain New Zealand case law in this field from *Bowen* onwards.

- Greig J in *Stieller v Porirua City Council* [1983] NZLR 628, at p 635

> The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonable, prudent Council will do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect which can cause very substantial damage to a building. This as I have said is not a question of foundations but rather of the exterior finishing and materials.

Does *Hamlin* Apply?

18.7 Ms Bambury has made extensive submissions that this case does not come within the ratio of the *Hamlin* decisions, so that the Owners cannot rely upon *Hamlin* decisions to show that the Council owes them a duty of care. The *Hamlin* decisions are, of course, the judgments of our Court of Appeal (mentioned above) and the Privy Council in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 and [1996] 1 NZLR 513.

18.8 Similar submissions have been made in other WHRS adjudications, and in particular I would refer to:

> *Smith v Waitakere City Council* (WHRS claim 277, Adjudicator Green, 12 July 2004);
> *Widdowson v Bekx* (WHRS claim 92, Adjudicators Scott & Douglas, 15 September 2004);
> *Gray v Lay* (WHRS claim 27, Adjudicator Dean, 11 March 2004);
> *Hay v Dodds* (WHRS claim 1917, Adjudicator Dean, 10 November 2005).

18.9 In all of these adjudications the adjudicator was not persuaded that *Hamlin* should not apply to the WHRS cases. I would consider that much of my reasoning given in the Ponsonby Gardens Determinations (see *Gray v Lay*

mentioned above) would be relevant here, as well as the reasoning of my fellow adjudicators in the other cases that I have mentioned above. Furthermore, two of these Determinations have been taken to appeal, and neither of the District Court Judges was persuaded to criticise or alter the adjudicators' findings on this matter – *Waitakere City Council v Smith* (Auckland District Court, CIV 2004-090-1757, Judge McElrea, 28 January 2005); *Waipa District Council v Widdowson* (Hamilton District Court, Judge Wolff, 19 June 2006).

18.10 In this case, Ms Bambury submits that the Owners do not fit within the category of plaintiffs that are afforded protection by the *Hamlin* decision, and provides five particular differences. I will consider each one separately.

18.11 The first suggested difference is that the Owners are certainly not individuals of modest means, have owned more than one property, have considerable assets, Mr Hawken is a businessman and Ms West is employed. It was certainly mentioned by McKay J in *Hamlin* that the housing scene in New Zealand included a high incidence of home ownership, and a high proportion of buyers of modest means. However, to extend that reference and convert "modest means" into a qualifying factor is, as they say, drawing a long bow. I do not see the Owners' financial assets or professional qualifications as having any impact on whether the Council should owe them a duty of care.

18.12 The second suggested difference is that this house was not constructed nor was it purchased under a regime of government support and funding. I can see nowhere in the *Hamlin* decisions that a homeowner's reliance on the territorial authority to exercise reasonable care was caused by the presence of government support, or was restricted to houses that had government funding. Mr Hamlin's was not a state house, and I see no reference in the *Hamlin* judgments to his obtaining a mortgage from State Advances or any government agency.

18.13 The next suggested difference was that the Owners were able to protect themselves contractually, as not only were the vendors under various contractual obligations, but the Owners could easily have also asserted further provisions for their own protection. However, as I understand it, Mr Hamlin purchased the land as a separate exercise to the contract to build his house. I see no reason why Mr Hamlin could not have inserted (and in fact may have inserted) maintenance or warranty clauses into his building contract. Mr Hamlin

could have inserted clauses for his own protection in the same way that the Owners did, or could have done.

18.14 The fourth suggested difference was that the Owners could clearly have been expected to obtain a pre-purchase report prior to committing themselves to the purchase. Mr Hamlin did not obtain a pre-purchase report, but he was buying a new house. Furthermore, it would have been unusual to have commissioned a pre-purchase report for an existing house in New Zealand in 1972. However, I will be considering the suggestion that the Owners should have obtained a pre-purchase report under the claims for contributory negligence.

18.15 The last suggested difference was that the Owners were not insured for the losses that they have suffered, and nor have any of the respondents insurance for the liability that they now face. I am not sure how this factor should be seen to take the Owners outside the ratio of the *Hamlin* decisions, unless it is being suggested that the Owners could have taken out insurance against their losses. In my view, this point is not relevant to *Hamlin*.

18.16 I do not accept that I should be moving away from *Hamlin*, and I find that the Council owed a duty to the Owners to exercise reasonable care when carrying out its statutory duties relating to the construction of this house.

Liability for Code Compliance Certificate

18.17 Ms Bambury has made extensive submissions on the issuance of the CCC, to persuade me that an independent duty of care should not be found to have been owed by the Council as a result of the issue of this certificate.

18.18 I am not aware that the Owners are alleging that a duty of care arises out of the issuing of the CCC. They are claiming that the Council failed to carry out adequate inspections or checks, and these failures led to the issue of a CCC. Put another way, the Owners are saying that it was the responsibility of the Council to carry out adequate inspections of the work in progress, and at completion, so that it was in a position to properly issue a CCC.

18.19 The Council is not expected to carry out the function of a clerk of works or a quality control supervisor, and in the words of Henry J in *Lacey v Davidson* (Auckland High Court, A.546/65, 15 May 1986):

> The duty is to take reasonable care in carrying out inspections of building work. It is important to bear in mind that the Council is neither a guarantor of the builder nor an insurer of the owner or occupier, the main purpose of the Council's power of control being to ensure the structural stability of the building. The duty cannot be elevated to that required, for example, of a supervising architect.

18.20 A territorial authority will not be held to be negligent if it carries out its inspections at such times, and with due diligence, so that it can say that it has reasonable grounds to conclude that the work that has been done has complied with the Building Code. It is not a matter of strict liability.

Building Consent

18.21 The Owners are claiming that the Council should not have issued a building consent on the basis of the Architect's drawings and specifications, because they had inadequate details of how to waterproof parts of the building. They also claim that the drainage details were insufficient.

18.22 In 1997 the Building Act required all applications for building consents to be accompanied by "such plans and specifications and other information as the Council reasonably requires". Section 34(3) of the Building Act says that "... the [Council] shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application". Therefore, if the Owners are to succeed in their claim, then the Owners will have to prove that no reasonable Council could have been satisfied that the provisions of the building code would be met, if the work was to be carried out as shown in the submitted plans and specifications.

18.23 To prove that the Council had been negligent in issuing a building consent on the basis of the drawings and specifications that were provided would require clear evidence of inadequacy as measured against the standards of the time. The Owners did not identify specific deficiencies, and were content to rely on the generalisations mentioned above.

18.24 Most of the building experts were asked about the standard of information and detailing provided in the Architect's drawings and specifications, which were those submitted to the Council for the application for the building consent. Mr Gregersen, the building inspector thought that they were above average for 1997, whilst Mr Gillingham and Mr Johnson thought that they were fairly typical

of the standard of detailing provided at the time. Mr Summers, the WHRS Assessor, considered that the information, when read together with the notes added by the Council, was sufficient for a building consent in 1997. Mr Jessop agreed. Both Mr Hughes and Mr Maiden were guarded with their opinions about adequacy, but both agreed that the drawings were pretty typical for the time.

18.25 On balance, I am not persuaded that the drawings and specifications were lacking in detail, or inadequate for the purposes of the application for the building consent. It would have been helpful if some of the construction detailing had been more advanced, but I am not satisfied that the Council has been shown to have been negligent in its issuing of the building consent for this building.

The Final Code Compliance Certificate

18.26 The background to the issue of the CCC in December 2001 has already been provided in paragraphs 12.34 to 12.52 above. I have traversed the matters that were raised by the Council in July 2001, and how these were resolved – with particular significance to the cracks in the plaster, and the ground levels around the house.

Liability for Particular Defects

18.27 I have found that the Council had a duty to take reasonable care with its inspections so that it could conclude that it had reasonable grounds for saying that the provisions of the Building Code had been met. It is now necessary to review each of the leak locations that have caused damage to the building to ascertain whether the Council was in breach of its duty of care.

18.28 **Level 1 blockwork** (locations 1 and 2A) – $914.80 + $8,610.26 = $9,525.06
I have found that this leak was caused by the change from blockwork to timber framing which was not waterproofed, and also by pouring the concrete steps against the plaster cladding.

18.29 I think that it is unlikely that the building inspector actually noticed that the blockwork had been substituted for timber framing in this part of the building, but if he did notice it, he did not make any notes on the building consent or file a field note to this effect. I accept the evidence from Mr Gregersen and others with experience of the work of building inspectors at this time, that it was

reasonably frequent that small changes from the consent drawings would not be specifically noted.

18.30 Although the substitution was "unauthorised", I am not persuaded that the building inspector was negligent in this case. The blockwork was being maintained where it was to be a retaining wall. It was only at the corner that the problem arose, and only when the concrete steps were poured against the timber-framed structure.

18.31 When the building inspector returned in June 2001, it would not have been obvious that the steps were causing a problem. I will dismiss the claims against the Council for these leaks.

18.32 **Level 2, under dining room** (location 3) - $332.66
I have found that this leak was caused by an open joint in the foundation wall. This is not a matter which I would expect a building inspector to see or notice, as it was concealed from normal viewing. In fact it was not discovered until mid 2004 when the WHRS Assessor carried out his inspection.

18.33 **Ventilation to sub-floor areas** (location 4) - $7,235.27
The evidence is that this problem was never noticed or picked up by the building inspector, either during construction, or in 2001 during the final inspections. It should have been noticed, and it was negligent of the building inspector to overlook this defect.

18.34 **South side by Bedroom 2** (location 5A, 5B and 5C) - $14,840.52 + $9,893.68 + $6,752.92 + $1,688.23 = $33,175.34
I have found that these leaks were caused by the change from blockwork to timber framing, extending the stucco below ground level, and leakage from the downpipe system.

18.35 The change from blockwork to timber framing meant that a reasonable length of footing was not poured, and this should have been noticed at either the foundation inspection, or at the blockwork inspection. Ms Bambury submits that the Council's inspector would not have inspected the entire perimeter of the foundation. I do not accept that submission. Many of the reported building cases relate to inadequate foundations, which should indicate that special care

needs to be taken to ensure that the foundations are not defective. This point was made by Greig J in *Stieller* (see paragraph 18.6 above) when he said,

> The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect which can cause very substantial damage to a building.

18.36 I have no hesitation in concluding that, by failing to notice that a substantial length of footing had been omitted, the inspector was negligent. He should have noticed this change, not only because it must have been obvious to a semi-vigilant inspector, but also because it should have been accompanied by a statement from the engineer to confirm that it was structurally acceptable.

18.37 The Council's inspector did notice the building up of the ground in June 2001, and asked the Perrys to correct this problem but, as I have already noted, no real change occurred in this location. The Council simply did not follow up to ensure that a permanent satisfactory solution was put into place. The soil remained against the plaster cladding. In my view, this was negligent of the building inspector.

18.38 The third cause of leaks and damage was the absence of overflows in the rainwater heads, and the leaks in the sealed downpipe system. The inspector could have asked for a pressure test on the downpipe system, which may have disclosed some leaks. However, there was no evidence to show that the system leaked at that time, or whether the leaks developed at a later date. I do not consider that overflows to rainwater heads were the sort of detail that the building inspector should reasonably notice. None of the experts was of the opinion that a Council inspector should have picked up these omissions. I find that the Council should not be held liable for the third cause of leaks (location 5C).

18.39 **Deck to Living room** (location 6) - $27,610.46

I have found that the main causes of the leaks in this area were the inadequate step-down between the internal floor level and the deck, and the inadequate falls across the deck. However, I have also mentioned that there must be problems with the integrity of the waterproofing membrane, because water was getting either through or around the membrane into the timber framing.

18.40 The experts were in general agreement that the 20-25 mm step-down was not adequate. This should have been noticed by the building inspectors. The fall across the deck was virtually non-existent, and this should have been noticed by the inspector. The combination was fatal. These points should have been picked up by the Council inspector as they were not only clearly visible in 1998, but also in 2001 when the CCC was issued.

18.41 **Pergola Posts** (location 7A) - $42,482.70
I have found that these leaks have been caused by a failure to properly seal around the post penetrations, and a general failure of the waterproofing membrane on the top surfaces of the balustrade and seat.

18.42 There is no evidence that suggests that anyone was concerned about the waterproofing membrane on the balustrade and seat, and no evidence to indicate that the Council's inspector should have detected any problems. The post penetrations are different, in that most of the experts conceded that it was an extremely difficult junction to properly waterproof.

18.43 Mr Gregersen told me that he had questioned the Builder about this detail, and had been told that the Architect would be giving instructions on how to seal and finish the junction. Ms Bambury submits that the inspector is entitled to trust the builder in situations such as this, rather than taking on the role of a clerk of works. I think she is correct, and I find that the inspector took reasonable steps to ensure that the work was being properly carried out. The Council should have no liability for these leaks.

18.44 **Parapets and balustrade nibs** (location 9) - $116,482.21
I have found that the main causes of these leaks were the flat top surface to the parapets and nibs and the cracks that developed in the plaster; a general failure of the waterproofing membrane, probably as a result of application or workmanship deficiencies; and the consequential cracking caused by the swelling of damp timber framing.

18.45 When the house was substantially completed in April 1998, the only visible problem with the parapets would have been the flat (rather than sloping) tops. However, when the Council was asked to issue the CCC in June 2001, the parapets had cracks across their surface. Mr Gregersen recognised this as

being potentially a major problem, and told the Perrys that they would need to convince him that the plaster was waterproof.

18.46 I have already recited the events that followed in paragraphs 12.40 to 12.47 above. The Perrys (or the Architect) produced a Producer Statement that was a sham. The Architect wrote a letter to say how well the plaster had been applied – even though he told me in this adjudication that he was rarely on site. A Mr Culbert of Creative Cladding wrote a creative letter saying that he had no concerns, and that cracking was normal.

18.47 Mr Gregersen gave me the impression that he was not a person who would fall for this sort of fairly obvious fancy footwork. However, soon afterwards he approved the release of the CCC. He detected a potential problem, which shows that he was applying himself to the task of his inspections with suitable caution. However, by allowing the problem to pass by without ensuring adequate remedial work was done by the Perrys, he was negligent.

18.48 **Stucco below ground** (location 10) - $56,389.11
I have found that the cause of the leaks in these locations was that the outside ground levels were too high in relation to the internal floor levels; that the stucco was taken below ground level; and that there was inadequate subsoil drainage to carry the water away from these areas. However, the inadequate drainage would not have caused the damage if the other defects had not been present.

18.49 This problem was identified by the Council in June 2001, and I have already recited the events that followed in paragraphs 12.48-12.52 above. Council should have taken some steps to check that there was a sub-soil or field drain around the back of this house. The slot drain that was installed only ran for 5 metres – instead of 16 metres – and was installed so that it would not work effectively. The ground levels were not reduced, so that the stucco still went below the ground.

18.50 This is a similar situation to the previous item. Mr Gregersen detected a potential problem and asked the Perrys to fix it. However, he then accepted a solution that was never going to work properly. This, once again, was negligent and should not have been allowed to happen by the Council.

18.51 **Cracking in stucco** (location 11) - $87,077.36

I have found that the cracking and general deterioration in the stucco was initially caused by the absence of control joints, and then accelerated by swelling of the timber framing.

18.52 This problem is very similar to the parapets and balustrade nibs. The Council noticed the cracking in June 2001, and alerted the Perrys to the problem. The evidence is that the cracking was reasonably widespread, and should have set the alarm bells ringing with the building inspector. Having done all the good work, he then allowed the problem to pass, without ensuring adequate remedial work was done. This was negligent.

Conclusion

18.53 I find that the Council was negligent in the carrying out of its duties to inspect, as more fully explained in the preceding paragraphs, and negligent in its issuing of the Code Compliance Certificate, and thereby in breach of the duty to take care that it owed to the Owners. This negligence had led to water penetration and damage, to the extent that it is liable to the Owners for:

Ventilation to sub-floor areas (location 4)	$ 7,235.27
South side by Bedroom 2 (locations 5A and 5B)	24,734.19
Deck to Living room (location 6)	27,610.46
Parapets and balustrade nibs (location 9)	116,482.21
Stucco taken below ground (location 10)	56,389.11
Cracking in stucco (location 11)	87,077.36
General damages (paragraph 7.8)	5,000.00
Proportion of interest (paragraph 9.5)	3,019.67
	$327,548.27

19. CONTRIBUTORY NEGLIGENCE

19.1 All of the respondents have made submissions on the affirmative defence of contributory negligence in respect of all, or part of the Owners' claims.

19.2 Some of the background factual details have already been provided in earlier sections of this Determination, and in particular in Section 11. The respondents submit that the Owners failed in a number of ways which are as follows:

1. Failing to obtain a pre-purchase inspection report;
2. Failing to properly cancel their agreement with the Norgates;
3. Continuing with the purchase knowing that the building leaked;
4. Failing to undertake appropriate remedial work.

19.3 It is submitted that by failing to do either of 1, 2 or 3 above, the Owners have contributed to their own damages, in that a proper up-to-date inspection would probably have detected the defects and leaks, thus allowing the Owners to avoid the purchase – or at least would have allowed them the opportunity to negotiate a suitable reduction in the price. It is also submitted that by failing to carry out No 4 above, the Owners have allowed the property to deteriorate and thus greatly increased the extent of the remedial work.

19.4 This defence relies upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1) which states:

> 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.
>
> Provided that –
>
> (a) This subsection shall not operate to defeat any defence arising under a contract:
>
> (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

"Fault" is defined in s.2 in this way:

> Fault means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

19.5 Mr Sullivan has referred me to probably one of the recent leading judgments on contributory negligence, *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, where on page 113 Thomas J adopted the dictum of Devlin LJ in *Ingram v Little* [1961] QB 31, at pp 73-74:

> For the doing of justice, the relevant question in this sort of case is ... which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part.

Pre-Purchase Inspection Report

19.6 All of the respondents have raised the issue of a pre-purchase inspection report. They say that the Owners failed to take the elementary precaution of engaging a building surveyor to carry out a pre-purchase inspection, and to provide a report. If the Owners had taken this step then they would have known that they were buying a house that had serious leaking problems.

19.7 Mr Bates submits that the Owners ignored good standard conveyancing practice and knowledge by neglecting to get a pre-purchase building report prior to the agreement becoming unconditional. He says that the Owners were represented by an experienced property professional who had been a conveyancing solicitor, so that they could be expected to have had a knowledge and understanding of good conveyancing practice.

19.8 Mr Sullivan says that the Owners have clearly shown a culpable disregard for their own interest. He says that Mr Hawken admitted that this style of house was known to often have water ingress problems, and that Mr Hawken was an experienced property consultant involved in the acquisition of properties. Nevertheless, he says, Mr Hawken did not take the prudent step of obtaining a pre-purchase inspection report.

19.9 Ms Grupen submits that the Owners were sophisticated property investors who were well aware of the issues surrounding leaky houses at the time when they purchased this property. She points out that Mr Hawken, a former conveyancing lawyer with more than twenty years experience, was familiar enough with the problems to ask the Land Agent whether it was a leaky building. She says that the evidence of leaks must have been obvious, as they were to Mr Cartwright a month later.

19.10 Ms Grupen refers me to the Australian case of *Goulding v Kirby* [2002] NSWCA 393 as authority for the contention that sophisticated purchasers, such as Mr

Hawken and Ms West, should not recover their full damages when the defects and problems were obvious to them at the time of purchase.

19.11 Ms Bambury has referred me to previous decisions where the claimants failed to obtain pre-purchase inspections. I will briefly traverse these cases. The first one is ***Peters v Muir*** [1996] DCR 205, where it is submitted that Judge Ryan reduced the damages awarded against the Council by one third, on the grounds that the purchaser failed to arrange for a pre-purchase inspection.

19.12 I am familiar with this case, which concerned a house built by a Mr Muir in 1978 in Tekapo. Miss Peters purchased the property in 1992, and then after she had moved in she applied for a building consent to install a new potbelly stove. As a result of a visit by a building inspector, the building was found to be so badly built that it was structurally unsound, and was leaking badly. On the matter of contributory negligence, the Judge said:

> The council has pleaded contributory negligence and in support of that Mr James pointed to a number of matters. Miss Peters acknowledged that she had set out to become very familiar with the Tekapo property market. She inspected a number of properties, approximately 17. She has owned houses previously. She first made an offer to buy 33 Murray Place in or about May of 1991. At that time, although the asking price was $98,000, Miss Peter's offer was $60,000. She made further offers at that figure during the latter part of 1991. In early 1992, when the property was still listed at $98,000, she offered $65,000. Miss Peters had apparently heard a rumour in Tekapo that Mr and Mrs Muir were likely to accept an offer much lower than their stated asking price. All this goes to show that Miss Peters was not a naïve purchaser. She was well familiar with the property and she knew that it was going to require further work to be done to complete it. She had no reason to suppose, nor did she in fact believe, that she was purchasing a property which she should be entitled to regard as well finished and complete in all respects. Against this background it is urged for the council that so many of the defects were so obvious that even to a person not experienced in building there was sufficient to put them on notice and prompt further inquiry. It is clear that Miss Peters did not seek advice from any person competent to assess the actual soundness of the building. While I doubt if an aspiring purchaser could be said to be negligent in failing to make inquiry as to the state of foundations, such are the defects in, for example, the block-work, there are obvious gaps which one can see through at some points, lintels were sagging and bowing, a timber joist supporting the first floor structure, which joist is not covered up had been sawn part way through and consequently split along part of its length. This and so many other features were there to be seen. It is not that I take the view that Miss Peters, or any other purchaser not experienced in building work, should be able to reach particular conclusions as to all the defects, and it may have been that Miss Peters simply regarded these as being matters incidental to the fact that the basement area had never been finished. But at the very least the defects were sufficiently numerous and obvious as to, in my judgment, put a reasonable person upon inquiry. In failing to look further into the

> matters which must have been so obvious, then in my view Miss Peters has contributed in some degree to her own loss.

19.13 I do not find that this judgment is supportive of a general proposition that purchasers should have obtained pre-purchase inspection reports in 1992. Clearly, Miss Peters should have been alerted by what she saw, but this was slightly different in the case of the house at 67 Crescent Road East. All of the evidence given to me shows that there were signs of leaks into this house in 2003, but they were not such as to put an ordinary layperson on notice that further inspections or enquiries should be undertaken. It was not a new house, but it was only six years old. However, I do accept that the knowledge and public awareness about building defects in 1992 was not the same as it was in 2003.

19.14 The other case to which I was referred by Ms Bambury was ***Cinderella Holdings Ltd v Housing Corporation of New Zealand***, [1998] DCR 406, in which the court found that a purchaser failed to take the steps which a reasonably prudent purchaser would have been expected to have taken, and reduced the damages by 85%.

19.15 The case involved the purchase of a commercial office building in Napier, which was later discovered by the purchaser to have a highly toxic substance in some of the light fittings. It cost $94,000 to replace the light fittings. The possible danger to life arising out of the presence of the toxic substance was remote, and a danger only arose in the event of a fire. The key finding was that the purchaser did not take the steps that a reasonably prudent purchaser of a valuable building could have taken.

19.16 The Owners say that they did not obtain a pre-purchase report because they had already made enquiry of the Land Agent as to whether the building was a leaky building. They were told that, as far as the Land Agent knew, it was not a leaky building. They relied upon that response. It is clear from this comment by the Owners that they were aware of the possibility that this house could be a leaky building.

19.17 They also say that they inspected the Council's filed, obtained a LIM report, commissioned a valuation, questioned the Land Agent, and none of these enquiries raised any concerns that the house might have leaking problems. Furthermore, Mr Hawken told me that he had had previous experience with

stucco houses, which had given him a level of confidence that, if properly designed and built, these were not a problem.

How obvious was the Problem?

19.18 Mr Mitchell visited the property on 8 April 2003 for the purpose of preparing a valuation. He provided a reasonably detailed description of the house, which indicates that he had a good look around. On page 3 of his report he said:

> "Condition-wise, this relatively new dwelling is presented in almost new condition to both the exterior and through the interior, and the chattels … [giving a value]"

19.19 This view contrasts sharply with the observations of Mr Cartwright, when he carried out his inspection on 10 June 2003. I have already quoted his conclusion in paragraph 11.24 of this Determination, and his chilling opening comment, "It is obvious that this dwelling is suffering from a severe case of 'leaky building syndrome'". And he reached this conclusion after a visit of about one hour duration.

19.20 The question may be asked as to how two professionals could reach such widely differing views about the condition of a house. The answer, I suspect, would be that the purpose of their inspections were quite different, and their skills were also quite different. Whilst Mr Mitchell was probably not looking for building defects but more for indicators as to value, Mr Cartwright was looking past the superficial aesthetics and cosmetic finishes – he was looking for problems. It does indicate that the general appearance of the building, to a layperson, was favourable and that the problems were not that obvious.

19.21 I suppose that a similar situation may occur when two different people are looking at a second-hand car. One person sees the gleaming bodywork and shiny engine, whilst the other person notices the oil leak and the smoking exhaust. However, it is clear that the signs of the leaks were there to be seen in April/June 2003 if one chose to look for them.

19.22 *The New Zealand Herald* had been conducting a "campaign" from as early as 2001 about the growing concerns relating to leaky buildings. Ms Bambury had produced over 90 articles from the Herald from March 2002 to April 2003 for Mr Hawken to review. He agreed that he was a reasonably regular reader of the *Herald*, and that he had been generally aware of the "leaky home crisis" in April 2003.

19.23 Mr Hawken told me that he had specifically put the question to the Land Agent, as to whether the house was a leaky building. I should mention that by April 2003, not only had the matter of leaking houses been raised by the media, but the Government had commissioned and received the Hunn Report, had enacted the Weathertight Homes Resolution Services Act (November 2002), and the WHRS had received over 1,000 claims. All of these factors indicate to me that the Owners were well aware of the widespread problems with leaking houses in New Zealand, and appreciated, or should have realised, that this house was built during the period of concern, and was of materials and style that were classified as high risk.

Pre-purchase inspections

19.24 Mr Hawken told me that he would now always obtain a pre-purchase building report, but did not consider it was necessary in April 2003. He did not agree that it was a common practice at that time to obtain such reports before committing to buying property.

19.25 Several witnesses gave evidence on the practice and regularity of pre-purchase reports. Mr Maiden acknowledged that the company which he works for, Prendos Ltd, has promoted pre-purchase reports for many years. I note that one of the principals of Prendos, Mr Greg O'Sullivan, was closely associated with the *BRANZ Bulletin 423*, which was issued in February 2002. This *Bulletin* was all about pre-purchase inspections and explained the key points that the inspection should cover and how to go about seeking a suitable consultant to carry out the inspection. Whilst I would not expect a layperson to be aware of *BRANZ Bulletins*, I would expect property professionals involved in the housing market to have included them in their normal reading routines.

19.26 Mr Hughes from Citywide Building Consultants Ltd told me that his firm was doing about two inspections a day in 2002 but this had increased to four a day by March 2003, and by mid 2005 they were carrying out seven inspections a day. He also told me that he would have considered it imprudent to purchase this type of house without having obtained an inspection and report.

19.27 Mr Gillingham was of the opinion that, by April 2003, it was a regular practice for prospective purchasers to obtain pre-purchase reports.

19.28 Having carefully considered all of this evidence, I find that the Owners did not take all of the steps that a reasonably prudent purchaser would have been expected to take under the particular circumstances of this case, for the following reasons.

(a) There was a high level of public awareness by April 2003 that certain house types were known to have leaking problems.

(b) This house included several of the features that were regularly associated with leaky homes – flat roofs with parapets, no overhangs, plastered exterior cladding.

(c) Pre-purchase inspections were reasonably common by early 2003, particularly for this type of building.

19.29 The Owners say that they were the victims of a fraudulent cover-up, and that the defects were of a technical nature and could not be detected on inspection. I disagree with the latter part of this statement. The defects were not "technical" and they were very obvious to Mr Cartwright as soon as he entered the house – without any sort of sophisticated testing. He smelt dampness, and he saw rotting carpets, cracks and discoloured paint-work.

19.30 Although the Owners accept that they noticed cracks in the plaster, they took no further action despite having had experience of living in a plaster house before. They say that the cracks were explained as 'normal' by documents on the Council's file, but they only saw these documents after they had put in their offer and were committed to the purchase. In reality, they noticed the cracks and took no steps to see whether these signalled a problem. Mr Cartwright had no hesitation in realising that the cracks were indicating a major problem.

19.31 This is, in my view, a case where the Owners have failed to take the steps which should have been taken by reasonably prudent prospective purchasers. They were aware, or should have been aware, of the risks associated with monolithic-clad and plaster houses. They chose not to engage a professional surveyor or consultant to inspect the house.

19.32 I am satisfied that this is a case where the Owners have made a contribution towards the situation in which they now find themselves. I am also aware of

what a pre-purchase inspection would have uncovered because I have Mr Cartwright's report prepared at the time. He was engaged to check out a leak in the master bedroom, but he quickly detected that the house had serious problems. He estimated repair work costing as much as $100,000.00 or more.

19.33 However, if the Owners had obtained the Cartwright report prior to purchasing, it is unlikely that they would have committed to the purchase at that stage. Mr Cartwright had made it clear that further investigation was necessary, and his estimate of $100,000.00 was no more than an interim guess. Therefore, the Owners would have either walked away or obtained a more detailed report about the house, such as was provided by Mr Hughes in April 2004.

19.34 Mr Hughes' report concluded that there had been a complete cladding failure and it provided a reasonably detailed summary of the required remedial work. He obtained an estimate of the cost of the remedial work from a quantity surveyor, Mr Stephens of Stephens Thorstenson Associates, who put a figure of $149,100.00 on the work.

19.35 In my view, this is probably the advice that the Owners would have received if they had obtained a professional pre-purchase inspection report. They would have been told that the repair work would be in the order of $150,000.00, whereas I have found that the remedial costs will be about $380,000.00 (refer paragraph 6.6.1). This is a figure of 40% of the actual damages.

Cancellation of Agreement with Norgates

19.36 Some of the respondents are saying that the Owners have contributed to their losses by failing to properly cancel their sale and purchase agreement with the Norgates.

19.37 This matter has already been considered in section 11 of this Determination as a defence raised by some of the respondents on the grounds that the Owners had caused their own losses as a result of their failure to defend the action brought by the Norgates against them (see paragraphs 11.4 to 11.22 above).

19.38 I dismissed these claims by the respondents as I was not persuaded that it had been shown that the Owners failed to defend themselves against the Norgates, or that the losses that they are now claiming were caused by their failing to

reach a better settlement with the Norgates. I will dismiss this claim for contributory negligence for the same reasons.

Purchasing when knowing that the house leaked

19.39 Most of the respondents have made submissions that the Owners have contributed towards their own losses because they finally committed to purchase the house when they knew it was leaking. This argument is based on the assumption that the Owners made their final commitment to purchase at the mediation in March 2004.

19.40 This has already been considered in Section 11 of this Determination as a defence raised by the respondents under the heading of "causation – aware of leaks" (see paragraphs 11.30 to 11.46 above). I dismissed these claims by the respondents as I was not persuaded that it had been shown that there had been a break or interruption in the causal claim. I will dismiss this claim for contributory negligence for the same reasons.

19.41 However, in paragraph 11.44 above, I did find that the Owners had already received $100,000.00 as compensation for the leaks from the Norgates, and that this amount must be taken into account when calculating the amount of damages that may be awarded to the Owners. I think that it is quite appropriate to introduce this adjustment into this section of my Determination.

19.42 It is a duplication of the amount calculated for the contribution to be made by the Owners for failing to obtain a pre-purchase inspection report. Therefore, I find that the adjustment has already been taken into account in the contribution that I decided for the pre-purchase inspection issue (see paragraph 19.35 above).

Failing to undertake remedial work

19.43 It has been submitted by Ms Grupen that the Owners have failed to carry out the remedial work, which has led to the costs of the work increasing by about 15%. She says that there has been no evidence from the Owners to show that they could not afford to carry out the work promptly, and in fact she refers to two letters written by the Owners to their Bank showing that they did have the necessary funds for the remedial work.

19.44 The Owners strongly deny that they have failed to carry out remedial work, or have contributed in any way to the costs increasing. They say that they took immediate professional advice as to what work would be needed, and what temporary steps should be taken to reduce increasing damage. They undertook extensive work around the rear of the building to reduce the ground levels, but were advised to stop carrying out further work on the recommendation of the WHRS Assessor.

19.45 I prefer the submissions made by the Owners on this matter. There is no evidence to support the allegation that the Owners have failed to mitigate their losses and, to the contrary, there is evidence to show that they have taken all reasonable steps under the circumstances. I will dismiss this claim for contribution from the Owners.

Conclusion

19.46 All of the respondents are claiming for a substantial contribution from the Owners, and percentages of up to "85% at least" are to be found in the closing submissions. Unfortunately, none of the respondents have provided a logical evaluation of what the contribution should be in monetary terms, or how the percentage should be calculated.

19.47 I have found that the Owners must bear the first $100,000.00 of the remedial costs (see paragraph 11.44 above) because they have already received that amount in compensation from the Norgates. I have also found that the Owners also failed to take the step which should have been taken by a reasonably prudent prospective purchaser, that is, the failure to obtain a pre-purchase inspection report, and that this failure has led them to incur losses that are of about $150,000.00 or 40% of the actual damages that have been caused by the leaks (see paragraph 19.35 above).

19.48 Therefore, I find that the Owners should make a contribution of 40% to the amount of the remedial costs, which is finding that the defence of contributory negligence will succeed in the amount of 40% of the damages awarded to the Owners. This figure of 40% **includes** the $100,000.00 adjustment mentioned in the previous paragraph.

20. CONTRIBUTION BETWEEN RESPONDENTS

20.1 I have found that each of the respondents have a liability to the Owners in the following amounts, after adjusting for the contribution that must be made by the Owners.

The Perrys – from paragraph 12.78	$ 355,451.69
Less 40% contribution by Owners (para 19.48)	142,180.68
	$ 213,271.01
Mr Jessop – from paragraph 14.59	$ 167,915.57
Less 40% contribution by Owners (para 19.48)	67,166.23
	$ 100,749.34
Island 2000 Ltd – from paragraph 15.47	$ 161,527.88
Less 40% contribution by Owners (para 19.48)	64,611.15
	$ 96,916.73
Mr Lee – from paragraph 15.56	$ 161,527.88
Less 40% contribution by Owners (para 19.48)	64,611.15
	$ 96,916.73
Mr Santana – from paragraph 16.19	$ 210,483.29
Less 40% contribution by Owners (para 19.48)	84,193.31
	$ 126,289.97
Auckland City Council – from paragraph 18.53	$ 327,548.27
Less 40% contribution by Owners (para 19.48)	131,019.31
	$ 196,528.96

I must now turn to the complex problem of considering the liability between respondents. I say that this is a complex problem, but only from the arithmetical point of view, and not for any other reason.

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

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

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

20.4 It should be noted that most of the arithmetical calculations in this Determination have been carried out in electronic spreadsheets, where calculations are computed to many decimal places. This will sometimes result in apparent discrepancies when the figures are rounded off at two decimal places or at whole numbers. For example 1 + 1 = 3, because the full calculation is actually 1.45 + 1.45 = 2.9. As these apparent discrepancies are of very small value, they have no material effect on the calculations as a whole.

20.5 **Level 1 blockwork** (locations 1 and 2A) The only respondents that I have found to have any liability for these two areas of leaks are Island 2000 Ltd and Mr Lee. I was not addressed as to whether Mr Lee should in any way indemnify the company Island 2000 Ltd, or vice versa. Therefore, where I have found that they have a joint and several liability for a problem area, then I will allocate the responsibility on a 50/50 basis.

20.6 Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to these leak locations, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (see para 6.6.5)	$ 9,525.07
Proportion of interest (para 9.5)	90.02
	$ 9,615.08
Less 40% contribution by Owners (para 19.48)	3,846.03
	$ 5,769.05

Island 2000 Ltd	50%	$ 2,884.52
Mr Lee	50%	2,844.52
		$ 5,769.05

20.7 **Level 2, under dining room** (location 3) The only respondents that I have found to have any liability for this leak are Island 2000 Ltd and Mr Lee. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to this leak location, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)	$ 332,66
Proportion of interest (para 9.5)	3.14
	$ 335.80
Less 40% contribution by Owners (para 19.48)	134.32
	$ 201.48

Island 2000 Ltd	50.0%	$ 100.74
Mr Lee	50.0%	100.74
		$ 201.48

20.8 **Ventilation to sub-floor area** (location 4) The main burden of responsibility for this defect must be with the Builder and those on the site, that is with Island 2000 and Mr Lee. The Council was clearly negligent in failing to detect this obvious defect, and I find that the Council should bear 20% of the responsibility. This is in line with the allocation of responsibility in *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234. Mahon J initially found that the builder and the local authority in a foundations defects case should be held equally liable for the problems (see [1977] 2 NZLR 530 at p 535) but this was adjusted on appeal by the Court of Appeal to 80%/20% - builder/local authority.

20.9 However, as the Perrys had reached an agreement with the Builder that they would take over responsibility from the Builder for all known defects in the work, then the Builder is entitled to an indemnity from the Perrys. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to this leak location, I now find that each of these

respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)		$ 7,235.27
Proportion of interest (para 9.5)		68.38
		$ 7,303.65
Less 40% contribution by Owners (para 19.48)		2,921.46
		$ 4,382.19
The Perrys	80.0%	$ 3,505.75
Island 2000 Ltd	0.0%	0.00
Mr Lee	0.0%	0.00
Auckland City Council	20.0%	876.44
		$ 4,382.19

20.10 **South side by Bedroom 2** (locations 5A, 5B and 5C) It is going to be simpler to consider these three sub-locations separately, as I have found that different parties are responsible for each of the four sub-locations. The first section related to the change from blockwork to timber framing (location 5A). Once again, the main burden should be borne by those who actually carried out the work, but both Mr Jessop and the Council failed to notice the unauthorised change.

20.11 I will set the Council's contribution at 20% and Mr Jessop's contribution at slightly higher, or 25%. This means that the Builder's contribution will be 55%. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to this leak location, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)	$ 14,840.52
Proportion of interest (para 9.5)	140.25
	$ 14,980.76
Less 40% contribution by Owners (para 19.48)	5,992.31
	$ 8,988.46

Mr Jessop	25.0%	$ 2,247.11
Island 2000 Ltd	27.5%	2,471.83
Mr Lee	27.5%	2,471.83
Auckland City Council	20.0%	1,797.69
		$ 8,988.46

20.12 The second section relates to the build-up of soil against the stucco, which is a problem that is shared between the Perrys and the Council. This is not a situation where the Council should be restricted to a 20% contribution, as it was the Council that identified the problem and then failed to check that the required work had been properly completed.

20.13 I cannot see any good reason for apportioning different amounts of blame, as both parties showed a similar level of neglect, so I will find that these respondents are equally liable. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to this leak location, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)	$ 9,893.68
Proportion of interest (para 9.5)	93.50
	$ 9.987.18
Less 40% contribution by Owners (para 19.48)	3,994.87
	$ 5,992.31

The Perrys	50.0%	$ 2,996.15
Auckland City Council	50.0%	2,996.15
		$ 5,992.31

20.14 The third and fourth sections relate to the overflows and leaks in the downpipe system. The only respondents that I have found to have any liability for these leaks are Island 2000 Ltd and Mr Lee. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to these leak locations, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)		$ 8,441.15
Proportion of interest (para 9.5)		79.77
		$ 8,520.92
Less 40% contribution by Owners (para 19.48)		3,408.37
		$ 5,112.55
Island 2000 Ltd	50.0%	$ 2,556.28
Mr Lee	50.0%	2,556.28
		$ 5,112.55

20.15 **Deck to living room** (location 6) I have found that five of the respondents should have a liability for these problems. Once again, I think that the main burden of responsibility must lie with those on site. In this case it was the Builder and the waterproofing contractor. The Perrys were responsible for ensuring that the waterproofing work was properly done, so that the main burden must be shared equally between the Builder and the Perrys.

20.16 Mr Jessop and the Council both failed to identify these problems but I find that the architect should have been more alert to detecting or avoiding this sort of problem. I will set the ratio of contribution between Mr Jessop and the Council at 3:2, whereas I would retain a ratio of contribution between builders and Council at 4:1. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to this leak location, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)		$ 27,610.46
Proportion of interest (para 9.5)		260.93
		$ 27,871.39
Less 40% contribution by Owners (para 19.48)		11,148.56
		$ 16,722.84
The Perrys	30.8%	$ 5,145.49
Mr Jessop	23.1%	3,859.12
Island 2000 Ltd	15.4%	2,572.74
Mr Lee	15.4%	2,572.74
Auckland City Council	15.4%	2,572.74
		$ 16,722.84

20.17 **Pergola Posts** (location 7A) I have found that 25% of this problem was a failure by the waterproofing contractor to properly seal the top surface of the balustrade and seat, not associated with the post penetration points. The Perrys must bear that burden as their own. The remaining 75% is to be apportioned between Mr Jessop and the Perrys (on account of the waterproofing contractor). I find that this problem is one that should be shared equally between these two parties. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to this leak location, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)		$ 42,482.70
Proportion of interest (para 9.5)		401.48
		$ 42,884.18
Less 40% contribution by Owners (para 19.48)		17,153.67
		$ 25,730.51
The Perrys	62.5%	$ 16,081.57
Mr Jessop	37.5%	9,648.94
		$ 25,730.51

20.18 **Parapets and balustrade nibs** (location 9) The responsibility for these problems must lie mainly with the trades that carried out the plastering and the waterproofing. The Perrys must accept responsibility for taking reasonable steps to ensure these contractors did their work properly. I will set the Perrys contribution at 20% of that of the tradesmen. However, as the waterproofing contractor is not a party to this adjudication, the Perrys must take 100% responsibility for that trade.

20.19 Under normal circumstances I would have set the Council's contribution at a relatively low percentage because the problems with the parapets would not have been clearly visible at the time when the work was originally completed. There would have been no cracks. However, in 2001 I have found that the Council allowed these obvious defects to pass without ensuring that adequate remedial work was carried out, which would not be "normal circumstances". I think that this means that the Council's contribution must increase to at least 30%, and this is the percentage that I will adopt.

20.20 Assuming that the plasterer and waterproofing contractors have made an equal contribution towards these failures, Mr Santana's contribution will be (½ x 70% x 80%) 28%; the Perrys' will be ((½ x 70%) + (½ x 70% x 20%)) 42%; whilst the Council's will be 30%. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to these leak locations, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)		$116,482.21
Proportion of interest (para 9.5)		1,100.80
		$117,583.01
Less 40% contribution by Owners (para 19.48)		47,033.21
		$ 70,549.81
The Perrys	42.0%	$ 29,630.92
Mr Santana	28.0%	19,753.95
Auckland City Council	30.0%	21,164.94
		$ 70,549.81

20.21 **Stucco below ground** (location 10) This is another of the leaks that does not fit within the usual parameters, as a result of the events in the latter half of 2001. I would normally have considered that the Council's contribution towards this sort of defect should have been at between 10-20%, as the main burden must be with the persons who either did, or were responsible for engaging others to do, this work.

20.22 However, the Council noticed the problem, but then accepted a solution that was never going to work properly. As with the previous item, I am going to set the Council's contribution at 30% due to the circumstances under which it approved this work. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to these leak locations, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)		$ 56,389.11
Proportion of interest (para 9.5)		532.90
		$ 56,922.01
Less 40% contribution by Owners (para 19.48)		22,768.80
		$ 34,153.20
The Perrys	70.0%	$ 23,907.24
Auckland City Council	30.0%	10,245.96
		$ 34,153.20

20.23 **Cracking in stucco** (location 11) There are similarities between this leak location and location 9 as far as the contributions are concerned, so that the reasoning given in that matter is adopted for this leak location. I would set the Council's contribution in the ratio of 3:7 with those who actually carried out the work, which is the 30% that I adopted in paragraph 20.19

20.24 The Builder and the plasterer have made equal contributions towards these problems, and the Perrys' contribution has been set at 20% of the plasterer. The final contribution that I need to set is that of Mr Jessop. I found that he should have noticed the absence of control joints, and I think that this failure should be set at the same level as the contribution set for the Council. Whereas I have found that more than one of the respondents are liable to the Owners for the damages relating to these leak locations, I now find that each of these respondents is entitled to recover a contribution from the other respondents as follows:

Cost of remedial work (para 6.6.5)		$ 87,077.36
Proportion of interest (para 9.5)		822.92
		$ 87,900.27
Less 40% contribution by Owners (para 19.48)		35,160.11
		$ 52,740.16
The Perrys	5.38 %	$ 2,837.42
Mr Jessop	23.08%	12,172.43
Island 2000 Ltd	13.46%	7,098.83
Mr Lee	13.46%	7,098.83
Mr Santana	21.54%	11,360.23
Auckland City Council	23.08%	12,172.43
		$ 52,740.16

General Damages

20.25 The contributions towards the amount of general damages, based on the proportions of liability that I have determined in this decision, should be:

Amount of general damages (para 7.8)	$ 5,000.00
Less 40% contribution by Owners (para 19.48)	2,000.00
	$ 3,000.00

The Perrys	$ 776.22
Mr Jessop	360.84
Island 2000 Ltd	346.70
Mr Lee	346.70
Mr Santana	455.13
Auckland City Council	714.42
	$ 3,000.00

Summary

20.26 In the event of all respondents meeting their obligations as ordered in this Determination, then the amounts that they will pay to the Owners will be as follows:

The Perrys

Ventilation to sub-floor areas (location 4)	$ 3,505.75
South side stucco cladding (location 5B)	2,996.15
Deck to living room (location 6)	5,145.49
Pergola Posts (location 7A)	16,081.57
Parapets and balustrade nibs (location 9)	29,630.92
Stucco below ground (location 10)	23,907.24
Cracking in stucco (location 11)	2,837.42
General Damages	776.22
	$ 84,880.76

Mr Jessop

South side by Bedroom 2 (location 5A)	$ 2,247,11
Deck to living room (location 6)	3,859.12
Pergola Posts (location 7A)	9,648.94
Cracking in stucco (location 11)	12,172.43
General Damages	360.84
	$ 28,288.45

Island 2000 Ltd

Level 1 blockwork (locations 1 and 2A)	$ 2,884.52
Level 2, under dining room (location 3)	100.74
Ventilation to sub-floor areas (location 4)	0.00
South side by Bedroom 2 (location 5A)	2,471.83
Overflows and downpipes (location 5C)	2,556.28
Deck to living room (location 6)	2,572.74
Cracking in stucco (location 11)	7,098.83
General Damages	346.70
	$ 18,031.63

Mr Lee

Level 1 blockwork (locations 1 and 2A)	$ 2,884.52
Level 2, under dining room (location 3)	100.74
Ventilation to sub-floor areas (location 4)	0.00
South side by Bedroom 2 (location 5A)	2,471.83
Overflows and downpipes (location 5C)	2,556.28
Deck to living room (location 6)	2,572.74
Cracking in stucco (location 11)	7,098.83
General Damages	346.70
	$ 18,031.63

Mr Santana

Parapets and balustrade nibs (location 9)	$ 19,753.95
Cracking in stucco (location 11)	11,360.23
General Damages	455.13
	$ 31,569.31

Auckland City Council

Ventilation to sub-floor areas (location 4)	$ 876.44
South side by bedroom 2 (location 5A)	1,797.69
South side stucco cladding (location 5B)	2,996.15
Deck to living room (location 6)	2,572.74
Parapets and balustrade nibs (location 9)	21,164.94
Stucco below ground (location 10)	10,245.96
Cracking in stucco (location 11)	12,172.43
General Damages	714.42
	$ 52,540.78

21. COSTS

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

> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by –
> (a) bad faith on the part of that party; or
> (b) allegations or objections by that party that are without substantial merit.
>
> (2) If the adjudicator does not make a determination under sub-section (1), the parties to the adjudication must meet their own costs and expenses.

21.2 The only specific claims for costs are those made by the Owners, which I listed in paragraph 6.4.2 of this Determination. These relate to expenses incurred as a part of preparing and presenting their claims to this adjudication, including witness fees and expenses. I am not persuaded that the Owners have been caused to incur costs or expenses, either by actions of bad faith or allegations or objections by any of the respondents that were without substantial merit. I will not award the Owners any of their costs or expenses in this adjudication.

21.3 In her closing submissions, Ms Bambury indicated that she wished to make separate submissions on the issue of costs following the publication of my Determination on the substantive issues. I do not want to deny her client the right to make submissions on costs, but I cannot see any good reason why the

Council would be seeking costs, or would be protesting against my decision not to award any costs to the Owners.

21.4 However, in case I have overlooked some other factors, I will give the Council leave to file closing submissions on costs, but these must be received by WHRS within five working days of the Council's receipt of this Determination.

21.5 Subject to any amendment that I may make on receipt of closing submissions on costs from the Council, I will not allow any of the claims for costs and will make no orders as to costs.

22. ORDERS

22.1 For the reasons set out in this Determination, I make the following orders.

22.2 Glenn Perry and Lynda Perry are ordered to pay to the Owners the amount of $213,271.01. Glenn Perry and Lynda Perry are entitled to recover a contribution of up to $28,288.45 from Darren Jessop, and/or a contribution of up to $18,031.63 from Island 2000 Ltd, and/or a contribution of up to $18,031.63 from Mr Bernie W Lee, and/or a contribution of up to $31,569.31 from Mr Coco Santana and/or a contribution of up to $52,540.78 from the Auckland City Council, for any amount that they have paid in excess of $84,880.76 to the Owners.

22.3 Mr Darren Jessop is ordered to pay to the Owners the amount of $100,749.34. Darren Jessop is entitled to recover a contribution of up to $18,031.63 from Island 2000 Ltd, and/or a contribution of up to $18,031.63 from Mr Bernie W Lee, and/or a contribution of up to $31,569.31 from Mr Coco Santana and/or a contribution of up to $52,540.78 from the Auckland City Council and/or a contribution of up to $84,880.76 from Glenn Perry and Lynda Perry, for any amount that he has paid in excess of $28,288.45 to the Owners.

22.4 Island 2000 Ltd is ordered to pay to the Owners the amount of $96,916.73. Island 2000 Ltd is entitled to recover a contribution of up to $18,031.63 from Mr Bernie W Lee, and/or a contribution of up to $31,569.31 from Mr Coco Santana and/or a contribution of up to $52,540.78 from the Auckland City Council and/or a contribution of up to $84,880.76 from Glenn Perry and Lynda Perry and/or a contribution of up to $28,288.45 from Darren Jessop, for any amount that it has paid in excess of $18,031.63 to the Owners.

22.5 Mr Bernie W Lee is ordered to pay to the Owners the amount of $96,916.73. Bernie W Lee is entitled to recover a contribution of up to $31,569.31 from Mr Coco Santana and/or a contribution of up to $52,540.78 from the Auckland City Council and/or a contribution of up to $84,880.76 from Glenn Perry and Lynda Perry and/or a contribution of up to $28,288.45 from Darren Jessop, and/or a contribution of up to $18,031.63 from Island 2000 Ltd, for any amount that he has paid in excess of $18,031.63 to the Owners.

22.6 Mr Coco Santana is ordered to pay to the Owners the amount of $126,289.97. Coco Santana is entitled to recover a contribution of up to $52,540.78 from the Auckland City Council, and/or a contribution of up to $84,880.76 from Glenn Perry and Lynda Perry and/or a contribution of up to $28,288.45 from Darren Jessop, and/or a contribution of up to $18,031.63 from Island 2000 Ltd, and/or a contribution of up to $18,031.63 from Mr Bernie W Lee, for any amount that he has paid in excess of $31,569.31 to the Owners.

22.7 Auckland City Council is ordered to pay to the Owners the amount of $196,528.96. Auckland City Council is entitled to recover a contribution of up to $84,880.76 from Glenn Perry and Lynda Perry, and/or a contribution of up to $28,288.45 from Darren Jessop, and/or a contribution of up to $18,031.63 from Island 2000 Ltd, and/or a contribution of up to $18,031.63 from Mr Bernie W Lee, and/or a contribution of up to $31,569.31 from Mr Coco Santana, for any amount that it has paid in excess of $52,540.78 to the Owners.

22.8 As clarification of the above orders, if all respondents meet their obligations contained in these orders, it will result in the following payments by the respondents to the Owners.

From Glenn Perry and Lynda Perry	$ 84,880.76
From Darren Jessop	28,288.45
From Island 2000 Ltd	18,031.63
From Bernie W Lee	18,031.63
From Coco Santana	31,569.31
From Auckland City Council	52,540.78
	$ 233,342.56

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

Notice

Pursuant to s.41(1)(b)(iii) of the Weathertight Homes Resolution Services Act 2002 the statement is made 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 this 14th day of July 2006.

A M R DEAN
Adjudicator