CLAIM NO: 00804

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN	**PAUL & ISOBEL CLARKEN**
	Claimants
AND	**PHILIP CARLING**
	First respondent

(Intituling continued next page)

Hearing: 2 February 2005

Appearances: Paul Clarken, the Claimant in person
No appearance by or on behalf of the First Respondent
Douglas Foley, the Second Respondent in person
Pat Lawrence for the Third Respondent
Neil Waites for the Fourth respondent

Determination: 12 May 2005

DETERMINATION

AND **DOUGLAS & ROBIN FOLEY**

Second respondents

AND **ROTORUA DISTRICT COUNCIL**

Third respondent

AND **CANTEC SERVICES LIMITED**

Fourth respondent

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INTRODUCTION

[1] This is a claim concerning a “leaky building” as defined under s5 of the Weathertight Homes Resolution Services Act 2002 (“the Act”).

[2] The Claimants, Paul and Isobel Clarken are the owners (“the owners”) of a dwellinghouse located at 19 Foley Drive Rotorua, (“ the property”) and it is the owners’ dwelling that is the subject of these proceedings.

[3] The First Respondent, Philip Carling, is an architect. Mr Carling prepared the plans and specifications for the dwellinghouse for the second respondents Douglas and Robin Foley.

[4] The Second respondents, Douglas and Robin Foley (“the Foleys”) are property developers in Rotorua. They arranged for the construction of the owners’ dwellinghouse and sold the property to the owners in 1996.

[5] The Third respondent, Rotorua District Council (“the Council”) is the Local Authority responsible for issuing the Building Consent and Code Compliance Certificate for the owners’ dwellinghouse.

[6] The Fourth respondent, Cantec Services Limited (“Cantec”), is a duly incorporated company based in Rotorua and carries on the business of the application of specialist coatings, waterproofing and tanking membranes, injection grouting and Insulclad Cladding Systems. Cantec was engaged by the Foleys to apply Butyl liners to the internal gutters of the owners’ dwelling and to clad the exterior of the owners’ dwelling with Insulclad Exterior Plaster Cladding System. (“Insulclad”)

MATERIAL FACTS

[7] Distilling the situation as best I can, the relevant material facts are these:-

[8] In or about 1994, the Foleys engaged Mr Carling to prepare plans and specifications for a dwelling to be constructed at 19 Foley Drive, Rotorua.

[9] Mr Carling prepared plans and specifications in November 1994 which were used to support a Building Consent application by the Foleys.

[10] The plans and specifications prepared by Mr Carling were approved by the Council and a Building Consent was issued to the Foleys, by the Council on 13 March 1995 for the construction of the owners' dwelling on the property.

[11] The Council carried out a number of inspections of the owners' dwelling during construction and on completion of the building works.

[12] On 25 March 1996 the Council issued a Code Compliance Certificate for the owners' dwelling.

[13] On or about 4 July 1996 the owners entered into a sale and purchase agreement with the Foleys to purchase the property and settlement occurred on 16 August 1996.

[14] Between 16 August 1996 and 11 March 1997 the owners became aware of problems with the property.

[15] On 11 March 1997 the owners obtained an independent report on the property from Ken Lamb Builder Limited. The report identified a number of defects in the dwelling, but not the defects which are the subject of this claim.

[16] On 5 August 1998 the owners issued proceedings against the Foleys. The Statement of claim did not include a claim for the defects which are the subject of this adjudication claim. A settlement was reached between the owners and the Foleys.

[17] On 13 March 2003 the owners filed a claim with the Weathertight Homes Resolution Service ("the WHRS") and in January 2004, the WHRS Assessor, Mr Probett, provided a report concluding that the owners' dwelling was a leaky building and he assessed the cost of repairing the damage to the owners' dwelling at $12,630.00.

THE HEARING

[18] The hearing of this matter was convened at 10.00am on 2 February 2005 at the Heritage Motor Inn, 349 Fenton Street, Rotorua.

[19] None of the parties were represented by counsel at the hearing. The Claimants and the Second respondents appeared in person, the First respondent advised that it was not economic to attend the adjudication and asked that his liability be determined on the basis of written submissions prepared by his solicitors, the Third respondent was represented by its Building Controls Manager, and the Fourth respondent was represented by its manager.

[20] Mr Probett, the independent building expert appointed by WHRS to inspect and report on the owners' property, attended the hearing and gave sworn evidence. Mr Probett's report contained a number of helpful photographs which I shall refer to in this determination using the same terminology as Mr Probett, namely (PIC (number)) meaning the number attributed to each photograph by Mr Probett.

[21] The only witness (who gave sworn or affirmed evidence) in support of the claim was:

- Mr Paul Clarken (Mr Clarken is a Claimant in this matter)

[22] The witnesses (who all gave sworn or affirmed evidence) to defend the claim were:

- Mr Doug Foley (Mr Foley is a developer and the Second respondent in this matter)

- Mr Pat Lawrence (Mr Lawrence is the Building Controls Manager for the Third respondent, the Council)

- Mr Neil Waites (Mr Waites is the manager of the Fourth respondent, Cantec)

[23] I undertook a site visit and inspection of the Claimants' dwelling on the afternoon of 2 February 2004 in the presence of representatives of the Claimants, the Second, Third and Fourth respondents, and the WHRS Assessor, Mr Probett.

[24] Following the close of the hearing, all parties presented helpful and detailed closing submissions which I believe canvass all of the matters in dispute

THE CLAIM

[25] In the Notice of Adjudication filed on or about 20 September 2004, the owners sought the sum of $12,630 from the respondents based on the value of the remedial work assessed by Mr Probett in the WHRS report dated 17 February 2004.

CAUSES OF ACTION

[26] Those who build, develop or sell leaky buildings may be liable to owners of those buildings for breach of contract and/or alternatively, in tort for negligence in respect of faulty workmanship. The contractual liability may arise out of a building contract and/or from warranties contained in a Sale and Purchase Agreement.

[27] Owners may claim against all the various respondents in tort for negligence in respect of faulty design, workmanship, supervision, inspection and/or approval of the building work.

[28] Under section 90 of the Building Act 1991 civil proceedings may only be brought against a building certifier in tort and not in contract.

THE DEFENCE FOR THE FIRST RESPONDENT (PHILIP CARLING)

[29] The First respondent accepts that the owners' home is suffering from damage caused by lack of weathertightness but denies responsibility for the deficiencies and faults causing water penetration and says that the claim against him must fail because: there is no evidence from a qualified architect stating that Mr Carling has breached his duty to the Claimants; Mr Strez, a qualified architect confirms that Mr Carling did meet the standards required of an architect engaged to prepare drawings for building consent purposes in 1994; and, the Assessor has stated that the drawings lodged with the territorial authority were sufficient for construction.

[30] The First respondent further submits that if he is found liable to the Claimants, the other respondents are liable as concurrent tortfeasors with him to contribute such loss or damage as he may be held liable for pursuant to s29(2) of the Weathertight Homes Resolution Services Act 2002 and s17(1)(c) of the Law Reform Act.

THE DEFENCE FOR THE SECOND RESPONDENTS (DOUGLAS AND ROBIN FOLEY)

[31] The Second respondents deny responsibility for any leak in the dwelling and submit that the claims by the Claimants do not arise as a result of the design, construction, or otherwise of the dwelling, or the materials used in its construction, but as the result of the total inattention by the Claimants to carry out any maintenance on the dwelling over nine years.

[32] The Second respondents submit that the Claimants bought the completed dwelling on 4 July 1996 with settlement on 16 August 1996

and therefore the Claimants claims are time barred in terms of the Limitation Act 1950.

[33] The Second respondents submit that the claims by the Claimants against them in this proceeding arising from the construction of the dwelling by the Second respondents were claims that arose prior to and were the subject of proceedings brought in the District Court at Rotorua by the Claimants. The proceedings were subject of a full and final settlement on 15 June 1999 of all claims of the Claimants against the Second respondents and accordingly the Claimants are estopped from now making claims in respect of the construction of the dwelling against the Second respondents.

THE DEFENCE FOR THE THIRD RESPONDENT (THE COUNCIL)

[34] The Council denies liability for any damage to the owners' dwelling. The council denies that there has been any breach of its common law and/or statutory obligations in issuing the Building Consent.

[35] The Council denies any breach of its common law and/or statutory obligations in relation to its inspection of the building works and says further, that that obligation only extends to defects that may subsequently become latent (hidden) and not to defects that remain patent (obvious).

[36] The Council submits that there is no evidence that the defects complained of amount to a breach of the Building Code/Building Act and in any event, even if defects do exist they were not detectable by a reasonable Council Officer at the time the inspections were carried out

and even if they were they remain patent and thus identifiable by the Claimants before or at the time of purchase.

[37] By way of affirmative defence, the Council submits the water ingress is due to lack of maintenance on the part of the Claimants and the claim for repainting amounts to betterment.

[38] By way of further affirmative defence, the Council submits that the Claimants appear to have been awarded damages pursuant to the proceedings filed in the District Court at Rotorua on 5 February 1998 and claimants may not bring a claim for damages twice.

[39] By way of further affirmative defence, the Council submits that the Claimants have failed to mitigate their losses by failing to detect the defects now alleged prior to completing the purchase of the property on 4 July 1996 and by failing to maintain and repair their dwelling as the defects became apparent between 1 February 1997 and the date of the hearing of this claim.

[40] By way of further affirmative defence, the Council submits that one or more of the claims by the Claimants are time barred by virtue of section 4 of the Limitation Act 1950.

[41] The Council further submits that if it is found liable to the Claimants, the other respondents are liable as concurrent tortfeasors with the Council to contribute to or indemnify such loss or damage as the Council may be held liable for pursuant to s29(2) of the Weathertight Homes Resolution Services Act 2002 and s17(1)(c) of the Law Reform Act or under common law.

THE DEFENCE FOR THE FOURTH RESPONDENT (CANTEC)

[42] Cantec denies liability for any damage to the Claimants' dwelling and claims that lack of maintenance is the cause.

[43] Cantec denies that there is anything wrong with the butynol gutters apart from some having wrong falls and holding water. Cantec submits that it was not responsible for designing or building the gutters and that it is unreasonable to expect the butynol layers to police the design and building of gutters for correctness.

[44] Cantec denies that the Insulclad cladding was installed incorrectly and contends that there is no evidence of any incorrect work on the part of Cantec. Cantec claims that movement in the structure has been greater in some places than the Insulclad can cope with which is a design issue, that the balustrade was constructed with a flat top on the instructions of the Second respondents, that fixing the handrail through the balustrade cap is another design issue, and that the crack in the front of the balustrade is likely to be the result of the plywood backing to the curved balustrade springing away from the framing and exerting undue pressure on the polystyrene.

THE DAMAGE TO THE CLAIMANTS' DWELLING

[45] In simple terms, the damage to the owners' dwelling is the penetration of the dwellinghouse by water. (See: Smith v Waitakere City Council and Ors - Claim No. 00277/12 July 2004 at paras. 95-99)

[46] In this case, The WHRS Assessor has concluded that the penetration of the owners' dwellinghouse by water has caused further damage which may be summarised as follows:

- Popping and minor cracking of the internal linings in the lobby beside the WC, the bathroom, bedroom 1 and ensuite, and above the windows facing the street in the lounge and living areas.

- Soft rot degradation of timber framing to the deck handrail

- Cracked joints to Insulclad on top and exterior face of balustrade

- Cracking to cladding at parapet corners and minor damage to paintwork of soffits

THE CAUSES OF THE DAMAGE TO THE CLAIMANTS' DWELLING

[47] Following his inspections of the property on 9 and 21 January 2004, Mr Probett reported that water was entering the dwelling as a result of the following construction:

[a] Parapet corners because of the lack of cover over the internal (concealed) gable end gutters by the roof tiles, poor fitting of the gable end parapet flashings, and/or failure of the butyl rubber in the corner of the stop ends to the principal gutters or because the butyl rubber had not been turned up in the stop ends of the gutter so as to be above the overflow height.

[b] Internal gutters overflowing tile battens because the downpipe and the overflow were blocked or failed to cope with heavy rain.

[c] The deck handrail/wall because the horizontal (Insulclad) surface has been constructed without fall and the metal handrail above the Insulclad wall is mounted on short vertical stanchions that penetrate the cladding.

Parapets and internal gutters

[48] I accept Mr Probett's evidence that water is penetrating the parapets as further evidenced by the cracking and staining on the lower face and bottom edge of the parapet cladding below each end of the roof gables.

[49] In relation to the water penetration in and about the internal gutters referred to in [a] and [b] above, Mr Probett acknowledged that the droppers and the gutter overflows could have blocked with leaves causing water to build up and overflow the gutter rather than the problem being related to design or construction fault.

[50] Mr Foley stated in his evidence that the butyl rubber in the gutters was installed with adequate upstands and was taken up and over the first tile batten and Mr Waites stated in Cantec's written response to the claim that the overflows were clearly below the butyl upstands as evidenced by PIC 009 in Mr Probett's report.

[51] There is no evidence that water is penetrating the butyl rubber gutter linings or that the butyl rubber upstands are inadequate at any point in the gutter construction and it would seem to me that if water was penetrating the dwelling because it overflowed the gutter, evidence of same and consequential damage would be reasonably apparent along the entire length of the parapets; it is not, and that much was obvious from Mr Probett's photos (PIC 002,003,004) and from the site visit. I am satisfied that the evidence discloses that the overflows are lower than

the first tile batten and any water penetration over the tile battens could only be due to a build up of leaves and debris in the gutters which is not a design or construction defect.

[52] Of the inconsistent evidence given in relation to this matter, I prefer on the balance of probabilities, Mr Probett's view that the cause of the water penetration is due to inadequate or improper flashings in and around the gables and/or the junction between the gable ends of the roof planes and the internal butynol gutters.

The deck handrail

[53] I understand that the curved timber framed handrail to the deck off the dining room has been constructed by bolting 100x50 timber balusters to the 150x50 cantilevered deck joists, that the timber framing was then sheathed in plywood and the handrail wall clad with Insulclad on the top and both sides.

[54] A full length vertical crack in the Insulclad cladding is clearly observed on the outer face of the handrail wall slightly to the eastern side of the centre of the deck and the top of the handrail at the eastern end of the deck is noticeably cracked on a line through the end stanchion. (See figure 004 and PIC 017 of Mr Probett's report)

[55] Mr Probett reported that the top surface of the handrail is quite weathered, has many micro cracks, and fails to shed water because it is flat and textured.

[56] Moisture meter readings taken by Mr Probett along the length of the curved outer wall of the deck disclosed that the moisture content of the handrail framing ranged from 23.6% to 64.7%.

[57] Mr Probett removed samples of timber framing and plywood from the handrail and sections from across the depth of those samples were tested by Mr Wakeling of Primaxa Limited. In a report dated 9 February 2004, Mr Wakeling advised that the samples contained decay micromorphology typical of soft rot, that the extent of fungal infection indicated that the framing and plywood had been exposed to at least 5 years of continuous moisture or a longer period of fluctuating moisture conditions, and Mr Wakeling recommended that the timber framing and plywood should be replaced because it would have lost a significant proportion of its structural integrity.

[58] In his report dated 17 February 2004, Mr Probett stated that the cladding to the handrail has not been fixed in accordance with Plaster Systems Limited recommended construction details and concluded that water is entering the handrail through the textured level surface and around the handrail stanchions.

[59] Mr Waites deposed that the cracking was caused by structural movement caused by settlement and/or earthquakes and/or because the plywood sheathing behind the polystyrene was springing away from the timber framing.

[60] Of the competing views, I prefer Mr Probett's analysis of the problem which I consider to be convincing on balance. There may well be some merit to Mr Waites' theory but I am more inclined to think that any movement in the plywood handrail sheathing has been caused by water penetration rather than by purely mechanical failure (of the fasteners), certainly there was no evidence of mechanical failure of the plywood fasteners presented by any party in these proceedings.

Summary of causes of damage to Claimants' dwelling

[61] For the reasons set out above and rejecting all arguments to the contrary, I determine that the causes of damage to the owners' dwellinghouse are as follows:

- Water penetration due to inadequate or improper flashings in and around the gables and/or the junction between the gable ends of the roof planes and the internal butynol gutters.

- Water penetration through the flat textured Insulclad surface to the handrail wall and cracking around the handrail stanchion

THE REMEDIAL WORK

[62] Mr Probett recommended that the following remedial work be actioned as soon as possible to make the dwellinghouse watertight and to repair the damage:

- Repair the internal wall linings in the lobby beside the WC, laundry, bedroom 1 and ensuite as well as the ceiling in the lobby and the area of wall above the windows facing the street in the lounge and living rooms

- Replace the deck handrail where infected with soft rot

- Form a sloping surface to the handrail wall or fit metal flashings

- Modify the metal handrail so that water entry around the stanchions is eliminated

- Repair cracks in the external areas of the parapet gable intersections

- Re-flash or rework the flashings on the gable ends

- Lower the height of the gutter overflows

- Check all butyl rubber work including the height of the butyl rubber up-stands and the corner details in the gutters

- Reform the butyl lined gutters to correct falls

[63] Mr Probett assessed the cost of that work at $12,630 inclusive of GST and provided a breakdown of his costings in the form of a spreadsheet.

[64] I have already determined that there has been no proven failure of the butynol and accordingly the costs in the amount of $2,820 related to that work (being spreadsheet reference items 7.05.1 - 7.05.5) should be deducted from Mr Probett's assessment of the cost of the remedial work. I note that whilst the gutters may not have been constructed to correct falls, that failure is a building defect that has not caused water penetration and is thus a matter over which I have no jurisdiction to determine liability and remedies.

[65] The council has submitted that for the claimants to expect the parties to pay for the repainting amounts to betterment because the dwelling does not appear to have been repainted since it was built and plaster-clad houses should be repainted every 5 years.

[66] The Council's submission on this issue was echoed by all respondents and a considerable amount of evidence was given during the course of

the hearing by each of the witnesses on the period of time within which a dwelling should be repainted. It must be said that that evidence was largely conjectural and anecdotal, however it would seem that there is little dispute over this issue because the period of 10 years within which the Claimants accept a dwelling should be repainted is to hand and Mr Clarken gave evidence that it was pointless repainting the dwelling in recent years when there were more serious weathertightness issues that needed to be resolved first.

[67] In the end I have concluded that the matter is really of little moment insofar as this claim is concerned because the total amount allowed for painting by Mr Probett is only $300 odd dollars and I am satisfied that that modest amount would quickly be consumed by the additional costs the owners will need to meet in preparing the repaired Insulclad areas to receive what would otherwise have been only a repaint.

[68] In the circumstances I am satisfied that no further deduction from Mr Probett's assessment of the cost of the remedial work is justified on the ground of betterment.

Summary of remedial work

[69] Therefore to summarise the position, I determine that the proper scope of the necessary remedial work is that work recorded at 7.04.1, 7.04.2, 7.04.3, and 7.05.1 of Mr Probett's spreadsheet, viz. remove and replace the deck handrail support wall, modify the metal handrail and refix, repair cracks in the Insulclad, and re-flash gable ends to the roof planes.

[70] The proper cost of effecting the necessary work to prevent water penetration of the owners' dwellinghouse and to remedy the damage that has been caused by the dwellinghouse being a leaky building is therefore $9,810.00 inclusive of GST.

LIABILITY FOR DAMAGE TO THE CLAIMANTS' DWELLING AND THE COST OF REPAIR

The liability of the First respondent, Philip Carling, in tort

[71] For an Architect or Engineer providing professional services, liability to third parties may arise out of either negligent design or negligent supervision of contract works (*Young v Tomlinson* [1979] 2 NZLR 441, *Morton v Douglas Homes Ltd* [1984 2 NZLR 548).

[72] In this case the evidence discloses that Mr Carling had no further involvement in the building of the Claimants dwelling once the building Consent was issued and never attended the site. Accordingly, liability could only attach to Mr Carling in relation to negligent design.

[73] Whilst the handrail design and construction (a flat top surface penetrated by handrail stanchions) has certainly caused water penetration, the evidence of Mr Probett was that the deck handrail was constructed in a different manner to that detailed by the Architect, Mr Carling and the deck handrail cladding was not fixed in accordance with Plaster Systems standard recommendations. In the circumstances, it clearly follows that Mr Carling has not caused any loss and has no liability to the Claimants or any other respondent in relation to the water penetration and damage to the deck handrail.

[74] The evidence also discloses that the parapets and associated flashings were constructed in a different manner to that detailed by Mr Carling. Accordingly it follows that Mr Carling has not caused any loss and has no liability to the Claimants or any other respondent in relation to the water penetration and damage to the parapets.

[75] Accordingly, I am satisfied that Mr Carling's drawings met the standard required of an architect engaged to prepare drawings for building consent purposes in 1994, there is no evidence that Mr Carling breached the duty of care that he owed to the Claimants, and the claim against Mr Carling Fails.

The liability of the Second respondents, Douglas and Robin Foley

The Limitation defence

[76] The Claimants bought the property from the second respondents on 4 July 1996 and settlement occurred on 16 August 1996.

[77] The Claimants filed an application to use the Weathertight Homes Resolution Service on 13 March 2003, some 6 years 7 months later.

[78] Mr Dennett, the solicitor acting for the Second respondents, submitted in the written response to the adjudication claim filed on 24 December 2004 that claims made by the Claimants are barred in terms of the Limitation Act 1950.

[79] Section 4(1) of the Limitation Act 1950 provides that actions founded on simple contract or on tort shall not be brought after the expiration of 6 years from the date that the cause of action accrued.

[80] Accordingly, any claim against the Second respondents in contract, i.e. for breach of warranty in the Sale and Purchase Agreement is time barred by operation of Section 4 of the Limitation Act 1950 because the cause of action in contract is deemed to accrue at the time of the breach, which in this case was the date upon which the warranty was given

being 16 August 1996, more than 6 years before these proceedings were initiated.

[81] In tort however, the accrual of the cause of action in negligence arises when the damage occurred or when the when the defect became apparent or manifest. In relation to latent (hidden) defects, that cause of action accrues only when they are discovered or could have been discovered by reasonable diligence. (*Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA), [1996] 1 NZLR 513)

[82] I accept the evidence of Mr Clarken that he did not become aware of the cracks and leaking until 2001 when he contacted Cantec to inspect and repair the gutters. Accordingly, any claim in negligence is not statute barred by operation of section (4) of the Limitation Act 1950 because the limitation period of 6 years from discovery had not run when the Claimants filed an application to use the Weathertight Homes Resolution Service on 13 March 2003.

The defence of estoppel

[83] Mr Dennett submitted that the Claimants are estopped from making claims in respect of the construction of the dwelling against the Second respondents because, following the issuing of proceedings by the Claimants against the Second respondents in the Rotorua District Court in February 1998, there was a settlement on 15 June 1999 by the Second respondents of the claims made by the Claimants in respect of the construction and maintenance requirements of the dwelling which was a full and final settlement and constituted a full accord and satisfaction between the Claimants and the Second respondents.

[84] There is a certain difficulty with that defence in this case because the claim that is the subject of these proceedings is a claim in relation to latent defects which according to Mr Clarken's evidence, which I accept, did not manifest themselves until 2001, some 2 years subsequent to the settlement of the District Court proceedings relied upon by the Second respondents, and which by my reading clearly related to non-completion by the Second respondents of certain defined building and maintenance matters.

[85] Therefore I am driven to conclude that there was no accord and satisfaction (i.e. there was no agreement and consideration to make the agreement operative) in relation to the matters which are the subject of these proceedings between the Claimants and the Second respondents in 1999 and accordingly the Claimants are not estopped from claiming against the Second (or any other) respondents in these proceedings.

The liability of the Second respondents in tort

[86] Following a long line of cases including *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, *Mt Albert Borough Council v Johnson* (CA) [1979] 2 NZLR 234, *Morton v Douglas Homes Limited* [1984] 2 NZLR 548, *Brown v Heathcote County Council* [1986] 1 NZLR 84, *Lester v White* [1992] 2 NZLR 483, *Chase v de Groot* [1994] 1 NZLR 613, *Riddell v Porteous* [1999] 1 NZLR 1, the law is well settled in New Zealand, that those who build and/or develop properties owe a non-delegable duty of care to subsequent purchasers. The non-delegable duty on the builder/developer is not merely to take reasonable care for the safety of others, it generates a special responsibility or duty to see that care is taken by others, for example by an agent, or independently employed contractors, such as the Fourth respondent in this case. Non-delegable duties need not be discharged by the employer personally, but

liability rests with the employer if their discharge involves negligently inflicted harm or damage.

[87] There is no dispute in this case that the Second respondents, Douglas and Robin Foley were the builders and developers of the Claimants' dwellinghouse which they sold to the Claimants.

[88] The evidence establishes overwhelmingly that moisture has entered the dwelling through the external envelope and that there has been decay and degradation of the timber handrail framing and damage to the Insulclad cladding system.

[89] The Second respondents were the developers of the Claimants' property and they were responsible for the construction of the Claimants' dwellinghouse. Therefore, by application of the principles illustrated in the authorities cited (supra), I find that the Second respondents, Douglas and Robin Foley, owed the Claimants a duty of care as the purchasers of the property they built and developed, Douglas and Robin Foley breached that duty of care by constructing, or permitting to be constructed, defective building works, and by reason of the said breaches, the Claimants have suffered loss and damage to their property for which the Second respondents are liable.

[90] Accordingly, I find the Second respondents, Douglas and Robin Foley, liable to the Claimants for damages in the sum of $9,810.00.

Liability of the Third respondent, the Council

[91] Following a long line of authorities, the law is now well settled in New Zealand that a Council owes a duty of care when carrying out

inspections of a dwelling during construction, and that position was confirmed in *Hamlin v Invercargill City Council* [1994] 3 NZLR 513:

> It was settled law that Councils were liable to house owners and subsequent owners for defects caused or contributed to by building inspector's negligence.

[92] The duty of care owed by a Council in carrying out inspections of building works during construction is that of a reasonably prudent building inspector.

> 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 reasonably prudent Council would 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 in which can cause very substantial damage to a building.
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[93] Notwithstanding that the common law imposes a duty of care on Councils when performing duties and functions under the Building Act 1991, a Council building inspector is clearly not a clerk of works and the scope of duty imposed upon Council building inspectors is accordingly less than that imposed upon a clerk of works:

> A local Authority is not an insurer, nor is it required to supply to a building owner the services of an architect, an engineer or a clerk of works.
>
> *Sloper v WH Murray Ltd & Maniapoto CC*, HC Dunedin, A31/85 22 Nov. Hardie Boys J.

[94] The duty of care imposed upon Council building inspectors does not extend to identifying defects within the building works which are unable to be picked up during a visual inspection. This principle was confirmed by the High Court in *Stieller* where it was alleged the Council inspector

was negligent for failing to identify the omission of metal flashings concealed behind the exterior cladding timbers:-

> Before leaving this part of the matter I should refer to some further item of claim made by the plaintiffs but upon which their claim fails. They are as follows:
>
> Failure to provide continuous metal flashings for the internal angles behind the exterior cladding. It seems from the hose test that this is a defect in the corners of the wall at the southern end of the patio deck but I am not satisfied that there is any such defect in other internal angles. It is at all events not a matter upon which the Council or its officers were negligent either in issue of the permit or in the inspection. It is a matter of detail which the Council ought not to be expected to discover or indeed which can be discoverable on any proper inspection by the building inspector.
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[95] The extent of a Council inspector's duty does not extend to including an obligation to identify defects in the building works that cannot be detected without a testing programme being undertaken. In *Otago Cheese Company Ltd v Nick Stoop Builders Ltd*, CP18089 the High Court was considering the situation where no inspection of the foundation was carried out prior to the concrete pour. The Court held as follows:-

> I do not consider that any inspection of the sort which a building inspector could reasonably be expected to have undertaken would have made any difference. There is no question that the builder faithfully constructed the foundation and the building in accordance with the engineer's plans and specifications. No visual inspection without a testing programme would have disclosed to the inspector that the compacted fill was a layer of peat and organic material. If there was a failure to inspect I do not consider that any such failure was causative of the damage which subsequently occurred.
>
> *Otago Cheese Company Ltd v Nick Stoop Builders Ltd*, CP18089

[96] The Council submits that it accepts that there is case authority in existence that says that when a Council carries out an inspection of a domestic dwelling during construction it must carry out that inspection with the due care and attention that a reasonable Council officer would

have done at the time of the inspection taking account the knowledge available to Council officers at that time. The Council submits further, that the obligation only extends to defects that may subsequently become latent and not to defects that remain patent.

[97] The council says there is no evidence available that establishes that the defects complained of amount to a breach of the Building Code/Building Act. In any event, it says that even if the defects do exist, they were not detectable by a reasonable Council officer at the time the inspections were carried out and even if they were, they remain patent and thus identifiable by the Claimants before or at the time of purchase.

[98] The Council submits that the defects complained of by the Claimants are maintenance issues, that the Claimants may not claim for the same damage twice (being a reference to the settlement as between the Claimants and the Second respondents made in 1999), that the Claimants failed to mitigate their loss by failing to detect the defects now alleged prior to completing the purchase of property on 4 July 1996, and that one or more of the claims by the Claimants are time barred by virtue of Section 4 of the Limitation Act 1950.

[99] The issue of whether or not the claims in tort are time barred has already been dealt with at para [82] supra, similarly with the defence of estoppel (see para [85]) .The claim that the Claimants failed to mitigate their losses by failing to detect the defects prior to purchase is in all reality a very long bow to draw in circumstances where the Council claims the defects complained of were not evident to its own experienced officers upon inspection.

[100] That would seem to leave only the Council's argument that the reason for the water penetration of the dwelling is lack of maintenance and its contention that the defects were not identifiable by a reasonable officer at the time the inspections were carried out, as defences to liability for negligent inspection and approval of the building works.

Maintenance

[101] Maintenance, by its very meaning implies that the work at issue was undertaken and completed properly in the first instance so that that state of finish and utility can be preserved for the future by regular checking and repairing when necessary, not by reconstruction to a new and different detail.

[102] Mr Clarken gave evidence that he had contacted a master builder in Rotorua to inspect the dwelling with a view to effecting repairs, and that the builder had advised that the cracks were a result of water ingress, not the cause. In the end he was unable to secure the engagement of the builder to effect any repairs, and not knowing what to do, filed a claim with the WHRS to obtain an independent and measured report on the state of the building. Mr Clarken stated that he considered it pointless to simply repaint the dwelling when he believed there were more serious issues to be resolved, as now borne out in the WHRS report.

[103] I do not consider that the issues complained of are simply maintenance issues and the reasons for reaching that conclusion are these: First, I accept Mr Probett's evidence that water is entering the parapet corners at the base of the gables to the roof planes and merely repairing the cracks and repainting the parapet corners is not of itself going to prevent the penetration of water which I am satisfied on the evidence is entering the cladding in or about the parapet flashings. Secondly, I accept Mr Probett's evidence, as corroborated by Mr Waites, that the handrail walls have not been clad in accordance with the Plaster Systems Ltd. approved detail. Mr Probett stated that the handrail wall capping has been constructed flat (i.e. without the recommended fall) and the textured level surface holds water in "small reservoirs" allowing the water to "percolate between the micro cracks that exist in plaster systems of this type." The uncontested evidence of Mr Wakeling in the Primaxa report is that water penetration of the handrail cladding had been occurring for at least 5 years of continuous moisture or a longer period of

fluctuating moisture conditions placing the time that water penetration first occurred (being 1999 at the very latest) well short of the earliest date (being 2001, 5 years after completion) advocated by any of the parties for repainting the dwelling. Notwithstanding the incorrect construction of the handrail cap, the problem of water penetration was further exacerbated by the metal handrail stanchions that penetrated the Insulclad on the handrail cap and according to Mr Probett, provided "a loosely filled underlying joint that provides an effective access for moisture that penetrates around the leg/plaster joint." It is clear therefore that no amount of patching and paint (maintenance) is going to provide an effective remedy for the water penetration of the handrail wall and the proper remedy requires reconstruction.

Defects not detectable by visual inspection

[104] It would seem therefore, that the only defence left to the Council is its contention that the defects (defective parapet flashings and deck handrail construction) giving rise to the water penetration would not have been detectable by a reasonable council officer carrying out a visual inspection. (See *Stieller*)

[105] Having considered the evidence and having viewed the Claimants' property, I am satisfied that a reasonable Council officer carrying out a visual inspection of the Claimants' dwelling would have simply observed that the parapets were flashed, that the flashings appeared adequate and fit for purpose, and a council officer would not have been able to detect any defect or failure with the parapet flashings without recourse to any testing regime. The extent of a Council inspector's duty does not extend to including an obligation to identify defects in the building works that cannot be detected without a testing programme being undertaken and by application of the principles illustrated in the authorities cited (supra), I find that the Council did not breach the duty of care owed to the Claimants as future purchasers of the property in relation to the defective construction that has caused water penetration in and around the parapet flashings of the dwelling.

[106] The position is somewhat different however in relation to the handrail construction and Mr Lawrence's own evidence supports that. Mr Lawrence gave evidence that the handrail capping was not constructed in accordance with the plans approved by the Council when it issued the Building Consent and that a building officer would have been able to pick up that change in detail by visual inspection. In the circumstances it seems fairly clear to me that a Council officer exercising due care and attention whilst inspecting the dwelling during the course of construction, or on completion, should have detected the changed handrail construction detail which in turn would have directed him to observe the incorrectly executed building work.

[107] Mr Probett gave evidence that the approved Plaster Systems detail for the construction of fully clad parapet and handrail walls required a sloping top to be formed and that that detail had been current for 5 years prior to the construction of the Claimants' dwelling. Mr Probett stated that water is entering the handrail framing through the textured level top surface of the handrail and an inclined surface would have eliminated the risk of water penetration through the micro-cracks that exist in plaster systems of this type.

[108] Mr Waites submits that the Insulclad was done correctly, but accepts that the top of the handrail wall was not clad correctly.

[109] In the circumstances, I am satisfied that the Council owed the claimants a duty of care (in relation to the inspection of the handrail) that the Council breached that duty when it failed to detect the unapproved and non-compliant construction of the handrail that was patent and detectable at the time the Council's inspections were carried out, and by reason of the said breach, the Claimants have suffered loss and damage to their property for which the Third respondent, the Council, is liable.

[110] Accordingly, I find the Third respondent, the Council, liable to the Claimants for damages in the sum of $6,210.00 being the amount

allowed for remedial work to the handrail by Mr Probett in his costing schedule at Ref. 7.04.

The liability of the Fourth respondent, Cantec

[111] Mr Waites submits that the cracks in the handrail wall cladding are the result of structural movement which has been greater than the Insulclad can cope with which is a design issue. I think that is partially correct, but only in relation to design work imputed to Cantec by virtue of the changes it made to the manufacturer's recommended cladding details for parapet and handrail walls.

[112] Mr Waites acknowledges that the flat top to the deck handrail wall has not been constructed in accordance with the Plaster Systems Ltd recommendations. However, Mr Waites submits that that failure is not the fault of Cantec because during the course of construction and without consultation or the knowledge of Cantec management, the design of the handrail was changed on the instruction of the Second respondents who paid Cantec to do what they required.

[113] I think there is a distinct difficulty with that argument because notwithstanding the alleged instruction of the Second respondents, I am satisfied that it is just and reasonable to hold that Cantec, as the specialist cladding contractor, owed a duty of care to future homeowners in respect of the cladding work that it carried out on the (owners') dwellinghouse. By its own admission, Cantec knew or ought to have known, that the cladding work it undertook to the top of the handrail wall was not in accordance with the manufacturer's recommendations, and clearly it either followed instructions that it knew or ought to have known were contrary to the manufacturer's recommendations and industry standards and/or it departed from those recommendations and

standards intentionally or inadvertently of its own volition, and in either case, I find that it did so entirely at its own peril and it must now bear responsibility for the damage that ensued.

[114] In the end, I am satisfied that Cantec, the specialist cladding contractor, owed a duty of care to future home owners when it undertook the cladding work on the owners' dwelling, that it breached that duty of care by departing from the manufacturer's installation recommendations, and by reason of the said breach, the Claimants have suffered loss and damage to their property for which the Fourth respondent, Cantec, is liable.

[115] Accordingly, I find the Fourth respondent, Cantec, liable to the Claimants for damages in the sum of $6,210.00 being the amount allowed for remedial work to the handrail by Mr Probett in his costing schedule at Ref. 7.04.

CONTRIBUTION

[116] I have found that the Second respondents Douglas and Robin Foley, breached the duty of care that they owed to the Claimants, and accordingly Douglas and Robin Foley are tortfeasors or wrongdoers and are jointly and severally liable to the Claimants in tort for the full extent of their loss, namely $9,810.00.

[117] I have also found that the Third and Fourth respondents breached the duty of care they owed to the Claimants and each of them is liable to the Claimants in tort for their losses to the extent of $6,210.00.

[118] It follows that the Second respondents and the Fourth respondent are joint tortfeasors because they are responsible for the same tort (i.e. negligent construction) and the Second respondents and the Third respondent, the Council, are concurrent tortfeasors because they are responsible for different torts (i.e. negligent construction on the part of the Second respondents and negligent inspection on the part of the Council) that have combined to produce the same damage giving rise to concurrent liability. Concurrent liability arises where there is a coincidence of separate acts which by their conjoined effect cause damage (*Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 at 584 (CA)). However, and notwithstanding that distinction:

> Joint or concurrent tortfeasors are each liable in full for the entire loss…. Actual satisfaction of the full amount by one tortfeasor discharges claims against other tortfeasors whether joint or concurrent, because there is no loss left to compensate.
>
> [Todd, The Law of Torts in New Zealand, 3rd Ed., page 1144]

[119] Accordingly, for the reasons set out in this determination, and based on the principles enunciated in *Todd* (supra) the Third and Fourth respondents are each jointly liable with the Second respondents in respect of the same damage for which I have found each of them liable, namely $6,210.00.

[120] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[121] The basis of recovery of contribution provided for in s17(1)(c) is as follows:

> 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 a joint tortfeasor or otherwise…

[122] The approach to be taken in assessing a claim for contribution is provided in s17(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.

[123] 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. In *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), the Court apportioned responsibility for the damages at 80% to the builder and 20% to the Council on the basis that primary responsibility lay with the builder as the person responsible for construction in accordance with the bylaws and that the inspector's function was supervisory.

[124] I have determined that the Claimants have suffered damage to the extent of $9,810.00 as a result of the breaches of the second respondents, and that the Third and Fourth respondents each contributed to that damage suffered by the Claimants to the extent of $6,210.00.

[125] As in *Mount Albert v Johnson* primacy for that damage ($6,210.00) to the Claimants' dwelling rests with the Second and Fourth respondents as the builders/developers/contractors whose responsibility it was, to carry out, or to have carried out, the building works in accordance with the building code and the building consent. It is a condition of every building consent that the building work is to be undertaken in accordance with the plans and specifications so as to comply with the Building Code and the

observance of that requirement was the builders/developers/contractors' primary responsibility.

[126] The Council's role, on the other hand is essentially supervisory and to that extent I consider that its role should be significantly less than that of the principal author(s) of the damage. Having considered the matter carefully, I see no compelling reason to depart from the general principle in this case and accordingly the Council, is entitled to an order that the Second and Fourth respondents equally and jointly bear 80% of the total amount to which the Claimant would otherwise be entitled to obtain from the Council in damages pursuant to this determination.

[127] I am satisfied that it is just and equitable that the Second and Fourth respondents should bear equal responsibility for the damage that both are responsible for and that each is accordingly entitled to an order that the other bears 50% of the amount to which the Claimants would otherwise be entitled to obtain from either the Second or Fourth respondents in damages pursuant to this determination.

[128] Accordingly, I determine that the Second respondents are entitled to a contribution towards the amount of $9,810.00 that the Claimants would otherwise be entitled to obtain from them in damages pursuant to this determination as follows:

- From the Third respondent, the Council, $1,242.00 (being 20% of $6,210.00; and

- From the Fourth respondent, Cantec, $2,484.00 (being an equal share amounting to 40% of $6,210.00).

[129] The Fourth respondent is entitled to a contribution from the Second respondents towards the amount of $6,210.00 that the Claimants would otherwise be entitled to obtain from it in damages pursuant to this determination in the amount of $2,484.00 and the Fourth respondent is entitled to a contribution from the Third respondent towards the amount of $6,210.00 that the Claimants would otherwise be entitled to obtain from it in damages pursuant to this determination in the amount of $1,242.00.

COSTS

[130] The power to award costs is addressed at clause 43 of the Act, which provides:

> **43 Costs of adjudication proceedings**
>
> (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 subsection (1) the parties must meet their own costs and expenses.

[131] I think it is fair to summarise the legal position by saying that an Adjudicator has a limited discretion to award costs which should be exercised judicially, not capriciously.

[132] I am not persuaded that any party has acted in bad faith, or that its case was without substantial merit such that an award of costs would be appropriate in this case.

[133] I therefore determine that the parties shall bear their own costs in this matter.

CONCLUSION AND ORDERS

[134] For the reasons set out in this determination, and rejecting all arguments to the contrary, I determine:

[a] The Second respondents are in breach of the duty of care owed to the Claimants and they are jointly and severally liable to the Claimants in damages for the loss caused by that breach in the sum of $9,810.00.

[b] The Third respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $6,210.00.

[c] The Fourth respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $6,210.00.

[d] As a result of the breaches referred to in [a], [b] and [c] above, the Second respondents on the one hand, and the Third respondent and the Fourth respondent on the other are concurrent and joint tortfeasors respectively.

[e] As between the Second respondent on the one hand and the Third and Fourth respondents on the other; the Second respondent is entitled to a contribution from the Third and Fourth respondents, jointly and severally, for the same loss that each has been found liable for, being $3,726.00.

[f] As between the Third respondent on the one hand and the Second and Fourth respondents on the other; the Third respondent is entitled to a contribution from the Second and Fourth respondents,

jointly and severally for the same loss that each has been found liable for, being $4,968.00.

[g] As between the Fourth respondent on the one hand and the Second and Third respondents on the other; the Fourth respondent is entitled to a contribution from the Second and Third respondents jointly and severally for the same loss that each has been found liable for, being $3,726.00.

[h] As a result of the breaches referred to in [a], [b], and [c] above, the gross entitlement of the Claimants is $9,810.00.

Therefore, I make the following orders:

(1) The Second respondents, Douglas and Robin Foley are jointly and severally liable to pay the Claimants the sum of $9,810.00.

(s42(1))

(2) The Third respondent, the Council, is liable to pay the Claimants the sum of $6,210.00.

(s42(1))

(3) The Fourth respondent, Cantec, is liable to pay the Claimants the sum of $6,210.00.

(s42(1))

(4) In the event that the Second respondents, Douglas and Robin Foley pay the Claimants the sum of $9,810.00 they are entitled to a contribution of $3,726.00 from the Third and Fourth respondents, jointly and severally, in respect of the amount which the Second respondents on the one hand and the Third and Fourth respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(5) In the event that the Third respondent pays the Claimants the sum of $6,210.00 it is entitled to a contribution of $4,968.00 from the Second and Fourth respondents jointly and severally, being 80% of the amount in respect of which the Third respondent on the one hand and the Second and Fourth respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(6) In the event that the Fourth respondent, pays the Claimants the sum of $6,210.00 it is entitled to a contribution of $3,726.00 from the Second and Third respondents jointly and severally, being 60% of the amount in respect of which the Fourth respondent on the one hand and the Second and Fourth respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(7) In the event that the Third respondent pays the Second respondents the sum of $3,726.00, the Third respondent is entitled to a contribution of $2,484.00 from the Fourth respondent being 40% of the amount in respect of which the Third respondent on the one hand and the Second and Fourth respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(8) In the event that the Fourth respondent pays the Second respondents the sum of $3,726.00, it is entitled to a contribution of $1,242.00 from the Third respondent being 20% of the amount in respect of which the Fourth respondent on the one hand and the Second and Third respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(9) Each party shall bear its own costs and expenses in this matter.

(s43(2))

[135] To summarise the position therefore, if all respondents meet their obligations under this determination, this will result in the following payments being made forthwith:

<u>To the claimants by:</u>		
The Second respondents	$6,084.00	
The Third respondent	$1,242.00	
The Fourth respondent	$2,484.00	
	$9,810.00	$9,810.00
Total amount of this determination:		$9,810.00

Dated this 12th day of May 2005

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JOHN GREEN

ADJUDICATOR

STATEMENT OF CONSEQUENCES

IMPORTANT

Statement of consequences for a respondent if the respondent takes no steps in relation to an application to enforce the adjudicator's determination.

If the adjudicator's determination states that a party to the adjudication is to make a payment, and that party takes no step to pay the amount determined by the adjudicator, the determination may be enforced as an order of the District Court including, the recovery from the party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs entitlement arising from enforcement.