CLAIM NO: 2171

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **AVIS COOPER**

Claimant

AND **WELLINGTON CITY COUNCIL**

First Respondent

AND **R & I KENNEDY LIMITED**

Second Respondent

AND **R TE ONE ASSOCIATES LIMITED**

Third Respondent

AND No Fourth Respondent Master Build Services Limited having been struck out

AND **TREVOR GASKIN**

Fifth Respondent

AND No Sixth Respondent CSR Building Products having been struck out

AND No Seventh Respondent Telfer Young (Wellington) Limited having been struck out

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DETERMINATION
(Dated 3rd October 2006)

AND **GORDON COOPER**

Eighth Respondent

AND **RICHARD ARCUS**

Ninth Respondent

AND **BARRY DUNN**

Tenth Respondent

Hearing: 14 – 15 August 2006

Appearances: B A Gibson, Counsel for the Claimant and Eighth Respondent
J A D Woolley, Counsel for the First Respondent
Mike Basil Jones. Counsel for the Third Respondent
Trevor Gaskin, the Fifth Respondent in person
Gordon Cooper, the Eighth Respondent in person
Richard Arcus, the Ninth Respondent in person
Barry Dunn, the Tenth Respondent in person
Don Frame, Assessor appointed by WHRS
John Lyttle, Assessor appointed by WHRS

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1.0 BACKGROUND

1.1 On 9 February 2004 the Claimant made application to the Weathertight Homes Resolution Service ("WHRS") under the Weathertight Homes Resolution Services Act 2002 (the Act) in respect of their property at 18 Crawford Green, Miramar, Wellington.

1.2 An assessor's report dated 22 December 2004 was provided by Don Frame of House Care Ltd ("Assessor's report") pursuant to s10 of the WHRS Act.

1.3 The claim was accepted pursuant to s7 of the WHRS Act.

1.4 The Claimant on 29 March 2005 made application pursuant to s26 of the Act for the matter to be referred to adjudication.

1.5 I was assigned the role of adjudicator pursuant to s27 of the Act.

1.6 A preliminary conference was held on 27 May 2005 by teleconference. The preliminary conference set down the procedures for the adjudication process and timetabling.

1.7 There were 20 Procedural Orders issued during the interlocutory proceedings which dealt with applications for removal and joinder of parties, timetabling matters and the like.

1.8 The Fourth, Sixth and Seventh Respondents were removed from the adjudication proceedings during the interlocutory period.

1.9 Mediation was attempted during the period of the interlocutory proceedings but settlement of the claim was not achieved.

1.10 By letter dated 28 May 2006 Mr R P Kennedy advised on behalf of the Second Respondent, R & I Kennedy Ltd, that he would not be participating in the adjudication hearing due to ill health and did not appear at the hearing. A medical certificate was attached to the letter of 28 May 2006 and it advised that in the opinion of the doctor Mr Kennedy was not fit to attend court on a permanent basis. A 'Statement of Defence of Second Respondent' was filed by counsel for the Second Respondent in February 2006.

1.11 Counsel for the First Respondent provided a Casebook with details of 20 cases that were applicable to the proceedings. This was very helpful when considering the final submissions.

1.12 A hearing was conducted before me which commenced at 9.30am on 14 August 2006. The hearing was held at the Department of Building & Housing, 86 Customhouse Quay, Wellington.

1.13 Remedial work was commenced prior to the hearing and as the remedial work was only partially completed the parties were given the opportunity to inspect the property once the work was opened up. An Assessors report was prepared on the partially completed remediation work by a local Wellington Assessor Mr Lyttle as the original Assessor Don Frame was located in Nelson. This report was in effect only made available at the commencement of the Hearing. The status of the report was discussed at the commencement of the Hearing. I directed that Hearing be adjourned at 10.45am to enable the parties to have the opportunity to read the report before the inspection.

1.14 An inspection was made of the property at 11.00am on 14 August 2006. Attending at the inspection were the Adjudicator and those that were attending at the hearing.

1.15 The parties that were present or represented from the outset of the hearing were:

- Avis Cooper, the Claimant
- Stephen Cody, officer of the First Respondent
- John Drysdale-Smith, officer of the First Respondent
- Richard Te One, the Third Respondent
- Trevor Gaskin, The Fifth Respondent
- Ralph Moore, assisting the Fifth Respondent
- Gordon Cooper, the Eighth Respondent
- Richard Arcus, the Ninth Respondent
- Barry Dunn, the Tenth Respondent
- Peter Wright, assisting the Tenth Respondent

1.16 Persons that appeared as witnesses and gave evidence under oath or affirmation were:

- Avis Cooper, the Claimant
- Gordon Cooper – for the Claimant
- Stephen Cody, officer of the First Respondent
- John Drysdale-Smith, officer of the First Respondent
- Richard Te One, the Third Respondent
- Trevor Gaskin, The Fifth Respondent
- Richard Arcus, the Ninth Respondent
- Barry Dunn, the Tenth Respondent

1.17 Parties that appeared as expert witnesses or were called by me to assist the tribunal were:

- DonFrame – WHRS appointed Assessor
- John Lyttle - WHRS appointed Assessor

1.18 At the commencement of the hearing I outlined my powers under the Act and advised I would endeavour to relax the rules of evidence and assist the parties in presenting the facts and allow them to question the other parties in an informal way. I would however be maintaining the principles of natural justice.

1.19 During the hearing I advised that the Responses to the Notice of Adjudication and the replies to the responses were a matter of record and I would refer to them if required.

1.20 All parties who attended the hearing were given the opportunity to present their submissions and evidence and to cross examine all of the witnesses.

1.21 I directed that written closing submissions were to be filed by 29 August 2006.

2.0 THE PROPERTY

2.1 The property is a detached single storey residential property on a flat corner site situated at 18 Crawford Green, Miramar, Wellington, and the registered owner is Mrs Avis Cooper.

2.2 Construction was from August 1999 to March 2000 with occupation in March 2000.

2.3 Final inspection by the territorial authority has never been made and no Code Compliance Certificate has been issued.

2.4 R & I Kennedy Limited were contracted by the Owner and her husband to build the house with the contract being a lump sum contract

2.5 The construction of the house is concrete foundations and slab, light timber framing clad with brick veneer, aluminium external joinery, part pitched roof with Monier concrete tiles and part flat roofs with Dexx roofing membrane and generally timber framed plasterboard interior linings.

3.0 THE PARTIES

3.1 The Claimant is Mrs Avis Cooper as registered owner of the property and generally I have referred to the Claimant although where appropriate the term owner has been used..

3.2 The first respondent is Wellington City Council ("Council"), which is the territorial authority responsible for the administration of the Building Act in the area.

3.3 The second respondent is R & I Kennedy Limited who were contracted to build the house and were responsible as main contractors for the subcontractors and supervision of the construction. Mr Robert Kennedy has acted as the representative of R & I Kennedy Limited.

3.4 The third respondent is R Te One Associates Limited, the professional company that designed the house and prepared the documentation for the pricing and building consent. It is claimed that R Te One Associates were responsible for supervision of the construction. Mr Richard Te One has acted as the representative of R Te One Associates Limited.

3.5 The fifth respondent is Mr Trevor Gaskin, who carried out the brickwork subcontract for R & I Kennedy Limited.

3.6 The eighth respondent is Mr Gordon Cooper, the husband of Mrs Avis Cooper. Mr Cooper was joined as a respondent in this adjudication on the application of the second and third respondents on the grounds that it is claimed that Mr Cooper was in charge of the building. Leave was sought shortly before the hearing for Mr Cooper to be joined as a joint claimant and the application was refused.

3.7 The ninth respondent is Mr Richard Arcus. Mr Arcus was an employee of Gunac Ltd, the subcontractor for the Membrane Roofing.

3.8 The tenth respondent is Mr Barry Dunn, Mr Dunn was an employee of Prestige Roof & Brick Ltd, the subcontractor for the Monier tile roofing. That company has been liquidated.

4.0 THE CLAIM

4.1 The Claim by the Claimant is set out in 'Claim By Avis Cooper' dated Friday 16th September 2005.

The paragraphs that contain the allegations and the claim are:

"9. The dwellinghouse was duly constructed and occupied by the claimant and her husband, the eighth respondent, but was found not to be watertight with various leaks from the roof and parapet junctions to the bedroom and the lounge.

10. It was a term of the contract between the claimant and the second defendant that the dwellinghouse would be constructed in a proper and tradesmanlike manner and would be watertight.

11. It was a term of the said contract that the second respondent would not employ as sub-contractors tradesmen other than tradesmen able to undertake the work on the claimant's house in a proper and tradesmanlike manner.

12. The second respondent failed to construct the dwellinghouse in accordance with the plans prepared by the third respondent. The third respondent prepared plans and specifications including a plan and specification for the brick parapet, which parapet failed and was a significant cause of the water ingress into the dwellinghouse.

13. The fifth respondent drew the attention of the second respondent to the design faults for the parapet, yet on the instructions from the second respondent, and in the knowledge that the parapet would not be watertight and had no metal apron flashings, completed the brickwork.

14. The tenth respondent who was a roofing sub-contractor, placed the monia (sic)r concrete tiles on the roof, which tiles failed because of the failure of the tenth respondent to ensure that flashings were installed under the roofing tiles.

15. *The first respondent was the territorial authority responsible for the issuing of the building permit and for undertaking inspections to ensure that the dwellinghouse, while in the course of construction, was being constructed in accordance with the requisite building codes in the terms of the building consent.*

16. *In the course of inspections referred to in the preceding paragraph it became apparent to the council's building inspectors that there was water ingress into the dwellinghouse yet, notwithstanding that knowledge, the Council failed to require alterations which would have prevented the water ingress.*

17. *By virtue of the aforesaid breach of the terms of the contract between the claimant and the second and third respondents and/or their negligence and the negligence of the fifth and tenth respondents and the negligence and breach of statutory duty of the first respondent as aforesaid the claimant seeks an award on adjudication requiring the said respondents to pay (other than the eighth respondent), on an indemnity basis, the costs of repairs necessary to repair the dwellinghouse and make it watertight and to obtain the issuance of a code compliance certificate."*

The Claimant has claimed against the First, Second, Fifth and Tenth Respondents and specifically excludes any claim against the Eighth Respondent. The only mention in the Claim about the Third Respondent is in paragraph 3 *" using the plans and specifications prepared by the third respondent."* and at paragraph 17 *" By virtue of the aforesaid breach of the terms of the contract between the second and third respondents and or their negligence…"*

4.2 The Quantum of the Claim was submitted under cover of a letter dated 23 May 2006.

"The claimant claims the following from the respondents-

1.	*The cost of remedial work according to the Quotation received from the Meek Group Limited dated 20 April 2006, a copy of which is annexed hereto*	*70,193.61*
2.	*Tse Group Limited – fee for supervising remedial work*	*17,000.00 (estimate)*
3.	*Wellington City Council – fee paid for building*	*2,000.00*

consent

4.	*G Cooper – materials purchased for use in remedial work*	*4,964.63*
		$94,158.24"

4.3 Counsel for the Claimant in opening submissions further elaborated on the claim including stating that the applicant relies on both the assessor's report and the report of Tse Group Limited dated 19 November 2003. The opening submissions include paragraphs outlining the details of the claim against the Third Respondent as follows:

> *"3.8 The claim against the third respondent is based on his failure to adequately design a building that would prevent leakage with the necessity to provide suitable roof flashings. Further it is plain that the third respondent carried out supervision of the project in the sense that he certified progress payments to the builder (page 35 of assessor's report) and it must have been apparent that the dwellinghouse was being constructed in such a manner that it would not be weather proof.*
>
> *3.9 The claimant further notes, and relies on the observations of Tse Group in their report of November 2003 that –*
>
> > "We believe that ingress of water into the building is exacerbated by inherent design faults. This can be understood from the drawings available, but in tandem with this is the builder's improvisation where no details are available."
>
> *(Paragraph 6.00 at Page16)*

4.4 The Claim against the Eighth Respondent, Mr Cooper the husband of Mrs Cooper, is made by the Second Respondent , the builder. The Second Respondent alleges that Mr Cooper ran the project and that the lack of watertightness was a direct result of Gordon Cooper's involvement with the roofer, who was a nominated contractor by Gordon Cooper and was engaged and paid direct by Gordon Cooper.

4.5 The Ninth Respondent, the membrane roofing contractor, was joined on the application of the Third Respondent. It is alleged that the application of the membrane roofing, or lack of it, at the brick parapets is a major cause of the leaks

The claim against the Ninth Respondent is that the company he represents was negligent in completion, or non completion, of the membrane roofing.

5.0 LEAKS AND DAMAGE

5.1 The Assessor's report under 'Observations' states:

"..It was obvious that the exterior was in very poor condition due to poor design, poor construction that had contributed to water penetration to this building. Efflorescence was abundant on the brickwork near the south entry door that indicated the presence of water penetration from the roof gutter above.

In my view from what I could see, the external cladding of this house could be considered as 'high-risk', …."

5.2 The Assessor's report lists:

*"**6.1. Causes(s)***

The causes(s) of the water entering the dwellinghouse is/are as follows:

6.1.1 *Poor design.*
6.1.2 *Poor workmanship.*
6.1.3 *Cracks in the cladding.*
6.1.4 *Inadequate parapet protection.*
6.1.5 *Inadequate roof drainage gutter fall.*
6.1.6 *Wall and spouting junctions.*
6.1.7 *Pergola penetrations.*
6.1.8 *Lack of suitable separation between soil and internal floor level.*

6.2. Damage

The nature and extent of any damage caused by the water entering the dwellinghouse is as follows:

6.2.1 *Brickwork to parapets.*
6.2.2 *Timber window lintels*
6.2.3 *Roof tiles and flashings.*
6.2.4 *Internal plaster board wall linings.*

6.3. Repairs

The work needed to make the dwellinghouse watertight (to prevent the further entry of water as a result of the cause identified) and repair the damage is as follows:

6.3.1 *Remove the complete brick parapet to expose top plate.*

6.3.2 *Replace complete top plate with 150x50 H3 timbers as required by approved plans, and provide suitable protection for securing the top edged brick. Provide the required 'perpends' (means– The vertical joints in bricks to provide cavity ventilation).*

6.3.3 *Supply and fit new folded metal flashings, place into mortar joint and drape over flat roof membrane.*

6.3.4 *Supply and install a new stainless steel internal gutter complete with flashings behind brick parapet above garage/entry.*

6.3.5 *Fit anti-ponding boards to perimeter drainage base under roof tiles. Replace all damaged tiles. Supply and fit approved side apron flashings at parapet/tile junction.*

6.3.6 *Remove all brick lintel bricks. Replace all damaged lintel timber. Provide suitable flashing under building wrap to exit any water to drainage weep-holes. Replace bricks to lintels.*

6.3.7 *Remove corner bricks in base course and 'rod-out' all mortar droppings.*

6.3.8 *Remove all decayed ceiling joists along with ceiling top plates.*

6.3.9 *Repair internal walls, and ceilings. Stop-up, and redecorate.*

6.3.10 *Supply and fit an approved cap flashing (side fixing with stainless steel screws) over the complete brick parapet including the membrane parapet.*

6.3.11 *Upon completion remove all debris from site, clean exterior brickwork, and clean the interior of the house."*

5.3 The Addendum to the Assessor's Report as prepared by John Lyttle added further recommended repairs as follows:

*"**7.4 Repairs – additional considerations***

7.4.1 To enable this building to meet necessary durability requirements of the Building Code additional flashings will need to be fitted above cantilevered joists and the windows.

7.4.2 All of the window lintels still need to be viewed from the outside to ascertain whether they need replacing.

7.4.3 The liquid applied membrane that is flashed into the mortar course of the brick work will need to be modified to stop future moisture entry."

5.4 The Tse Group Limited Report dated November 2003 elaborates further on the Assessor's report on some aspects of the causes and damage and I will deal with those matters when considering the various causes of the leaks. As mentioned by counsel for the Claimant in the opening submissions *"Both reports largely mirror the other in their conclusion."*

5.5 I will consider each heading of claim making findings on the probable cause of the leaks and the damage. I have to review the facts as presented in the evidence to answer the following questions:

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

5.5 Having heard the evidence from the parties and the witnesses. I have focussed my considerations on the following areas:

1. Parapets

2. Window and Door Heads

3. Brickwork Generally

4. Tile Roof and Flashings

5. Internal Gutter

6. Canopy Roof Projections cantilevered joists

5.6 Counsel for the Claimant in the opening submissions states:

> *"2.1 No party has challenged the assertion that the home is not weathertight and leaks. The dwellinghouse is plainly a leaky building in terms of section 7(2)(b) of the Weathertight Homes Resolution Services Act 2002."*

The Assessors concluded that the building leaked and from the evidence presented and the inspection there is no doubt that the building did and does leak and damage has resulted.

5.7 The cause of the leaks and the resulting damage and consequential remedial work are listed in previous paragraphs 5.2 and 5.3 and I will answer the questions in relation to the various items as listed in the preceding paragraph. I will deal with the remedial work and cost under a separate section.

1. Parapets

5.7.1.1 The evidence relating to the parapet design and construction took a major part of the hearing time. It was quickly established that the construction was not in accordance with the details as shown on the Building Consent drawings

5.7.1.2 The evidence showed that there were various aspects to the problem with the parapets, these are the design as included in the consent drawings; the design of the parapet as actually carried out; the waterproof membrane/flashings; the brick capping; and the timber top plate and the finish to the top of the parapets all have to be considered. I will deal with the various aspects contributing to the leaks from the parapets in a later section when dealing with liability.

5.7.1.2 The evidence established that there had been water penetration through the parapets and the penetration was extensive down the cavities right down to the floor level. The causes were a combination of no waterproof coating to the brick parapets, cracking to the mortar

joints of the parapets, sealant in lieu of flashings, inadequate waterproofing under the brick parapet cappings.

5.7.1.3 The damage as a result of the leaks from the parapets is rotten timber framing at various positions, swollen skirtings and damaged wall linings. This was evident from the evidence given at the hearing, the inspection and the photographs in both the Assessor's and Tse Group Limited reports. The damage is not just as a result of the leaks at the parapets as the details at the lintels and the lack of weep holes and the blockages at the bottom of the cavities also contribute.

5.7.1.4 The remedial work required at the membrane roof areas would be a complete rebuild of the top part of the parapets to a different design with adequate flashings, or as is intended to be carried out which is removal of the brick capping, remove and replace rotted timber top plate and any other affected framing with treated timber and apply treatment to remaining existing top plate, repair and properly fix building wrap, treated timber shaped fillet to form sloping top of wall with mechanical fixings, Equus membrane and bandage joint and coloured metal capping flashing with mechanical fixings. The remedial work at the sloping parapet areas is similar except for Equus membrane not being required and for the apron and roof flashings to the tile roof. I will deal with the roof flashings in a later section. This work is shown in details 1 and 2 of the follow up Tse Group Limited report dated 20 April 2006.

2. Window and Door Heads

5.7.2.1 Again the evidence established that the construction at the window and door heads was not in accordance with the details as shown on the Building Consent drawings.

5.7.2.2 The Assessor Mr Frame gave evidence that his examination of the construction was that at the steel angle lintels there was no deflection

in place to divert water away and out from the cavity, there were inadequate weep holes, and there were mortar droppings on the steel lintels. These all contributed to water penetration down the cavity as well as the trapping of water at the lintels.

5.7.2.3 The investigation as carried out by Mr Frame of the timber at the lintel at the kitchen window showed rotting timber. Moisture testing at other positions showed acceptable moisture contents. However the water that is not deflected out of the cavities above the lintels as it should be contributes to the damage to the framing, linings and skirtings at the floor level.

5.7.2.4 The remedial work required is as outlined in the Assessor's report. Remove all lintel bricks, replace damaged lintel timber, provide suitable flashing under building wrap to exit any water to weep-holes and replace brickwork. This is similar to what is shown at detail 3 in the follow up Tse Group Limited report dated 20 April 2006 except that detail shows replacement of the internal lining as required.

3. Brickwork Generally

5.7.3.1 The Assessor's report recommends that at the base of the brickwork corner bricks be removed and all mortar droppings be rodded out. The site inspection established that at the areas opened up for inspection of the bottom of the cavity that there were mortar droppings at the bottom of the cavity. Mr Frame gave evidence of how these droppings would contribute to the retention of moisture at the base of the cavities and contribute to the damage to the timber framing, internal linings and skirtings.

5.7.3.2 The follow up Tse Group Limited report dated 20 April 2006 recommends that the section of brick veneer at the West Elevation which comprises brick tiles stuck on to a backing rather than bricks should be replaced. The brick veneer has substantial cracking because

of the differential movement of the brick tiles and the backing. The Building Consent drawings at Sectn A-A on drawing 4 show horizontal weatherboards at this position.

5.7.3.3 Mr Gaskin pointed out the cladding during the site inspection and gave evidence of his instructions to carry out the work. There is no doubt that the differential movement causes cracking and it is advisable that an alternative cladding is used. However no evidence was presented that this area was leaking therefore it is not a leaky building situation and is not within the jurisdiction of this claim.

4. Tile Roof and Flashings

5.7.4.1 The Assessor's report alleges that the Monier tile roof was inadequately completed and may be a cause of leaks and damage. References are:

> *"**(photo 21)** views a tile that was poorly placed and relies on the underlay fabric to provide drainage. **(photo 53)** shows a damaged tile have not had 'anti-ponding board' installed. **(page 77)***
>
> ***(photos 23 & 24)** shows how the roofer tried to provide added lead-edge flashing under the Monier roof tiles to try and prevent water penetration. It should be noted the rough way the flashing has been placed as depicted in **(photo 24)***
>
> ***(photo 25)** view of the brick parapet, Monier tile roof, and the membrane junctions. **(photo 26)** is a close-up of the poorly placed lead flashing that should have been inserted into the mortar joint and covered two troughs of the tile. **(page 78 & 79) (photo 28)** view how the mortar joint in a craggy fashion that allowed water entry, where dye was injected. **(photo 27)** is a close-up view of the tile edge-membrane-building underlay-raw timber and lead flashing.*
>
> ***6.2 Damage***
>
> ***6.2.3** Roof tiles and flashings. Clause **5.3.2 – 5.3.3 – 5.3.6 – 5.3.7***

6.3 Repairs

6.3.5 *Fit anti-ponding boards to perimeter drainage base under roof tiles. Replace all damaged tiles. Supply and fit approved side apron flashings at parapet/tile junction."*

5.7.4.2 The Tse Group Limited report dated November 2003 also alleges that the tile roof may be a source of the leaks. References in that report are:

*"**5.1.2 Pitched Roof***

Our observations regarding the central pitched roof are largely directed towards the flashings, which are discussed below. The general condition of the tiles is fair, although at western eaves one of the tiles has broken and partially lifted.

Photo

5.2 Flashings

We comment that flashings are inadequate particularly in the area of the pitched roof, at the eaves over gutter. The projection required to throw rainwater clear and into the gutter is insufficient. The Owner informed us that on the eastern part of the roof, a revisit by the plumber who undertook the flashing was necessary to prevent leaks directly into the garage below."

5.7.4.3 I will deal further with the matter of the flashings and ponding boards under the section on liability. The parapets at the ends of the pitched tile roof are a source of leaks and this has been dealt with under 'Parapets'. The evidence presented to me did not convince me that the pitched tile roof and associated flashings, other than through the parapets, are a source of leaks therefore this aspect of the claim is not a leaky building situation and is not within the jurisdiction of this claim.

5. Internal Gutter

5.7.5.1 The Assessor's report alleges that the internal gutter at the pitched tile roof above the Entry may be a cause of leaks and damage. References are:

*"**(photo 6)** depicts a general view of the internal roof gutter of the south parapet over the entry/bathroom. **(photo 19)** views the east side brickwork of the internal gutter showing efflorescence. **(photo 22)** views the internal gutter that relies on a sealant as a brick flashing that has failed causing water to enter the cavity causing efflorescence around the front door entry.*

6.3. Repairs

6.3.4 *Supply and install a new stainless steel internal gutter complete with flashings behind brick parapet above garage/entry."*

5.7.5.2 The Tse Group Limited report dated November 2003 also suggests that the internal gutter/parapet junction may be a source of the leaks. References in that report are:

"We were unable to determine whether or not cavity trays had been fitted where the roofing membrane abuts brickwork, such as the area directly above the main entrance porch, although three weep holes are visible. We would expect a cavity tray to be included, allowing an overlap with the upstand or kerb to the roof membrane, ensuring weathertightness. The widespread efflorescence around the main entrance (see photograph, page 4) would indicate a lack of such a tray or the inadequate installation of same…."

5.7.5.3 The evidence is weighted very much that there has been water penetration through the parapet at the internal gutter and that the sealant joint between the internal gutter is inadequate and will be contributing to the water penetration.

5.7.5.4 The damage is the same as the damage caused by the water penetration into the cavities. A metal flashing is required at the junction of the parapet and the internal gutter and a cavity tray; this can be

done in conjunction with the remedial work to the parapets. There is no evidence that the internal gutter itself is not functioning properly and it does not require replacement as part of this claim.

6. Canopy Roof Projections cantilevered joists

5.7.6.1 The canopy roof projections are constructed with the main roof joists cantilevered out to form the roof framing for the canopies. This necessitates the brick veneer walls being built around the cantilevered joists. The water penetration into the cavities above the cantilevered joists has partly accumulated in the roof spaces and the timber has decayed. The Assessor's report shows many photographs of the dye tests that confirm the water penetration into the roof/ceiling spaces. As well as the water penetration from above it is more than likely that in certain weather conditions that water penetration occurs where the joists protrude through the brickwork as the penetrations have not been flashed. The lack of flashings to the joist penetrations constitute a leaky building situation.

5.7.6.2 The decayed timber and the damaged soffit/ceiling linings require replacement and redecoration.

7. Inadequate roof drainage gutter fall, Wall and spouting junctions, Lack of suitable separation between soil and internal floor level

5.7.7.1 The Assessor's report mentions these as causes under Section '6.1 Cause(s)' of the report. There is nothing in the report and no evidence was given at the hearing that these are causes of water entering the dwellinghouse. I will give them no further consideration.

6.0 REMEDIAL WORK AND COST

6.1 The Assessor's report included an estimated cost of repairs of $50,326.00 inclusive of GST. The date of completion of the report was 22 December 2004 so

it is assumed the estimate was current at that time. The estimate includes items such as fitting anti ponding boards and new internal gutter which I have determined are not part of this adjudication claim. The estimate excludes items such as professional fees and supervision, consent fees and the work to the cantilevered joists. The estimate includes a Contingency Amount of $6564.37.

6.2 The 'Quantum of Claim' is based on a quotation from The Meek Group Limited, who have already commenced the remedial work, with various items added based on the Assessor's report estimates. A summary of the The Meek Group Limited estimate is:

"As per scope The Meek Group Ltd $28,231.20

a. Site visit with Don Frame to remove sample timber for testing and check out moisture in window and door lintels
b. Remove top layer of brick
c. Remove surface rot and apply timber saver
d. Tidy up building wrap
e. Supply and install 3.1 treated timber fillet kiln dried covering width of brick cladding and internal framing. Fix using mechanical fixings
f. Supply and install equus membrane and bandage joints where necessary
g. Install flashings (supplied by owner) over top parapet.

Remove Roofing tiles where necessary and re-flash with 2 new flashings refer point 3 & 4 for location

Roof area point 6 inspect all timber and remove all rot and treat with timber saver product

Chemical wash down Roof areas and then re-coat existing dex membrane with maintenance coat

Build up parapet in area where current height does not meet current regulations
Re-use old bricks and new building materials

Replace bricks with ply and dex membrane

Where bricks are cracking re-mortar and seal

10% Contract Margin	2,823.12
Sub Total	$31,054.32
Provisional Sums – Anti ponding boards tile	$ 2,520.00*

	Rod out brick cavity	$ 820.00*
	Remove lintel bricks Replace decay timber and replace bricks	$10,000.00
	Garden repairs/clean up	$ 1,000.00*
	Scaffold	$ 3,000.00*
	Furniture and floor protection	$ 1,000.00*
	Interior make good walls and ceilings	$ 5,000.00*
Contingency Sum		$ 8,000.00
	Sub Total	$62,394.32
	GST	$ 7,799.29
	Total	$70,193.61”

* items included in Assessor’s report estimate.

As the Meek Group Limited information was prepared in April 2006 and when much more information was available on the state of the dwellinghouse and remedial work required I will use these figures and amend the amounts and groupings to suit the items that I determine are part of the claim and to suit the various areas of liability.

6.3 There are items of work included in The Meek Group limited scope that I have determined are not within the jurisdiction of a leaky building claim. These are:

1. Remove Roofing tiles where necessary and re-flash with 2 new flashings refer point 3 & 4 for location

2. Roof area point 6 inspect all timber and remove all rot and treat with timber saver product. Refer Pg 135 for photo’s

3. Chemical wash down Roof areas and then re-coat existing dex membrane with maintenance coat

4. Build up parapet in area where current height does not meet current regulations
Re-use old bricks and new building materials

5. Replace bricks with ply and dex membrane

I have dealt with items 1 and 5 already in this determination. Item 2 is an allowance for removing rotted timbers and for treating timber in the pitched roof. The reference to Pg 135 is to page 135 of the Assessor's report. The photographs at page 135 are of the area above Bedroom 1 and are not of the pitched roof area. There was no evidence presented that established the pitched roof area was leaking, other than at the parapets. The replacement of timber and ceiling repairs are allowed for elsewhere or will be covered by the Contingency Sum. Item 3 is a maintenance item and the evidence showed that the membrane roofs were satisfactory. Item 3 is not within the jurisdiction of a leaky building claim. It may be correct that item 4 does not meet the current regulations however no evidence was offered as to the rebuilding of the lower parapets. The parapet tops will be remedied as for all of the parapets. The building up of the lower parapets is not within the jurisdiction of a leaky building claim.

6.4 There is also an item of work included in The Meek Group Limited Provisional Sums that I have determined is not within the jurisdiction of a leaky building claim. This is:

Provisional Sums – Anti ponding boards tile	$ 2,520.00

6.5 The Provisional Sum for 'Remove lintel bricks and replace decay timber and replace bricks' included in The Meek Group Limited estimate is $10,000.00. The estimated amount included in the Assessor's report is $3,200.00. Having heard the evidence on the position with the lintels and having inspected the dwellinghouse I consider that the allowance of $10,000,00 is excessive and I set the amount at $6,000.00.

6.6 Mr Cody, a witness on behalf of the First Respondent, in his brief of evidence questioned some of the costs in the quantum claim. At paragraph 29.1 he referred to the original cost of the brickwork and submitted that had repairs been

effected early in the process that costs would have been much lower. I will deal with mitigation later in my determination. I have already dealt with the matters that Mr Cody raised as to Quantum except for the Tse Group Limited fees of $17,000. Mr Cody submits that the fees are excessive and that a large part of the fees relate to the production of the Tse Group Limited report in 2003 and to the more recently submitted documentation which it is maintained was work done for other purposes and cannot be claimed as repair costs. I agree that there is an element of the Tse Group Limited fee that is in the nature of costs which do not directly relate to weathertightness and I have reduced the fee to $11,000.00.

6.7 In the 'Submissions of Fifth Defendant – Trevor Gaskin' it is submitted that the absolute limit of a fair claim against any of those held to be responsible is the totality of the original brick work namely $24,700.00. The grounds for the submission are that the eighth respondent/claimant refused to implement an acceptable solution and use a metal capping. I do not accept that submission as a means of setting quantum. I will give it consideration when dealing with mitigation of loss and contributory negligence.

6.8 The other Respondents did not put forward any alternative cost information in their evidence that would persuade me to make any other alterations to the quantum claimed.

6.9 The total amount that I will use for the quantum of the claim is:

As per scope The Meek Group Ltd	$28,231.20
Less items excluded	$ 6,136.00
	$22,095.20
10% Contract Margin	$ 2,209.52
Sub Total	$24,304.72
Provisional Sums –Rod out brick cavity	$ 820.00

Remove lintel bricks

	Replace decay timber and replace bricks	$ 6,000.00
	Garden repairs/clean up	$ 1,000.00
	Scaffold	$ 3,000.00
	Furniture and floor protection	$ 1,000.00
	Interior make good walls and ceilings	$ 5,000.00
Contingency Sum		$ 8,000.00
	Sub Total	$49,124.72
	GST	$ 6,140.59
	The Meek Group Total	$55,265.31
Tse Group Limited fee		$11,000.00
Wellington City Council building consent fee		$ 2,000.00
G Cooper- materials purchased (includes parapet cappings)		$ 4,964.63
Total		**$73,229.94**

7.0 LIABILITY

7.1 The Owner in the 'Claim' is claiming that the builder and the designer of the dwellinghouse breached the terms of their contracts with the owner by not building and designing the dwellinghouse so that it did not leak. The Owner is also claiming that the builder, designer, bricklayer and roofing subcontractors all owed a duty of care to the Owner and breached that duty by their negligence in failing to carry out their work so that the dwellinghouse did not leak. The Owner is claiming that the territorial authority owed a duty of care and a statutory duty to

the Owner to carry out its inspections and the territorial authority was in breach of that duty by its negligence in failing to require alterations that would have prevented water ingress to the dwellinghouse.

7.2 The existence of a duty of care of those involved in building has been clearly established in New Zealand. Counsel for the Owner in closing submissions summarises the position:

> "3.2 Liability and negligence to owners of properties by both builders and local authorities is firmly established in law. In ordinary negligence principles a builder is liable for physical damage to property caused by faulty work of construction (refer Todd, *The Law of Torts in New Zealand*, 4th edition, para 6.4) and in *Stieller v Proirua City Council* [1968] 1 NZLR 84, 94 (CA) the Court of Appeal has affirmed that an inspecting council's obligations were not confined to defects effecting health and safety, nor to defects damaging or threatening to damage parts of the structure. It was enough if they reduced the value of the premises. An analysis of the reasons for imposing duties of care on the part of local authorities undertaking building inspections was made by the Court of Appeal in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, subsequently affirmed by the Privy Council in [1996] 1 NZLR 513 (PC). Todd summarises the development of the law in New Zealand, at para 6.4.02 (page 235) as –
>
> > "*Hamlin accordingly recognises that builders and local authority inspectors owe a duty of care to subsequent owners in building or inspecting dwellinghouses. The duty similarly can be owed by other persons whose negligence contributes to a building defect, such as architects, engineers and developers. And negligent repairers of an existing defect can be liable concurrently with the original wrongdoer."*
>
> 3.3 Although this passage refers to liability to subsequent owners it is of course trite that local authorities, builders and the other trades or professions described in the passage in Todd are liable for their negligence to the original owner of a dwellinghouse on ordinary negligence principles of special skill, proximity and reliance."

7.3 This position was not challenged and I have made my considerations for the determination on the basis that a duty of care exists between the parties and the owner.

7.4 The First Respondent, Wellington City Council

7.4.1 The claim against the First Respondent is a claim for a breach of a statutory duty and a claim in tort for a breach of a duty of care in carrying out the inspections during construction.

7.4.2 The Council denies any liability on the grounds that are set out in a combination of 'Outline of Submissions of first respondent' dated 7 June 2006, 'Opening submissions of first respondent' dated 14 August 2006, and 'Closing submissions of first respondent' dated 29 August 2006 which can be summarised as the headings at paragraphs 17 – 19 of the Closing submissions:

No duty of care owed to the claimant

No breach of duty

No causation

7.4.3 The Claimant submits that there was a breach of statutory duty by the Council in that it failed to perform its functions under the Building Act 1991. Specific parts of the submissions are:

> 4.9 *Notices could have been given to the builder pursuant to section 42 of the Building Act 1991 to rectify the work undertaken. A notice given in 2000, or even early 2001 may have led to the builder undertaking effective repairs.*
>
> 4.10 *…….Further section 24 of the Building Act 1991 imposed a duty on the part of the Council to enforce the provisions of the building code and regulations, and this plainly was a building not built in accordance with the same and more importantly section 6 imposes on the Council a specific requirement to ensure that buildings are safe and sanitary and section 9 to avoid unreasonable delay in carrying out its functions, or powers or duties."*
>
> 4.11 *The Council was aware the dwellinghouse was in the course of construction in late 1999/early 2000 and even became aware of problems with weathertightness*

in January 2001, it did not, in terms of section 9 of the Building Act 1991 react with the timeliness that the assessor indicates it was reasonable to accept of it to investigate and ascertain the extent of the damage and to take steps, in terms of section 46 of the Building Act 1991 in requiring the builder to return and repair the damage.

7.4.4 The Claimant places reliance on the comments in the Assessor's report as part of the justification for establishing a breach of duty by the Council. Although Mr Frame had experience as a Senior Building Inspector I place little weight on his opinion in his report on what could be expected as performance by the Council in these particular circumstances as his information at the time of preparing the report would have been fairly limited. Having heard the evidence on the chronology of events concerning the leaks and the attempts to have them rectified, the communications between the owner and the builder and subcontractors, the application to WHRS and the appointment of Tse Group Limited as advisors, the involvement of the Council in the process is much clearer. The evidence established that the last routine inspection of the building during construction was the pre-line inspection on 8 December 1999. There were Drainage inspections after that date. A brief chronology of the relevant events is helpful:

23.11.1999	Brickwork commenced
08.12.1999	Pre- line inspection by Mr Moore of WCC
02.02.2000	Brickwork completed
05.02.2000	R Te One completion inspection
03.03.2000	Builder advised Master Build Services ("MBS") house being handed over
??. 03.2000	Occupation by Owner
18.08.2000	Final claim from builder
07.12.2000	MBS spoke to Owner about problems with house
19..01.2001	Mr Moore of WCC noted on Inspection Checklist about windows leaking

26.09.2001	Mr Drysdale-Smith and Mr Whitefield of WCC visited property and made notes on Inspection Checklists
??.11.2001	Final payment made by Owner
06.10.2003	Builder advised MBS problems with leaks
10.10.2003	MBS visited property
15.10.2003	MBS visited property with builder and owner
20.10.2003	MBS visited property and prepared report
21.10.2003	MBS visited property with builder and owner
22.10.2003	MBS meeting with builder
05.11.2003	Tse Group visit property
22.10.2003	Tse Group visit property
26.11.2003	Claim by Owner to MBS
16.12.2003	MBS letter rejecting claim
23.02.2004	Application to WHRS

7.4.5 Mr Cody, the Team Leader for the Building Team within the Building Consents and Licensing Services Division of the Council and Mr Drysdale-Smith a Building Officer in the Council both gave evidence and they were cross examined at length as to the responsibilities and normal practices for building inspectors. My conclusion from their evidence and cross examination is that the position pertaining to this property was normal.

7.4.6 The Chronology of events shows a large gap from December 2000 until October 2003 with the visits by WCC inspectors in January and September 2001 being the only events noted. From the evidence given at the hearing the owner was endeavouring during this period to have the leaks remedied through the builder. Mrs Cooper stated *"After we took possession of the property it was apparent that it was leaking. This was something I drew to the attention of the Wellington City Council inspectors when they came to the property on 19 January 2001. I recall telling the inspector, Mr Moore, that we were waiting for the builder to fix the leaking windows. That arrangement with the builder was, I understood, made by my husband."* Mr Cooper also confirmed that the building was leaking and that he was aware of leaks prior to taking occupation. Mr Cooper also stated; "*The City Council inspected the building on several occasions, including on 19*

January 2001 when Tim Moore visited and leakage was pointed out. At that point we were waiting for the builder to undertake remedial work to stop the leakage problem but, notwithstanding that he promised on many occasions to do so, he never did." Evidence was given that it was proposed that a metal capping be put over the top of the brick parapet cappings but this was rejected by the owner. The date of the invoice for the proposed metal capping was 14 January 2003. The Field Notes of Tse Group Limited also establish that there was on going remedial work; an example is *"At garage door, water pouring out of corner and running outside at the adjacent door jamb. Hasn't leaked since flashing above to the outside repaired, approximately 18 months ago. Laundry cabinet underneath in the past water used to appear on the floor, skirting at the back looks as though it may have had water on it at some time or other. Refer photograph. Hasn't leaked over last 18 months. Some remedial work may have been done at that time by others."* There was also evidence given of attempts to carry out remedial work above the window lintels.

7.4.7 The First Respondent has cited *Balfour v Attorney General* [1991] 1 NZLR 519 as the authority for a defence to the claim for a breach of statutory duty. It is submitted that *"because the power to issue a notice to rectify is a discretionary power as opposed to a mandatory duty, there can be no claim for breach of statutory duty to issue a notice to rectify*". I agree with that submission on the authority cited and find that the First Respondent has not breached any statutory duty. It is also submitted that section 6 of the Building Act 1991 imposes on Council a specific requirement to ensure that buildings are safe and sanitary. That may be so but from the evidence presented during this claim I consider there was nothing stated that would have alerted the Council that the dwellinghouse may be unsafe or insanitary and therefore the Council could not have been expected to take action under section 6.

7.4.8 It is also alleged that the Council was negligent by failing to issue a notice to rectify once they were aware of leaks to the dwellinghouse. This is a breach of a duty of care rather than a breach of statutory duty. To decide whether the Council was negligent in not issuing a notice to rectify under section 42 of the Building Act 1991 the circumstances at the time that the

Council became aware of the leaks and the knowledge the council had of the state of the dwellinghouse have to be considered.

7.4.9 The Council first became aware of a problem in January 2001 when Mr Moore was advised that the owner was waiting for the builder to fix leaking windows. This appears from the evidence to be the extent of the knowledge of the Council of the problems with the building. The later visit by Council inspectors in November 2001 was an external inspection only and no contact was made with the owner, although it was stated that the check lists and a contact telephone number were left at the property. It appears that it was only when the owner made claims to MBS and WHRS that the full extent of the problems became known to the Council.

7.4.10 The owner has submitted that:

> *"4.11 The Council was aware the dwellinghouse was in the course of construction in late 1999/early 2000 and even after become (sic) aware of problems with weathertightness in January 2001, it did not, in terms of section 9 of the Building Act 1991 react with the timeliness that the assessor indicates it was reasonable to accept of it to investigate and ascertain the extent of the damage and to take steps, in terms of section 46 of the Building Act 1991 in requiring the builder to return and repair the damage."*

I do not accept this statement. The owner submits "*It is clear that the claimant did not know the extent of the problems and was entitled to rely on the assurances of the builder that they were not serious and would be fixed up. The Council ought to have discovered the absence of the weatherproof membrane and it ought to have acted promptly in directing those responsible for the work to rectify same"* It is also clear from the evidence that the Council was not aware of the extent of the problems.

7.4.11 It is a very serious step to issue a notice to rectify and would normally only be issued when there were known serious defects in the construction and the builder or owner had not taken action to rectify after being requested to do so. A final inspection is carried out when the builder or owner considers

the building work under the building consent is complete and a code compliance certificate is required. The Council has never been requested to make a final inspection, although the Council inspectors did act on their own initiative to visit during 2001 and hasten the possibility of a final inspection. It was suggested by Mr Cody that had Council been asked to complete its inspection process then the owner would have been advised that a code compliance certificate could not be issued until the leaks were remedied. Under cross examination it was confirmed that destructive testing was not carried out by building inspectors. I fail to understand how the Council should have known that the weatherproof membrane was not in place under the brick parapet cappings. I accept the submission from Council on the authority of *Otago Cheese Company Ltd v Nick Stoop Builders Ltd* (High Court, Dunedin, 18 May 1992, CP180/89, Fraser J) as authority that the extent of an inspector's duty to inspect does not extend to identifying defects in building works that cannot be detected without a testing programme being undertake. From the evidence there was nothing that would have alerted the Council to the possibility of issuing a notice to rectify.

7.4.12 Apart from the dates mentioned I accept completely the submission from Council at paragraph 29 of their opening submissions:

> *29 ……..In addition a notice to rectify could only be issued to an owner or to ' a person undertaking any building work'. In Wellington City Council v Kelly (19 August 1997, District Court, Wellington, CRN 6085018670, Judge AAP Willy) it was held those words impose a temporal limitation on Council's power. By the time the leaks were brought to the Council's attention on 14 or 19 March 2001 it appears the builder was no longer undertaking building work. As such the only party Council could have issued a notice to rectify to was the claimant as owner. Such a notice would not have told the claimant anything she did not already know – her house leaked and the leaks needed to be fixed. Again there is no causation."*

The dates of 14 or 19 March 2001 appear to be an error. The date of Mr Moore's visit was 19 January 2001. However if the Council had started investigations after the visit by Mr Moore, and there appears to be no

reason why the Council should have started an investigation as being informed that the owner was waiting for the builder to fix leaking windows is not of such consequence that an inspector would consider there was a major problem, then by the time any investigations may have revealed that there could be major problems the house would have been occupied and the building completed and it would have been the owner that a notice to rectify would have been issued.

7.4.13 Council submits that even if they had issued a notice to rectify and/or prosecuted this would not have fixed the leaks. It would have remained up to the owner either to get the builder to fix the leaks or engage others to do so. There can therefore be no damage or loss caused to the claimant by any alleged failure to take enforcement action. I agree.

7.4.14 I have found that there was no duty by the Council to issue a notice to rectify. I also find that Council was not negligent by failing to issue a notice to rectify once they were aware of leaks to the dwellinghouse therefore there can be no breach of a duty of care for not doing so.

7.4.15 The owner alleges that the Council was negligent on the grounds that are set out in the final submissions including:

"4.1 The claimant believes that a reasonably prudent building inspector will have detected the absence of a weatherproof membrane and the flashing not covering the whole of the parapet, that accordingly the claimant should recover from Council the amount sought. "

4.3 Nothing further happened until September 2001 when on 26 September 2001 Mr Drysdale-Smith and Mr Whitford inspected the property, Mr Whitford ticking the flashings/windows box for final inspection as having been approved, although there were no window flashings, and the windows continued to leak and also the ventilation to brickwork with that in itself because the absence of weep holes, being a contributing factor to the lack of weathertightness for the building.

4.4 The assessor's criticisms are justified. In the critical period of building, between November 1999 and March 2000 it must have become apparent to the Council

employees who visited or inspected at the site that the bricks had been laid without suitable weatherproof membrane underneath, thereby inevitably leading to water penetration. Nothing was done about this."

4.5 Further the approval of the windows and flashings (when no flashings existed) by Mr Whitford in September 2001 clearly indicates that the Council inspection was cursory and plainly ineffective."

7.4.16 There are two parts of these allegations, the period of the inspection process during building and the period after building was supposedly completed.

7.4.17 The last Council inspection of the building (there were drainage inspections later) during the building period was the pre-line inspection on 8 December 1999. Under the normal inspection process the next inspection would have been a final inspection after the building was completed. A final inspection has never been called for..

7.4.18 The Council submissions seek to establish that there was no duty of care owed by the Council and submits that *Stieller* and *Hamlin* cases can be distinguished from the circumstances of this claim as there was a different regulatory regime at the time of those cases. I do not accept that and it is established law that a Council owes a duty of care when inspecting during construction and that duty applied for this building.

7.4.19 The Council submits that a duty of care is negated when the damage or defect it is alleged the Council's negligence has caused or contributed to is patent or known to the claimant from the outset. That is correct. The evidence shows that the leaks that were known to the claimant were the leak over the bedroom that Mr Cooper was aware of when carrying out the wiring and that the windows were leaking. The evidence also established that the primary cause of the leaks, the parapet construction, was latent and did not become apparent until much later and could be considered as a latent defect. Had the leaks been only from the windows or had the claimant known at the time of occupation that the parapets were leaking

because of their defective construction then the comprehensive submissions as outlined at paragraphs 30 to 37 of the 'Outline of submissions of First Respondent' would have been sufficient to convince me that any duty of care had been negated.

7.4.20 As the primary source of the leaks was in the nature of latent defects then I have to consider whether Council was negligent and therefore breached its duty of care in carrying out its inspection regime.

7.4.21 Council has submitted, again comprehensively, at paragraphs 39 to 47 of the 'Outline' that there was no breach of duty of care by the Council. A précised summary of the points made and the authorities is:

- The duty owed is that of a reasonably prudent building inspector – *Stieller v Porirua City Council*

- A Council building inspector is not a clerk of works – *Sloper v W H Murray Ltd*

- The standard to be applied to Council officers when inspecting is the standard applicable at time of inspection – *Askin v Knox*

- Council is not a guarantor, an insurer or a supervisor – *Lacey v Davidson*

- When issuing a CCC a Council is not guaranteeing that building work is free of defects – *Hamlin v Bruce Stirling*

- The duty of care does not extend to identifying defects which can not be discovered during a visual inspection - *Stieller v Porirua City Council*

- The extent of an inspector's duty to inspect does not include an obligation to identify defects in building works that cannot be

detected without a testing programme being undertaken – *Otago Cheese Company v Nick Stoop Builders Ltd.*

When Mr Moore carried out the pre-line inspection on 8 December 1999 the brickwork had just commenced and it can be seen from the diary of Mr Gaskin that only 6 to 7 days of work had been completed and that the galvanised lintels had been ordered. The roof work would have been completed as far as it could be but the roof parapet junctions could not be finished until the brickwork was completed. Mr Moore could not have observed at 8 December 1999 the work that has ultimately been the cause of the leaks therefore he could not be held to have been negligent in his inspections. There is no evidence of any breach of a duty of care in carrying out inspections during the building period.

7.4.22 I now deal with the period after the building was completed. I have already dealt with the position of the Council after the building is completed when dealing with the submission that Council should have issued a notice to rectify. I agree with the position as stated in the "Opening submission of first respondent' at paragraphs 18 and 25:

"18 Council's duty, if any, once it knows of water ingress is to refuse to issue a CCC. None has been issued in this case and therefore Council is not in breach of duty. This was recognised in the recent WHRS Determination 792, Middlemass v NZ Log Chalets, 6 April 2006, where Otorohonga District Council was found not liable. The circumstances of that case are similar to this one and the Adjudicator noted at paragraph 106.

> Once the dwelling was basically constructed and weathertightness issues were apparent, ODC did as much as reasonably possible, indeed far more than it would have been required by law, (if indeed anything was required by law) to assist the Claimants, NZLC and Dorfliger to reach a resolution. In particular ODC (in compliance with its statutory duty) refused to issue a Code Compliance Certificate.

25 There was no breach of duty by Council in this case. Council did not complete its inspections of the dwelling. Leaks came to light in the course of construction. Had Council been requested to complete its inspections it is clear, given the apparent leaks, that it would not have issued a code compliance certificate. It would have required the work to be re-done."

7.4.23 Mr Cody and Mr Drysdale-Smith were extensively cross examined on the Checklists issued on 19 January 2001 and 26 September 2001, especially in relation to the ticked boxes against 'Ventilation to brickwork' and Flashings – windows' on the Checklist prepared by Mr Whitefield on 26 September. The thrust of the examination was to suggest that Mr Whitefield by ticking the boxes had given approval of the windows and flashings and the ventilation of the cavities behind the brickwork. It was suggested that Council should have inspected the brickwork immediately before the capping bricks were placed to ensure that a waterproof membrane existed at that point. There was no obligation for Council to make such an inspection and it would be unusual for an inspection between the pre-line and final inspection. There was no obligation to follow up. I find that the visits by Mr Moore, Mr Whitefield and Mr Drysdale-Smith in 2001 were of a nature to prompt the owner to apply for a final inspection. The checklists were as a result of cold call inspections and not a record of a final inspection. A final inspection has never been carried out. The contents of the Checklists would not have affected the sequence of events and it was the responsibility of the owner to get the leaks resolved. Under the Building Act 1991 the duty lies on the owner to come back to the council when they believe the work is finished. I find that the completion of the Checklists for final inspection were not a breach of duty of care by the Council.

7.4.24 Having found that the Council has not breached its duty of care under all of the headings submitted by the claimant I do not need to address the matter of causation which was addressed in the submissions from Council.

7.5 The Second Respondent R & I Kennedy Limited

7.5.1 The claim against the Second Respondent is both in tort and contract. It is established law that there can be concurrent claims in contract and tort.

7.5.2 The claimed breach of contract is that the builder did not construct the building in a proper and tradesmanlike manner, the builder did not construct a watertight building, the builder employed as subcontractors tradesmen that did not undertake the work in a proper and tradesmanlike manner and the builder failed to construct the building in accordance with the contract plans and specifications.

7.5.3 Mr Kennedy did not attend the hearing on behalf of R & I Kennedy Limited. A 'Statement of Defence of Second Respondent' dated February 2006 was filed by counsel for R & I Kennedy Ltd. A letter from R & I Kennedy Ltd to WHRS dated 28 May 2006 was circulated to all parties. The letter contained statements of the nature that would have been evidential had Mr Kennedy attended the hearing and given evidence and the letter was signed by Mr R P Kennedy as a director of R & I Kennedy Ltd. There was other letters from R P Kennedy that were referred to during the hearing and that were introduced into the evidence.

7.5.4 The allegations against the Second Respondent are set out in paragraphs 3.5 to 3.7 of the 'Outline of Submissions on Behalf of the Claimant' given at the hearing and in section 5 of the 'Submissions on behalf of Claimant and Eighth Respondent-Gordon and Avis Cooper' dated 29 August 2006.

7.5.5 Briefly stated the allegations are that the Second Respondent was the head contractor who was responsible for the supervision and coordination of the various sub-contractors, an obligation it plainly failed in by breaching the duty to take reasonable care to build a sound structure, using good materials and workmanlike practices. The poor workmanship of the builder and subcontractors and the failure by the builder to coordinate

subcontractors has led to the claim for breach of contract and breach of duty of care to the owner.

7.5.6 It is accepted that the Second Respondent was the head contractor. Although the documentation provided by the second Respondent has not been admitted as evidence matters in that documentation have to be dealt with as part of my determination. The Second Respondent alleges that Mr Cooper, the Eighth Respondent joined on the application of the Second Respondent, represented he was owner and he ran the project. The Second Respondent also alleges that the Ninth Respondent was a nominated contractor by Mr Cooper and he was engaged and paid direct by Mr Cooper. These allegations have an effect on the role of the Second Respondent as the head contractor.

7.5.7 Mr Cooper stated under cross examination that he was in effect a joint owner with Mrs Cooper and that he was frequently on the site and gave decisions on behalf of the owner, however he was not responsible for directing the builder on how to carry out his work or for directing subcontractors. Mr Drysdale-Smith in his evidence at paragraph 4 stated his recollection was that the owner Gordon Cooper was in control of the project. Mr Cooper's oral evidence gave an explanation for this impression. The evidence of Mr Gaskin, Mr Arcus and Mr Dunn supported the position that, although Mr Cooper was frequently on site, it was the builder that was running the project. I am satisfied Mr Cooper did not run the project.

7.5.8 Mr Cooper gave evidence that apart from the electrical work, which was carried out by himself, all of the subcontractors were engaged and supervised by the Second Respondent. The Assessor's report, the Tse Group Limited report, the MBS chronology and the evidence of Mr Cody all refer to a letter dated 21st October 2003 from R & I Kennedy Ltd to Mr Cooper. The assumption all have made as a result of the letter is that the membrane roofing became the responsibility of Mr Cooper. The subject of

this letter arose many times during the hearing and I will list its contents in full:

> Dear Mr Cooper
>
> I refer to the issues discussed and the recent investigative work carried out at the above address. After reviewing the information gathered we are convinced the water is entering through the top capping bricks.
>
> The roofing membrane was supposed to cover the top of the framed wall/parapet to prevent water seeping into the wall cavity through the capping brick. The roofing contractor did not do this work. This was discussed at the time by the employees of R & I Kennedy Limited; the roofing contractor, Mr Harry Arcus from Gunac NZ Limited and Dick Te One from Dick Te One Architects. You decided to alter the contract with R & I Kennedy Limited and removed the Roofing Contract from our contract and dealt with Gunac NZ Limited directly.
>
> We are not responsible for any subcontract work outside of our contract. The problems caused are directly related to the roofing work carried out and therefore any communication must be directly with Gunac NZ Limited.
>
> Recent work carried out, at no charge, by R & I Kennedy Limited was completed in good faith. No further work will be carried out by our organisation in relation to roof leakages.
>
> Yours sincerely
>
> Mr Robert Kennedy
> **R & I Kennedy Ltd**

Mr Cooper gave evidence denying that he altered the contract with R & I Kennedy Limited and removed the roofing contract and dealt with Gunac directly.

7.5.9 What is the evidence relating to the membrane roofing subcontract? In answers to cross examination Mr Cooper acknowledged that he paid Gunac NZ Ltd (“Gunac”) direct as there were problems between Gunac

and R & I Kennedy but that was the extent of any change to the contractual relationships. There was never any question of Mr Cooper taking over responsibility for Gunac as subcontractor. The letter of July 1999 from R & I Kennedy to Mr Cooper with the price for the building shows Dexx Roofing $8,754.00 as one of the main sub-trade prices. The final account from R & I Kennedy Ltd dated 18.8.00 deducts Gunac $9536.00 from the contract price which is consistent with the payment having been made by Mr Cooper. There is no mention until the letter from R & I Kennedy of 21 October 2003 that the subcontract had been removed from the contract with R & I Kennedy Ltd. There was no evidence given that the Gunac subcontract was a nominated subcontractor. The evidence of Mr Arcus was actually to the contrary and Mr Arcus stated that as far as Gunac were concerned they were at all times a subcontractor to R & I Kennedy Ltd, although they were paid direct by Mr Cooper. Mr Orchiston, on behalf of Tse Group Limited, Mr Te One and Mr Cody acknowledged that they were relying on the statement in the letter of 21 October 2003 for their opinions that the membrane roofing had become the responsibility of Mr Cooper. There was conjecture as to the reason that R & I Kennedy wrote the letter of 21 October 2003 and also sent a letter to MBS dated 9 December 2003 advising MBS that Mr Cooper had taken the Gunac contract away from them. As it is conjecture I will not comment further. The 'Submissions on behalf of the Claimant and Eighth Respondent' at paragraphs 5.4 to 5.10 give a good summary of the standing of the letter of 21 October 2003. They are lengthy so I will not quote them here but suffice to say the accuracy of the statements in the letter have not been tested as the addressor was not available to give evidence. I am satisfied from the evidence that the Gunac subcontract remained with R & I Kennedy and that they remained responsible for the performance of the subcontractor.

7.5.10 It is clear from the evidence that the principal cause of the leaks is the construction of the parapets, which includes the roof flashing junctions with the parapets, and the failure of the lintels to discharge water penetration into the cavities. The builder was responsible overall for the construction

and the coordination and supervision of the subcontractors. The builder patently failed in that task. The parapets were not constructed in accordance with the drawings and neither were the lintels at the window and door heads.

7.5.11 The parapet design as shown on the consent drawings was discussed extensively during the hearing and I will deal with that under the liability of the Third Respondent. The parapet construction differed from the designed parapet in some critical ways. There was no substrate to take a waterproof membrane under the brick capping, there was no waterproof membrane under the brick capping, the flashings from both the membrane and tile roofs were not properly carried under the brick capping or alternatively a flashing was not extended from under the brick capping to cover the upstand or flashing from the roof, the brick capping was not coated with a waterproof agent. When parts of the brick capping was removed for inspection it was established that all that was under the capping was the building wrap turned over the timber top plate. There was nothing to prevent water penetration whatsoever at the tops of the parapets and water was freely entering and running down the cavity spaces. Mr Kennedy has denied liability and submitted that all of the problems with the parapets are the fault of others. The evidence does not support that submission. The builder was in charge and directed the subcontractors and must ultimately be responsible for them. The evidence was that it was the builder that decided the parapet should be constructed as it was. I will be dealing with the liability of the brickwork subcontractor later but Mr Gaskin gave evidence that the last thing he did on the building was to place the parapet capping bricks on the direction of the builder.

7.5.12 The consent drawings No 7 shows flashings at window heads and window sills with weep holes at the sill flashings. The lintel angle is shown as supporting the brickwork only and does not close off the cavity. The evidence showed that the head flashings were missing and the steel angle was fixed to the timber framing closing off the cavity for the length of the lintels. The result of that construction was that water dropping down the

cavity would flow off the ends of the lintels and continue down the cavity as it appears that the sill flashings are also missing. Had the sill flashings been in position then the water would have been caught by the sill flashings and discharged out the weep holes beneath the sills. There was no evidence that that had occurred. The Specifications at Section 8 - Plumbing at page 21 item 14 calls for all metal flashings to be carried out by the Plumber and specifically mentions “Flashing work to include all window and head flashings”. The drawings show polythene flashings at the window heads and the Specifications at Section 4 – Brick Veneer at page 7 item 9 call for a polythene flashing across the top of all windows and door openings extended 200mm each side and also state “*provide all other flashings as detailed.*” The builder has the overall responsibility to ensure that the flashings were correctly provided. The evidence showed that they had not been provided as specified or drawn.

7.5.13 The Specifications at Section 1 – Preliminary & General page 1 item 6 Responsibility state:

“The whole of the work in all trade sections shall be carried out in accordance with good trade practice. The Contractor and each sub-Contractor is to be satisfied that the previous work and general conditions will be suitable for the proper execution of the work to follow. Conditions that are regarded as unsuitable for satisfactory results shall be referred to the main Contractor to arrange remedial work before proceeding.

The commencement of any operation on a surface or under conditions taken over from others will signify an acceptance of responsibility by the Contractor or the sub-Contractors concerned that the surfaces or condition are satisfactory.”

At page 2 item 9 Building Act and Regulations it states:

“It shall be the main Contractor’s responsibility to ensure that all work in this contract complies with the Building Act, the Building Regulations and Approved Methods of Compliance. If a conflict should exist between clauses of this specification and the above Act and Regulations, the Act and Regulations shall take precedence.

Complete all work in a manner which will comply with Section B2 Durability.”

And at page 3 item 24. Responsibility to Complete All it states:

"The contractor shall allow to complete all work specified, detailed or inferred by the documents all in accordance with the appropriate NZ Standards, the Building Code and acceptable trade practice. At the completion of the work the building shall have all services fully operational and shall be fit for occupation."

The New Zealand Building Code Clause E2 External Moisture at clause E2.2 states:

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

and under the heading 'Performance' the more detailed requirements concerning moisture penetration are set out.

7.5.14 To construct a dwelling with parapets that were patently not in accordance with the drawings and that would obviously leak, as all means of waterproofing was missing, must be considered as a breach of the contract to carry out the work in accordance with good trade practice and in accordance with the documents and I find that the Second Respondent is in breach of contract with the owner. The defects are of such a nature and to such an extent that I also find that the second respondent has breached the duty of care to the claimant and is also liable in negligence for the cost of the repairs to remedy the defective workmanship.

7.6 The Third Respondent, R Te One Associates Limited

7.6.1 The claim by the Claimant relies to a large degree on the comments made in the Assessor's report:

*"**R Te One and Associates Limited** provided the plans and specifications that were reasonably detailed apart from the brick parapet that was doomed to fail, causing one of the main leakage points. It is my view that R Te One accepted the responsibility to 'oversee' and act as a supervisor during the construction of this dwellinghouse, and*

further more they were accountable to the Claimant, to certify progress payments after verifying that the work completed complied with the drawings and the Building Code. …."

It may be the view of the Assessor that the Third Respondent breached the contract with the owner but it is for the adjudicator to make a finding after the evidence has been presented.

7.6.2 As mentioned previously in paragraphs 4.1 and 4.3 the 'Claim' did not properly make a claim against the Third Respondent, although it mentioned breach of contract. The opening submissions base the claim on failure to adequately design a building that would prevent leakage and failure to pick up defects during supervision. The closing submissions on behalf of the Claimant allege a breach of a duty of care. The actual causes of action are somewhat vague. There are two heads of claim, the design and the supervision. I have concluded that the cause of action concerning the alleged defective design is for a breach of contract and the cause of action for the alleged inadequate supervisory role is in tort for negligence and a breach of duty of care.

7.6.3 Dealing with the design of the building. The Claimant relies on the statement by the Assessor that "*the brick parapet was doomed to fail*", and the statement by Tse Group Limited in their report "*Had the parapet construction complied with the drawings, there is no doubt that the ingress of water would have been greatly reduced. To eliminate the risk of water penetrating the building envelope, then the detail design itself must be questioned. For example, the coping bricks are not sloping back towards the roof to shed any water that may otherwise lie on the surface. Additionally, an overhang of the brickwork past the face of the membrane on the vertical (roof side) surface of the parapet would throw water clear and allow it to drip on the roof itself."* These are opinions only and made without the knowledge of how the designed parapet would have performed as it was never constructed as designed.

7.6.4 A considerable amount of time was spent during the hearing on the possible performance of the parapet as designed. There were opinions given about the effect of the vertical ties every second brick penetrating

the Nuraply flashing, about the difficulty in applying the Nuraply that needed to be heated and the effect of coating with a waterproof agent. The end result was inconclusive and it was generally accepted that the detail as drawn would have been much more effective than what was constructed.

7.6.5 The 'Legal Submissions on Behalf of the Third Respondent' point out that although there were allegations of inadequacies in the building plans that may have contributed to the damage to the building, all the experts were unanimous in stating that the plans were adequate for the time in which they were prepared. I consider this is overstating it somewhat but it was accepted that generally the plans were satisfactory. As regards the original parapet detail I will not go into any further detail as I agree with the statement at paragraph 4.6 of the closing submissions:

> *4.6 Mr Orchiston in his evidence raised the issue that the detail could never have been built, however when clarifying that issue for the adjudicator, resiled from that position. Again it is mere speculation because in fact the detail was not attempted and there is therefore no causation between the damage and the detail on the working drawings."*

Accordingly I find that there was no breach of contract between the Third Respondent and the Claimant. Should it be considered that there was a cause of action in tort for breach of duty in providing the design for the building then I would have found that there was no negligence or breach of duty of care by the Third Respondent in providing the design for the building.

7.6.6 The closing submissions addressed various other aspects of the design that had been questioned by various parties. These are:

Change to Parapet Roofing Material
Possible Failure of the Dexx Membrane
Lack of Weep Holes
Anti Ponding Boards Under Concrete Tiles

Flashings and Failure to Install Flashings
Foundation Height

These items were either satisfactorily covered by the drawings and specifications or satisfactory explanations were given concerning these items. No allegations concerning these items were proved such that I could consider they affected my decision in the preceding paragraph.

7.6.7 I will now deal with the allegation of a breach of duty of care in supervision by the Third Respondent. The closing submissions on behalf of the Claimant allege a breach of a duty of care. At paragraph 6.3 it states:

> *"6.3 Failure to supervise the builder and ensure the builder properly coordinated the various sub-trades has plainly had a devastating effect on the contract. The third respondent meets the necessary criteria of proximity, reliance and foreseeability of damage within the traditional framework of a breach of duty of care. There is no doubt that the respondent, exercising a skilful occupation owed a duty of care to the claimant and the various failures to supervise amount to breaches of duty of care."*

There was no evidence offered that the Third Respondent was commissioned to supervise the contract. It appeared that the Second Respondent was commissioned to prepare the design documentation to enable a price to be obtained and building consent to be issued and the construction to be carried out. Any other services performed by the Second Respondent were on an ad hoc basis. Mr Te One in his evidence stated:

> *"My terms of Engagement were to prepare documents sufficient for construction and Building Consent and Mr Cooper, having supervised the construction of his last house (which I also designed) said he would do the same for this new house. As far as I was concerned my terms of engagement ended with the issue of the Building Consent. Only one account was ever rendered and this covered work up to the date of issue of the Building Consent. My understanding was my involvement ceased on 27 August 1999."*

7.6.8 The Claimant relies upon the following to establish that the Second Respondent carried out supervision of the project:

- The issue of a letter dated 23 September 1999 by R Te One Associates Ltd approving the first progress payment of $42,000.00 plus GST.

- It must have been apparent to the Second Respondent that the dwellinghouse was being constructed in such a manner that it would not be weatherproof.

- Involvement with the changes to the roofing material and the parapet.

- The site visit by the Second Respondent and the issuing of a list to R & I Kennedy Ltd of work to be completed dated February 5, 2000.

Neither Mrs or Mr Cooper stated in their evidence that Te One Associates Ltd were engaged to supervise the contract. Mr Basil Jones is correct when he states in his final Legal Submissions' that:

"Mr and Mrs Cooper agreed that my client did not undertake a supervisory role and had no part in supervision of the contract during its construction.

In his evidence Mr Cooper stated that the Main Contractor R & I Kennedy Ltd, undertook the supervision of the contract."

As the Third Respondent was not engaged for supervision of the contract the Third Respondent can not be held responsible for ensuring that the work was completed in accordance with the plans and specifications. As the Third Respondent did not have a duty to supervise it necessarily follows that he can not be in breach of that duty. I determine that the Third Respondent has no liability under this claim.

7.7 **The Fifth Respondent, Trevor Gaskin**

7.7.1 The claim against the Fifth Respondent is a claim in tort for a breach of duty of care in carrying out the brickwork for the dwelling. The Claimant believes the Fifth Respondent bears a significant share of the responsibility for the leakage to the building. The actions or omissions in connection with the brickwork that are alleged to have contributed to the leaks are:

- Laid the capping bricks to the parapets knowing there was no waterproof membrane underneath
- Insufficient weep holes at various positions
- Insufficient or no ventilation holes
- Steel angle lintels bridging the cavity and no head flashings
- No evidence of cavity trays
- Mortar droppings not cleaned out from base of cavities

The Claimant further elaborates on the alleged actions and omissions of Mr Gaskin, the Fifth Respondent, in section 7 of the final submissions on behalf of the Claimant.

7.7.2 The Fifth Respondent denies any liability on the grounds that are set out in ‘Submissions of Fifth Defendant’ dated 14/8/2006 which are summarised and précised by me as follows:

- The Second and Eighth Respondents were fixed with the knowledge, by way of advice from Mr Gaskin prior to building of the brick wall, that the parapet might leak. He was told to get on with it.

- The Second Respondent advised Mr Gaskin that the Nuralite flashing was not to be applied to the parapets

- Mr Gaskin was told by the Second Respondent that if there is any leaking a metal flashing would be placed over the whole of the parapet.

- The Eighth Respondent wanted the weep holes deleted and Mr Gaskin was told to leave out a number of weep holes.

7.7.3 As regards the parapet cappings the evidence clearly shows that Mr Gaskin did, prior to commencing the brickwork, alert the builder, the Second Respondent and the Claimant, the owner through the Eighth Respondent that the parapet as designed may leak. It is submitted as a defense the maxim volenti non fit injuria should apply. As the knowledge of the possible failure had been passed on to the builder and the owner, through the Eighth Respondent, and with that knowledge they had instructed Mr Gaskin to proceed and therefore had taken on the risk. I would accept that argument had the parapet been constructed as the original design. The fact is that the parapet was not constructed as the detail on the drawings and therefore the advice given by Mr Gaskin before starting the brickwork that the parapet may leak was not in relation to what was constructed and the maxim can not apply. Mr Gibson also submitted that the maxim could not be put forward as a defense as it had not been specifically pleaded as an affirmative defense. I do not have to deal with that submission as I have rejected it as a defense for other reasons. When Mr Gaskin reached the top of the brickwork it was obvious that the parapet was not as shown on the drawings and there was no waterproof membrane or sub strate to take a waterproof membrane at the top of the parapet. Mr Gaskin, albeit under pressure from the builder, placed the

capping brickwork when it must have been obvious to him that there was no waterproofing of the parapet top and that there were no apron flashings at the junction of the parapet and membrane roofing. I accept that it was not the responsibility of Mr Gaskin to do that work, that was the responsibility of the builder, but he finished the brickwork as requested by the builder. Mr Gaskin gave as his reason for completing the parapets that the builder had assured him that a metal capping would be placed over the parapets if there was a problem with moisture penetration. I accept that explanation but it was a risk by Mr Gaskin, as apart from verbal advice from the builder there was no guarantee that a capping would be placed, and Mr Gaskin did not take steps to protect his position vis a vis his instructions from the builder as he could have. I will take into account this aspect when assessing contributions. I find that Mr Gaskin must share the responsibility for completing the parapet cappings knowing that there was an extreme risk of moisture penetration at the cappings.

7.7.4 The Tse Group Limited report mentions *"absence of perpends/weepholes/head flashings above lintels." "It is our opinion that the leaks, which have become apparent since Practical Completion, result from the collection of water on the polythene strip over the lintel being unable to escape,… "* The lack of weep holes at the window and door heads which means had the flashings and lintels been placed as shown on the drawings any water would be unable to escape. The Tse Group Limited report also states that *"Weep holes are shown at the top and bottom of the cavity. The actual number and distribution of weep holes is less than could be expected from the drawings. There are none at window heads. "* Mr Te One gave evidence with respect to the lack of weep holes at the top of the brick wall, which act as ventilation and stated he was advised that Mr Cooper wanted the weep holes deleted. This concurs with Mr Gaskin's evidence that he discussed weep holes with Mr Cooper and was told to leave out a number of weep holes in the brickwork. The Specifications called for weep holes not exceeding every third course and weep holes were shown on many of the drawings. NZS 3604 in the section on brick veneer also deals with weep holes. Mr Gibson in his final submissions points out that the matter of Mr Cooper directing that weep holes be left out was never put to Mr

Cooper in cross examination, and that it is denied that Mr Cooper did so. He goes on to state that even if it were true it would not absolve Mr Gaskin of his responsibility to act in a proper and tradesmanlike manner. I will take this into account when considering contributions. Mr Gaskin is an experienced bricklayer and been involved in the industry for over 30 years at an executive level. I can not accept his explanation that he was not in a position to tell the architect and the master builder and owner how to carry out brickwork and to not carry out work properly because of pressure from the builder to complete is not a defense to failure to carry out the work as required by the drawings and specifications.

7.7.5 The Specifications require the polythene flashings at the window and door heads which are shown on the drawings to be provided and installed by the Bricklayer. The drawings show a steel lintel angle at the window and door heads which is the width of the brickwork and does not carry across the cavity. The lintel areas that were opened up show that the polythene flashings were not in place and the steel angle was across the cavity blocking it off. Mr Gaskin confirmed that he ordered the steel angles and gave no explanation for the missing flashings. The builder was in overall charge and should have been checking that all work was completed properly and therefore should have ensured that the window and door heads were constructed as the drawings. Mr Gaskin the Fifth Respondent however supplied and fitted the steel lintels and failed to place the flashings which is not what could be expected from an experienced bricklayer and I find was negligent. He must share the liability with the Second Respondent.

7.7.6 The Tse Group Limited report has a section ‘5.3 Cavity Trays’ and under that section it deals with the omission of flashings and weep holes at the lintels and the steel angle lintels and I have already dealt with that aspect. The report also states in the ’6.0 Conclusion’ section that *“We were unable to determine whether or not cavity trays had been fitted where the roofing membrane abuts brickwork, such as the area directly above the main entrance porch, although three weep holes are visible. We would expect a cavity tray to be included, allowing an overlap with*

the upstand or kerb to the roof membrane, ensuring weathertightness. The widespread efflorescence around the main entrance (see photograph 4) would indicate a lack of such a tray or inadequate installation of same. "

Little evidence was given concerning cavity trays and it was inconclusive. The major area where they would be required is at the top of the parapets and the parapets are to be rebuilt. Other than consideration of the brickwork as a whole I attach no further weight to this aspect of the evidence.

7.7.7 The Assessor's report includes photographs and comment on what was observed when sections of the walls were opened up to reveal the bottom plate and bottom of the external cavity. It comments *"It was also noted that the base rebate cavity was blocked with debris from mortar droppings. It is obvious that this rebate had never been 'rodded-out'."*

This was observed during the inspection and it is fair to assume that the bottom of all cavities would be the same. Mr Frame when giving his evidence was very critical of the bricklayer that such a basic aspect of bricklaying was not carried out. Mr Gaskin did not refute this.

I find that this lack of attention to what is basic procedure, which can lead to major problems due to the whole function of a cavity system being defeated if the bottom is blocked and moisture is retained within the cavity, contributes to the poor standard of the brickwork as a whole, and that there has been a breach of the duty of care by the Fifth Respondent to carry out the work in accordance with good trade practice and to produce a weathertight building. This liability should be shared with the Second Respondent, who has the prime liability for the work, and I set the share of that liability for the fifth respondent at 33%.

7.8 The Eighth Respondent, Mr Gordon Cooper

7.8.1 The Eighth Respondent was joined as a respondent on the application of the Second and Third Respondents. The Second Respondent, apart from filing a statement of defence and sending the letter to WHRS dated 28 May 2006 has not participated in the proceedings and has made no claim as such against the Eight Respondent apart from stating that the cause of the claimant's loss was the actions of the Eighth Respondent. The First, Third and Fifth Respondents in their submissions all allege that the Eighth Respondent should share in the liability and through the Eighth Respondent the claimant should also share in the liability. As there is no claim as such against the Eighth Respondent I will deal with any liability of the Eighth Respondent when considering mitigation and contributory negligence.

7.9 The Ninth Respondent, Richard Arcus

7.9.1 The 'Claim by Avis Cooper' did not include a claim against the Ninth Respondent and subsequent submissions by the Claimant have not made claims against the Ninth Respondent. Mr Arcus was joined originally at the request of the Second and Third Respondents and eventually as a result of the formal application from the Third Respondent which was supported by the First Respondent. The Second and Third Respondents have not made claims against the Ninth Respondent. The First Respondent in the closing submissions does mention Mr Arcus and that his evidence should be treated with caution. However, there is no formal claim made against Mr Arcus.

7.9.2 The membrane roofing was carried out as a subcontract to the Second Respondent by Gunac New Zealand Ltd. Mr Arcus was an employee of Gunac NZ Ltd and there was never any evidence offered that Mr Arcus had taken personal responsibility for the work. Mr Arcus was involved with the roofing on the building and his evidence was helpful for completing the picture and for corroboration purposes. There is no claim against Mr Arcus

and as there was no evidence Mr Arcus had taken on personal liability for the membrane roofing work I am not prepared to attribute any liability to Mr Arcus.

7.10 The Tenth Respondent, Mr Dunn

7.10.1 The claim against Mr Dunn is that the roofing tiles failed as there was a failure by the Tenth Respondent to ensure that flashings were installed under the roofing tiles. The 'Outline Submissions of the Claimant' state that the claim against Mr Dunn is on the basis identified by the assessor in his report that a roof warranty was not provided as contracted for. The final submissions of the Claimant do not include any claim against the Tenth Respondent.

7.10.2 The Assessor's report maintains that the flashings at the pitched tile roof/ parapet junctions are inadequate and that anti-ponding boards should have been installed. The Tse Group Limited report of November 2003 maintains that the flashings are inadequate particularly in the area of the pitched roof, at the eaves over the gutter. The projection required to throw rainwater clear and into the gutter is insufficient.

7.10.3 Mr Frame under cross examination confirmed that there was no evidence that the tile roof contract had been paid for and the warranty would not be issued until it was. Mr Frame also acknowledged that the evidence that Mr Dunn was going to give concerning the requirements for flashings by the Monier detail and NZS 4206 at the time in 1999 was only for one pan with of the tile rather than the two pan width that is now required.

7.10.4 Mr Dunn in his evidence advised that neither he or Mr Wright did the tile roof work. Prestige Roof & Brick Ltd were contracted to carry out the Monier roof tiles and the records of that company were destroyed by the liquidator.

7.10.5 The claims against Mr Dunn have not been established as the evidence showed that the tile roofing, and the associated flashings if they were indeed done by the tile roofing subcontractor, were in accordance with the requirements at that time. There was no evidence that Mr Dunn had done the work which is alleged to be defective or that Mr Dunn had taken on personal liability for the tile roofing work which was done by Prestige Roof & Brick Ltd. I am not prepared to attribute any liability to Mr Dunn.

8.0 CONTRIBUTORY NEGLIGENCE

8.1 The First, Third and Fifth Respondents have made submissions on the affirmative defence of contributory negligence by the Claimant. This defence relies upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1). The Second and Fifth Respondents have made submissions on the failure to mitigate the loss or the quantum of the claim.

8.2 The First Respondent states the grounds for the defence are the Claimant:

- Had, via her husband, knowledge that she was moving into a house which leaked and which had no CCC
- She has failed for more than six years to remedy those leaks
- In 2001 she made a final payment to the builder based on an assurance that he had, after almost two years, repaired the leaks
- The Claimant took no steps to have the Council complete its inspections prior to making that payment
- To a large extent the Claimant must be seen as the author of her own misfortune.

8.3 The First Respondent suggests that a figure of 90% to 95% would be an appropriate reduction for contributory negligence should the adjudicator find that a prima facie cause of action is established against any of the respondents.

8.4 The Third Respondent made submissions with similar grounds and in addition submits:

- It was up to the owner and her husband to protect their own interests
- It was incumbent upon the Claimant as a matter of law to act promptly to have the leaks fixed thereby minimising the damage caused and mitigating the losses
- It was only the Claimant and her husband who could enforce the terms of the building contract. No one else could do it for them.
- The metal capping solution suggested by the builder with the offer to contribute towards its costs was never taken up and that failure has permitted further years of damage top the building.

8.5 The Fifth Respondent submitted that there has been contributory negligence on the part of the Claimant, as the Eighth Respondent's agent and indeed negligence personally on the part of the Eighth Respondent himself. Counsel referred me to the decision of the adjudicator in C No. 1917 *Hay v Dodds and Others* 10 November 2005. In *Hay* the claimants were found to have failed to take steps which were recommended by an experienced professional advisor, namely that they obtain a building surveyors report. It is submitted that the negligence of the owners in this case was much worse. It is submitted that as the Hay claim was reduced by 75% then a much greater deduction should be made in the claim of the Claimant/Eighth Respondent in this instance. The amount suggested is 95%.

8.6 The Claimant in final submissions at section 9 makes a compelling case for the reason for delay in remedying the problems and submits that allegations of delay and increased costs cannot be substantiated as no attempt was made to offer as rebuttal evidence any proper scale of costs at any earlier point at which it was alleged the repairs to have taken place. It also submits that consequentially there is no liability for the eighth respondent and neither can any finding of contributory negligence be made against the claimant.

8.7 The possible cost of earlier repairs being carried out was raised on more than one occasion during the hearing and the proposed metal capping to the parapet was raised a few times. In response to questioning the Assessor indicated that if repairs had been undertaken in a timely fashion then it would be anticipated that the cost would be likely to be half of what it is now stated to be.

8.8 The Claimant in the final submissions at paragraph 7.10 submits that the claim of contributory negligence by the Fifth Respondent can not be supported on the grounds that it was not pleaded in the Fifth Respondent's statement of defence. It is also submitted that the plea can only be against the owner, the Claimant, Mrs Cooper. Paragraph 7.10 continues: *"Contributory negligence cannot apply to another respondent who is not a claimant and as joinder of the eighth respondent as a joint claimant was refused there is no party other than Mrs Cooper against whom a plea of contributory negligence could succeed, and it is submitted the evidence is clear that there was no contributory negligence on her part."*

8.9 The grounds for the refusal of joinder as a joint claimant were set out in Procedural Order No 20 and it was for timing and legal complication reasons being immediately before the hearing. Mr Cooper, the Eighth Respondent, as husband of the Mrs Cooper, the legal owner, had a role in the building being involved as the electrician. It was obvious from the evidence that as the husband he was acting as the owner's agent and took an active part during and after construction and was the person who was involved with the problems after occupation. The claims of contributory negligence are against the owner and it is the owner's actions or inactions, often through her husband, that I have to consider.

8.10 I also have to consider whether the Claimant has taken reasonable steps to mitigate the loss and overall the effect of the actions or inactions of the Claimant. Counsel for the First and Third Respondents have both referred to the case of *Lander v Sorensen* [1995] NZLR 219 as supporting the submission that it is incumbent as a matter of law for the Claimant to act promptly to have the leaks fixed thereby minimising damage and mitigating any losses. I accept that as applying. From the evidence I am convinced that the Claimant could have effected repairs at a much earlier time and should have accepted, even as a temporary measure, that a metal capping was required to the parapet. The delay in implementing remedial work is to a degree understandable as promises that repairs have been made or will be made can stretch out the period. However, the time between taking occupation, when it was known there were leaks, and the time of commissioning Tse Group and lodging a claim with MBS then WHRS is too long. I am satisfied in this case that the Claimant, through her husband who was acting for her, has made a considerable contribution towards the situation in which she now finds herself.

8.11 After considering the evidence and the circumstances I do not consider that this case is as bad a situation as the *Hay* case and I find that the Claimant should bear 50% of the damages, which is a finding that the defence of contributory negligence will succeed to the amount of 50% of the damages suffered by the Claimant.

9.0 CONTRIBUTION BETWEEN RESPONDENTS

9.1 I must now turn to the consideration of the liability between respondents.

9.2 The law allows 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 …

9.3 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.

9.4 I have found that the Second Respondent is liable to the claimant for the defects and that the Fifth Respondent should bear a share of that responsibility. The damages all relate to the parapets and brickwork or consequential work and cost therefore the quantum does not need to be allocated to different items relating to leaks. Therefore, the damages will be paid to the Claimant as follows:

Second respondent, R & I Kennedy Ltd	
Damages	$73,229.94
Less 50% contribution by Claimant	$36,614.97
	$36,614.97
Less share by fifth respondent	$12,084.92
	$24,530.05

Fifth Respondent, Trevor Gaskin	
33% of net damages	$12,084.92

10.0. COSTS

10.1 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.

None of the parties in this adjudication have made claims for the recovery of their costs, and I do not consider that there are any particular circumstances that would justify an award of costs. Therefore, I will make no orders as to costs.

11.0 **ORDERS**

11.1 For the reasons set out in this determination, I make the following orders:

11.2 R & I Kennedy Limited are ordered to pay to the Claimant the amount of $36,614.97. R & I Kennedy Limited are entitled to recover a contribution of up to $12,084.92 from Trevor Gaskin from for any amount that it has paid in excess of $24,530.05 to the Claimant.

11.3 Trevor Gaskin is ordered to pay to the Claimant the amount of $36,614.97. Trevor Gaskin is entitled to recover a contribution of up to $24,530.05 from R & I Kennedy Limited, for any amount that he has paid in excess of $12,084.92 to the Claimant.

11.4 No other orders are made and no orders for costs are made.

NOTICE

Pursuant to s.41(1)(b)(iii) of the WHRS Act 2002 the statement is made that if an application to enforce this determination by entry as a judgment is made and any party takes no steps in relation thereto, the consequences are that it is likely that judgment will be entered for the amount for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

This Determination is dated this 3rd October 2006.

G D DOUGLAS
Adjudicator