CLAIM NO: 00715

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **YVONNE ONG** and **GUAN LEE YEOH**
Claimants

AND **RIDVAN GARDEN DEVELOPMENTS LIMITED**
First Respondent

AND **WELLINGTON CITY COUNCIL**
Second Respondent

AND **ANTHONY WARREN MUIR**
Third Respondent

AND **ANTHONY ROBERT MUIR**
Fourth Respondent

AND **EQUUS INDUSTRIES LTD**
Fifth Respondent

AND **BRIAN ANDREOLI**
Sixth Respondent

AND **SHANE RONA**
Seventh Respondent

AND **JOHN EDWARD CHAPMAN BROADHEAD** and **CAROLINE JANINE BROADHEAD**

Eighth Respondents

DETERMINATION OF ADJUDICATOR
(Dated 7th May 2007)

INDEX TO DETERMINATION

1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS Act"). The claim was deemed to be an eligible claim under the WHRS Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS Act on 8 March 2005.

1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged and held by telephone on 26 May 2005, for the purpose of setting down a procedure and timetable to be followed in this adjudication.

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

1.4 Progress in this adjudication has been a long and protracted affair. There have been twelve applications to join additional parties, and these applications have been staggered over a period of more than twelve months. There has been a three month delay whilst an application for Judicial Review was made to the High Court. The hearing date has been set down, only to be changed later, on six separate occasions. It has been a frustrating process which I may need to review again when I come to consider costs.

1.5 The hearing was eventually held on 26 to 29 September 2006 in the meeting rooms of the Mercure Hotel at 345 The Terrace, Wellington. The parties were represented as follows,

- Mr Andrew Hazelton of Hazelton Law, representing the Claimants;
- Mr Ian Gordon and Ms Elspeth Horner of Morrison Kent, representing the first, third and fourth respondents;
- Mr David Heaney and Ms Sarah Macky of Heaney & Co, representing the second respondent;
- Mr Gary Still, representing the fifth respondent;
- Mr Brian Andreoli, the sixth respondent;
- No representation or appearance by the seventh or eighth respondents.

1.6 I was scheduled to conduct a site inspection of the property at 2.00 pm on 25 September 2006 but, due to Wellington airport being closed, I was delayed. I eventually arrived at the site at 4.10 pm and carried out my inspection in the presence of Mr Yeoh (one of the Claimants), the WHRS Assessor, and some of the respondents. The other respondents had carried out their inspection at the scheduled time of 2.00 pm, so that all parties had the opportunity to inspect.

1.7 The hearing took place over four full days from 26 to 29 September 2006. All the parties who attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses. Evidence was given under oath or affirmation by 35 witnesses of whom six would be classified as experts in the building field

1.8 At the commencement of the hearing, I instructed various experts to go into a separate room to discuss the technical aspects of the claims, so that they could report back on the matters that were agreed, and then summarise the matters that were not completely agreed.

1.9 Later in the hearing I asked the experts to try and agree on the remedial costs which they did with a high level of success. These discussions between the experts has reduced the areas of disagreement on the technical issues in this claim, and led to a reduction in the time needed to hear the evidence.

1.10 The parties were invited to make closing submissions at the conclusion of hearing the evidence, and these closing submissions were completed on 29 September. Before the hearing was closed the parties were asked if they had any further evidence to present or submissions to make, and all responded in the negative

1.11 The parties have agreed to an extension to the 35 working day period identified in s.40(1)(a) of the WHRS Act, and this was acknowledged at the start of the hearing.

2. THE PARTIES

2.1 The Claimants in this case are Ms Yvonne Ong and Mr Guan Lee Yeoh. I am going to refer to them as "the Owners". They purchased the house and

property at 41 Vasanta Avenue, Ngaio, Wellington, in April 2001 from Mr & Mrs Broadhead. The Owners are effectively the third owners of this house.

2.2 The first respondent is Ridvan Garden Developments Ltd ("Ridvan"), a company owned jointly by Mr Anthony Warren Muir and his wife. Ridvan is a company that develops land for residential subdivision, and provides a design and build service for constructing houses on these sections. Ridvan owned this property and it is alleged was involved with the construction of the dwelling in 1995-96.

2.3 The second respondent is the Wellington City Council ("the Council"), which is the territorial authority responsible for the administration of the Building Act in the area. The Council reviewed the application for a building consent, issued the consent, and carried out the inspections during construction prior to issuing the Code Compliance Certificate.

2.4 The third respondent is Mr Anthony Warren Muir, the managing director of Ridvan. I will refer to Mr Muir as Mr Muir (senior), to avoid confusion with his son Anthony Robert Muir.

2.5 The fourth respondent is Mr Anthony Robert Muir, who I shall refer to as Mr Muir (junior). Mr Muir (junior) designed and built the house on the property, albeit with the help of labour from Ridvan, and other contractors. He purchased the property from Ridvan, and built the house for himself and his wife.

2.6 The fifth respondent is Equus Industries Ltd ("Equus"), a company that it is alleged prepared specifications for external cladding and coating systems which were used on this house, and inspected and approved the application of the coatings.

2.7 The sixth respondent is Mr Brian Andreoli, an Equus approved applicator who was employed to install the external cladding system on this house. He employed Mr Shane Rona to help him plaster the cladding. Mr Rona is the seventh respondent in this adjudication.

2.8 The eighth respondents are Mr John Broadhead and Mrs Caroline Broadhead, who were the owners of the property from 1997 to 2001. They purchased the property from Mr Muir (junior), and sold it to the present Owners.

3. CHRONOLOGY

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

6 June 1995	Application for building consent
17 July 1995	Building consent issued
19 April 1996	Transfer from Ridvan to Mr Muir (junior)
April 1996	House occupied by Mr Muir (junior)
8 October 1997	Code Compliance Certificate issued
November 1997	Transfer from Mr Muir (junior) to Broadheads
22 September 1998	House leased to Singapore High Commission
23 March 2001	Broadheads agree to sell property to Owners
11 June 2001	Lease to Singapore HC terminated
18 February 2003	Owners make application to WHRS
8 December 2003	WHRS Assessor report published
8 March 2005	Owners file Notice of Adjudication

4. THE CLAIMS

4.1 The original claims made by the Owners in their Notice of Adjudication (8 March 2005) were for remedial work of approximately $225,000.00, plus other costs of $31,000.00 and general damages of $40,000.00. They were also claiming an unspecified amount for internal decoration, and for increased costs since December 2003. The total being claimed was $296,228.00 inclusive of GST.

4.2 These claims were amended in the Owners' revised Statement (of 1 August 2005) to remedial work of $259,620.00, other costs of $32,475.00, and general damages of $40,000.00, and an unspecified amount for increased costs of construction from May 2005. This amounted to total claims of $332,095.00 inclusive of GST.

4.3 These claims were again amended when the witness briefs were filed so that by the time that the hearing started, the Owners were claiming $413,467.78 for the cost of repairs, plus other costs of $25,458.00 and general damages of $40,000.00. This amounted to total claims of $478,926.00 inclusive of GST.

4.4 There are also claims for the recovery of experts' and legal costs associated with this adjudication, which I will consider separately under the heading of "Costs".

5. FACTUAL ANALYSIS OF CLAIMS

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

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

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

5.3 The WHRS Assessor identified that there were twelve areas, or locations, in which it was possible that moisture was getting into this dwelling, and he summarised these in a "Leaks List". I asked the experts to attend a Technical Conference (chaired by the WHRS Assessor) to see if they could identify how much of the Leaks List they agreed with, and to list the matters that were not agreed. They all agreed that there were leaks in all twelve of these areas. Therefore, I will consider the following areas or locations.

A Cracking to external walls generally
B Main bedroom balcony - balustrade
C Main bedroom balcony/family room ceiling
D Front balcony balustrade, wall and decking
E Front balcony – lounge windows
F Family room window
G Windows generally
H Parapet – lower edge
I External cladding into ground/drainage
J West wall of garage
K Sub floor – north-east below family room
L Storeroom – bottom plate

5.4 I had carried out a site inspection on the day before the hearing started, and as a result of that inspection, I suggested that it would be helpful if the WHRS Assessor return to the site to carry out some further cut-outs and tests. This happened on the afternoon of the first day of hearing, and the other experts were given the opportunity to accompany the Assessor. He reported back to the hearing on the second day with photographs and additional information.

5.5 The experts were able to agree on many of the technical issues about the extent of damage caused by the various leaks, and on the probable remedial work. They could not agree whether the building needed to be completely re-clad, or whether the repairs could be properly carried out by targeted repair work. I will need to consider that matter later in my Determination.

The Cladding System

5.6 The drawings that were submitted for a building consent showed the exterior cladding to be "40mm H grade polystyrene 'Glencadd' system". The specifications contained a similar description, with the additional clause to say that "... materials and workmanship in accordance with the relevant Standards and regulations carried out according to the plans in a tradesmanlike standard".

5.7 At some stage after the issue of the building consent, Mr Muir (junior) decided to change from Glencladd to an Equus system. This was not documented on the building consent drawings or specifications in any way that I was shown, and I am not sure whether the Council's inspectors realised that a change had been made. I do not regard this change as particularly significant, as the two systems are very similar. I would not consider the Equus system to be inferior, and I do not think that the Council would have had any cause to disapprove of the substitution.

5.8 Mr Muir (junior) told me that the cladding system that was installed was an Equus system in every respect. He says that all the materials were supplied by a company called Statuus Ltd, which acted as the agent for Equus in the Wellington region at that time. He says that he employed Mr Andreoli to supply and install the complete system because he had been told that Mr Andreoli was an approved Equus applicator. He says that a Mr Dean Barr of Statuus inspected the installation on several occasions during construction to ensure that everything was being done properly. He concludes by saying that all Equus

products come with a 15 year warranty and, in his experience, this warranty automatically issues from the time that the cladding is completed.

5.9 Mr Andreoli signed an affidavit in September 2005, before he had been joined as a respondent in this adjudication, saying that he supplied the Equus product. He said that he was not involved in the application of the product because it was done by Mr Rona (the seventh respondent). He made no mention of Mr Barr visiting the site to check on the installation work, or of any warranty that may have been issued. He has made other statements in letters to WHRS, and in his written witness statement prepared for the hearing, which have altered or amended this first affidavit.

5.10 When questioned at the hearing he told me that the polystyrene was supplied and fixed by the builder (whom he identified as Mr Muir (junior)). He confirmed that he purchased the plastering materials, and that most of the plastering was done by Mr Rona, as his subcontractor, but he did do some of the plastering himself. He then said that he remembered Mr Barr visiting the job when the polystyrene had been fixed in place, but as he was trying to do several other jobs at this time, he does not know whether Mr Barr visited later.

5.11 It is accepted by all of the parties that the exterior cladding was painted by another contractor, probably a Mr Eric Thistle. Mr Thistle was employer directly by Mr Muir (junior).

5.12 The term Equus System is shorthand for "Thermexx Insulated Cladding Self-textured coating" system. It is a complete cladding system which starts with the polystyrene panels, and finishes with the weatherproof paint. On this job it is not accurate to say that the cladding system was an Equus system in all respects. For the system to obtain an Equus warranty, all work must be done by an approved Equus Contractor, and all materials and workmanship must comply with the manufacturer's specifications and technical literature.

5.13 I will need to return to this topic when I consider the liability of some of the respondents, but at this stage of my Determination I will find that the exterior cladding was probably intended to be an Equus system, but was in fact a hybrid system which incorporated many of the Equus materials.

Water blasters on the property

5.14 Before I proceed to consider each area of leaking, it is necessary for me to confirm a preliminary finding that I made during the hearing. It involved the matter as to whether the house had ever been water blasted. A total of 26 witnesses were prepared to give evidence about the use of water blasters on the house at 41 Vasanta Ave – ten said that they had never seen a water blaster being used, and were fairly sure that one had never been used – whilst sixteen said that they had seen or heard a water blaster being used on or around the house.

5.15 At the request of the parties, I gave a preliminary indication at the hearing of my conclusions on this matter, after I had heard all the witnesses who were giving evidence on the topic. Having now carefully reviewed all of the evidence, I can now give my final decision on this matter of the water blasting.

5.16 The matters that I am required to decide are

1. Whether a water blaster had been used on the property.

2. If so, what was it used for (the purpose)
   - who decided to use it
   - who actually used and operated it.

3. Whether the use of the water blaster has contributed to the leaks and damage.

5.17 I am very mindful of the how vulnerable the memory can be, particularly after a period of five or six years. I am also aware of the power of suggestion, and the reason why we do not permit leading questions being asked under certain sensitive situations. I do not think, or even suggest, that there were any improper tactics, or dishonest behaviour on the part of any person in this hearing, but some of the witnesses must be mistaken in their recollections.

5.18 There is no evidence to show that the house was water blasted prior to September 1998, which is the period in which the Broadheads lived in the house, prior to their moving to Auckland and leasing the house to the Singapore High Commission.

5.19 Then there is the evidence from three people who recalled seeing a water blaster at various times between late 2000 and July 2002. I am not satisfied that these recollections are accurate as they are inconsistent with the other evidence, and I would not be inclined to rely on them.

5.20 That leaves me with two groups of 6 to 8 people, one group adamant that they had seen water blasters being used on this property, and the other group equally adamant that the first group is mistaken. I do not think that either group of people – regardless of the fact that they may be closely related, or be close neighbours – have sat down and deliberately agreed to make up a story, and then been prepared to lie on oath. I accept that it is a possibility – but having had the opportunity to hear from all these persons, I do not accept that there has been a conspiracy, or a deliberate attempt to mislead me.

5.21 However, I am satisfied that a water blaster was used on this property on one occasion. I accept the testimony of Mr Luke on this matter, and conclude that a large water blaster was used on this property between the middle of November and December 1999. It was probably arranged by Mr Kevin Thompson, on behalf of the Broadheads. It was probably used by a commercial property maintenance gang as a part of a request for property maintenance.

5.22 I do not accept that this house has been water blasted on a regular basis. Mr Thompson may have employed a commercial firm to clean down the exterior of the house whilst it was leased to the Singapore High Commission, but as Mr Lee was not aware of it, it cannot have been very often. Mr Thompson was not called to give evidence at the hearing.

5.23 There was a considerable amount of evidence given about the effects of water blasting buildings, and particularly about the possible damage that could have been caused to this building. However, I have not found that much of this evidence has been helpful in the determination of whether the leaks in this house were caused by, or assisted by the use of water blasters. After considering all of this evidence, I am not satisfied that it has been established that this house has been damaged by the use of water blasting, or by any other method of cleaning or maintaining the exterior cladding.

Cracking to external walls (generally) – Location A

5.24 The experts all agree that there is widespread cracking visible on the external plaster coating. Mr Nevill is of the opinion that the external cladding system has failed to the extent that it needs to be re-clad. He attributes the widespread failure to workmanship issues, and the lack of adequate detailing from the designers and manufacturers.

5.25 Mr Muir (junior) is of the opinion that there was nothing wrong with the cladding until the house was water blasted, and he says that the water blasting has damaged the sealants and caused the cladding to flex excessively so that it has cracked. None of the other experts was prepared to say exactly why the cladding had failed, although they did not openly disagree with Mr Nevill.

5.26 The evidence does indicate that the cladding has allowed sufficient water to leak into the wall framing, and over a large area, so as to make it inevitable that the house will need to have substantial parts of the exterior cladding replaced. I am not convinced that it is a practical proposition to try and carry out targeted repairs, as there is no realistic expectation that the repairs can be done without the introduction of a ventilated cavity. Furthermore, it is quite probable that the extent of the damage will be found to extend beyond the apparent boundaries of each damaged area. This has been accepted by most of the experts, as it has been anticipated in the agreed calculations for the repair costings.

5.27 At this point in my Determination I need to return to the matter of the exterior cladding system that I considered in paragraphs 5.6 to 5.13 above. Mr Muir (junior) said it was an Equus system, and that it was constructed in accordance with the specifications issued by Equus. Although I have found that it was a hybrid system which included many of the Equus materials, I accept that it was the intention of Mr Muir (junior) to adhere to the Equus specifications.

5.28 At the hearing there was some confusion between the witnesses about which Equus specification applied at the time that this house was being constructed. There was not a great deal of difference between the March 1988 and the February 1992 versions of the specifications, and this house had been completed prior to the 1996 version being published. I have concluded that the 1992 specification was available, and should have provided the fundamental

guidance to the persons installing the external cladding on this house in 1995-96.

5.29 In addition to this specification, there was a reasonable amount of literature on EIFS cladding and experience available to builders and applicators, in addition to the technical literature supplied by other manufacturers. BRANZ issued its Bulletin 287 in December 1991 which covered EIFS cladding, and this bulletin included notes on the importance of flashing/sealing around penetrations, installing proper movement control joints, and providing adequately detailed drawings to show how to install the EIFS cladding. There were no adequate details available on site on this job. Mr Muir (junior) told me that it was his first experience of the Equus system. The Equus specifications did not include any detail drawings for typical junctions, edgings, or penetrations. Mr Muir, as the designer of the house, did not provide any detailed drawings, and he seems to have relied upon Mr Andreoli and Mr Barr to tell him how to install the cladding system.

5.30 In my opinion, this lack of experience and information has contributed towards the failings in the exterior cladding. I would conclude by finding that the extensive cracking has probably been caused by a combination of the following factors:

- Lack of adequate construction details for the system;
- Inadequate supervision or quality control during the cladding installation;
- Timber movement as a result of other leaks.

Main bedroom balcony – balustrade – Location B

5.31 Water has penetrated the balustrade and caused some of the timber framing to start to deteriorate. Mr Nevill thinks that there are a number of causes for these leaks, and is of the opinion that the water is gaining access from the top, the cracks in the plaster, and from the bottom of the balustrade. In his view the fact that the cladding has been taken below the deck tiling and that the membrane upstand is insufficient, has allowed water to penetrate or wick up behind the cladding. This situation will aggravated by the restricted size of the outlet (allowing water to build up on the deck in times of heavy rainfall). Also the cracks that have developed in the flat top to the balustrade will be allowing water to get into the cladding.

5.32 Mr Muir (junior) does not agree that water is getting in at the bottom, but thinks that the leaks are from the cracks in the plaster and at the door jamb, a view that was shared by Mr Barnes. The additional investigation work carried out by Mr Nevill was very helpful, and I am satisfied that some of the water has been entering the balustrade at its base.

5.33 I think that Mr Nevill is most probably correct when he explains the leaks as being a combination of water entering through the cracks at the top of the balustrade, through the cracks on the sides of the balustrade, and from the bottom. If I have to put a percentage against these three causes, they would be:

From the top	35%
Through the side cracks	25%
From the bottom	40%

Main bedroom balcony/family room ceiling – Location C

5.34 There is an obvious leak through into the family room ceiling, which is directly beneath the doors opening from the main bedroom onto the first floor deck. There are a number of suggested reasons for this leak, including a failure of the door joinery, the absence of sill flashings, water leaking around the door jamb, insufficient membrane upstand at door sill, or a failure of the deck membrane generally.

5.35 I would accept the opinion of those experts who believe that the leak is most likely to be around or under the door sill. There is little protection against driving rain, as the tiles are close to the underside of the door sill. It is quite possible that there have also been some failures in the waterproofing membrane, as have been found elsewhere on this building.

Front balcony balustrade, wall and decking – Location D

5.36 The suggested reasons for the leaks into the front of the garage are that the deck and balustrade over the garage have the same problems that have been identified for the rear deck and balustrade – refer to Location B above. I asked Mr Nevill to carry out further investigations on this deck, and he removed a section of the tiling so that the waterproofing membrane could be examined. I

am satisfied that this demonstrated that the membrane has failed which is the main reason for the extent of the leaks in this location.

5.37 The thickness of this membrane was found to be between 0.5 and 0.6mm in the areas that it could be measured. The manufacturers of Duram, the product that was used to waterproof the decks on this house, specify that the membrane thickness should be between 1.2 and 1.5mm. Therefore it appears that the membrane was barely half the required thickness.

5.38 Mr Muir (junior) applied this waterproof membrane and I have no doubt that he carried out the application to the best of his knowledge and ability. However, the evidence shows that the membrane has failed in several places, and may have failed in other places. There are places where corner fillets have not been used, and the finished thickness indicates that either the required number of coats have not been applied, or that the specified coverage rates have not been met.

5.39 I find that the main cause of these leaks is the failure of the waterproof membrane. The leaks in the balustrade are also caused by some failures at the top, through the cracks in the sides, and due to the cladding being finished hard against the membrane at the bottom. In case it may be necessary to consider these different causes separately later in my Determination, I would assess the contribution as being:

Failure at the top of balustrade	8%
Failure of waterproofing membrane	75%
Through the side cracks in balustrade	7%
From the bottom of balustrade	10%

Front balcony, lounge windows – Location E

5.40 There is considerable damage caused by leaks around this facetted window which has started to destroy the flooring at the base of the window. Mr Nevill told me that there were no flashings found at the head, sill or jambs, and that the sealant that had been applied had not properly adhered to the window frame. I am not convinced that the sealant has been damaged by water blasting as it has only been exposed to view and examination after taking cut-outs from the external cladding around this window.

5.41 I have already mentioned that there was confusion between the witnesses at the hearing about which specification should have applied to this work. I have concluded that the 1992 version was available and should have been used for this job but, as this specification did not include detailed drawings, the builders would have needed to seek guidance from the detailing of other EIFS claddings and BRANZ literature. I think that it is reasonable to conclude that the Equus specification required that recessed windows should have head flashings, but could rely on backing strip and sealant at jambs and sills.

5.42 The application of sealant around the windows is an important issue in this adjudication. I accept the opinion of Mr Nevill that, in 1996 in a situation where it was intended to rely entirely upon sealant as a primary method of weatherproofing, then the sealant should have been applied behind the window flange (for face fixing), or in a suitably dimensioned gap around the flange (for recessed fixing). There is no literature that I was shown that approved the use of smears or small fillets of sealants to the face or edges of window sections. Equus recommended that a backing strip of compressed foam was inserted behind all window flanges before fixing.

5.43 The 1992 Equus specification is vague about the use of flashings around penetrations and openings. However, other EIFS claddings at this time were much more helpful in their guidance towards proper installation methods. I was shown excerpts from installation manuals. Rockcote was using flashings to heads, jambs and sills of recessed fixed windows from June 1994. Insulclad introduced the option of having these flashings as early as 1990, but did not make them mandatory until August 1992.

5.44 This window does not have a head flashing, nor was a backing strip of "Inseal" compressed foam inserted behind the window flanges at heads, jambs or sill. I find that these leaks have been caused by the inadequate methods used to weatherproof around this window.

Family room window – Location F

5.45 The situation with the family room window was similar to that found to exist at the lounge window, although the amount of damage was considerably less than was found around the lounge window. My findings are the same. I find that these leaks have been caused by the inadequate methods used to weatherproof around this window.

Windows generally – Location G

5.46 Mr Nevill took extensive measurements around the other windows in the house. He is of the opinion that the problems that he identified on the lounge and family room windows exist on all the other windows in this house. Not all the windows appear to be leaking at present, but this cannot be known for certain unless destructive testing is carried out around all of the windows. I am satisfied that his conclusions are reasonable, because all the windows have been built in the same way, and on the balance of probabilities they are all leaking to some extent. I find that these leaks have been caused by the inadequate methods used to weatherproof around these windows.

Parapet – lower edge – Location H

5.47 Mr Nevill has noted that the galvanised metal edge trim used to finish the bottom edge of the roof fascia panels has started to rust. He says that this is because there is no effective drip feature at this point so that water tends to track back under the soffit. He has classified this as damage caused by water ingress and says that the edge trim needs to be replaced.

5.48 I accept that moisture has penetrated the exterior envelope of the building, which means that this is a leak in accordance with the definition in the WHRS Act. The edge trim has started to rust and will, in time, cause the plaster to break away. The extent of the damage at this stage is relatively small, as it will be fixed when this edge trim has been replaced. However, the use of galvanised corner and edge trims in 1995 was specified by the manufacturers of most exterior insulation finish systems ("EIFS"). Therefore it would not be considered to be negligent to use these types of trim.

External cladding into ground/drainage – Location I

5.49 In some parts of the building the external cladding system is carried down to below the surrounding ground levels. Mr Nevill says that this has allowed some moisture to track up behind the cladding and enter the bottom plate of the wall framing.

5.50 Mr Muir (junior) told me that he believes that the ground levels have been altered since he sold the house, but he does not accept that water can be sucked up by capillary action. There was disagreement between the experts as to whether it was normal in 1995 to take these types of cladding below the

ground. There was not a lot of disagreement that some damage has been caused around the base of the house where the ground has been backfilled against the EIFS system.

West wall of garage – Location J

5.51 There is evidence that there has been a modest leak for a considerable period of time into the back (north-west) corner of the garage, and along the west wall. Mr Nevill says that this has been caused by a section of unfinished cladding. Mr Muir (junior) is of the opinion that this leak comes from the balustrade above, and from around the window. The results of Mr Nevill's investigations during the hearing do indicate that the problem may well lie with the waterproofing membrane under the deck that is above the garage.

5.52 I prefer Mr Nevill's opinion on this matter and find that the cause of this leak is the section of unfinished cladding at the end of the balustrade wall, which has probably been assisted by some failures in the waterproofing membrane.

Sub-floor – north-east below family room – Location K

5.53 I am told by the Owners that they discovered a disconnected downpipe in the sub-floor area, which had caused a part of the sub-floor area to become damp. They arranged to have this downpipe reconnected. Mr Nevill found that some of the timber framing in this area of the sub-floor had started to decay due to prolonged exposure to moisture.

5.54 I accept that this is a leak in accordance with the definition of the word in the WHRS Act. The leak has caused damage, because some of the timber framing will now need to be replaced.

Storeroom – bottom plate – Location L

5.55 The bottom timber plate in the wall framing in the sub-floor area is wet and has started to decay. This timber plate is fixed to the edge and top of a concrete floor slab, alongside which runs a field drain. This drain does not seem to be operating efficiently, and in times of heavy rain is will allow water to back up and soak into the timber plate. Mr Nevill is of the opinion that the concrete slab is in a state of constant dampness because the level of the field drain is too high.

5.56 I accept that this is a leak which has caused damage to the timber framing. It will be necessary to lower the level of the field drain to prevent this problem from continuing.

Extent of Remedial Work

5.57 The experts are in general agreement about the extent of the required remedial work, although they do not agree whether the house needs to be completely re-clad, or whether the repairs can effectively be carried out by undertaking targeted repairs. I have already mentioned this earlier in this Determination.

5.58 Having carefully considered all of the opinions and the evidence, I am not satisfied that targeted repairs will be allowed by the Council when the owners apply for a Building Consent to carry out the repairs. The Council will probably require a ventilating cavity to be included as a part of any reconstructed parts of the external cladding. This means that any wall that requires some repairs will need to be completely re-clad, because you cannot have part of a wall with a cavity and leave the remainder without a cavity. This is a practical necessity.

5.59 The extra costs of carrying out a complete re-clad as opposed to targeted repairs are about 22%. This is not an insignificant amount, but it is probably not an unreasonable premium to pay to avoid the risk of finding further damage or leaks when attempting to affect targeted repairs. I am satisfied that it is appropriate under these circumstances to accept that the cost of repairs should include for a complete re-clad of this house.

6. REPAIR COSTS

6.1 There was a high level of agreement reached between the experts about the costs of the remedial work. As I have decided that the remedial costs should be based on the re-clad option, I will not consider the figures for the targeted repairs. The re-clad figures were summarised during the hearing, after a discussion with the experts, as follows:

- Mr Muir (junior), $236,243
- Mr Nevill, $269,262
- Mr Clelland, $286,243

6.2 The reasons for the differences between these figures are not straightforward. The basic figure that all experts have accepted as a starting point for the re-

clad option is the $300,396, shown on the Ortus calculation sheets. Mr Muir (junior) says that these contain duplications, such as the amount for the contractor's margins. He says that an adequate total cost is $236,243.

6.3 Mr Nevill has revised the Ortus figures and provided his revised figures on a spreadsheet. He says that the total costs should be $269,262 and has included a further $16,000 to the Ortus figures, as they did not include for the special design and supervision costs that will be needed for remediation specialists.

6.4 Mr Clelland agrees with the figure of $236,243 suggested by Mr Muir (junior), but says that there should be further allowances made, over and above those allowed by Mr Muir (junior), for a further $20,000 for design and supervision, and another $30,000 for preliminary and general costs.

6.5 Estimating is all a matter of opinion. It is difficult for any expert to start with someone else's estimates, and try to adjust them to what is considered reasonable. I have considered the proposed adjustments made by both Mr Nevill and Mr Muir (junior), but by and large I prefer those made by Mr Nevill. I would accept that the Ortus figures provide a solid foundation, and whilst some figures do appear to be generous, there are other figures that appear optimistic. Overall, I am satisfied that they are slightly on the high side. However, they have not made any obvious allowance for the extra costs that are incurred by builders who carry out this sort of remediation work. It is not normal building, such as the construction of a completely new house, and it involves specialist management and supervision.

6.6 I do prefer the adjustments to the Ortus figures as made by Mr Nevill, but I consider that his allowance of $16,000 for specialist remediation costs to be inadequate and I will increase this to $26,000. This means that I will set the remedial costs at $269,262 + $10,000, or a total of $279,262. As it happens, this means that I have finished up with a figure that is closest to that provided by Mr Clelland.

Betterment

6.7 Mr Gordon made submissions on the need to reduce the amount of remedial costs on account of the Owners being the beneficiaries of betterment. Specific submissions were made on the need to adjust the cladding costs, which I will consider below.

6.8 The issue of betterment is often raised in building disputes and WHRS adjudications. Mr Gordon says that he is happy to abide by the line of reasoning given in the WHRS adjudications known as "Ponsonby Gardens" in respect of betterment.

External Painting

6.9 The amounts allowed in the Ortus estimates for the cost of the external painting are $12,600.00, which includes the appropriate amounts for margins and general costs. The house is now eleven years old and has not been repainted since it was first built in 1995-6. Based on the expert opinions given to me in this adjudication, I would consider that a realistic life expectancy for external paintwork on an EIFS system in this part of Wellington is about 8 years. Therefore, this house is well past its due date for repainting.

6.10 In *Ponsonby Gardens* I found that to paint an existing previously painted surface in good condition would cost less than painting a new and previously unpainted surface. However, *Ponsonby Gardens* had a cement plaster external cladding, which is slightly different from an EIFS system. I concluded that the Owners were entitled to recover the extra cost of painting on the new plasterwork over and above the cost of repainting after a normal life, and assessed these extra costs as being 55%. In this case, I would assess these extra costs as being about 35% of the total costs. Therefore, I will allow the Owners to recover 35% of these painting costs, which means that a deduction of $12,000 x 65% = $8,188 must be made for betterment.

Internal Decorating

6.11 Mr Gordon submits that on the basis of the same reasoning that was used in *Ponsonby Gardens*, there should be an appropriate deduction made from the cost of the interior decorating. The amounts allowed in the Ortus estimates for the cost of the interior decorating are $12,600.00, which includes the appropriate amounts for margins and general costs.

6.12 In this particular case, where the interior of the house is past the date by which it normally would have needed some redecoration, I think that it is appropriate to make some adjustment for betterment. I will allow a deduction of 50% of the costs of the internal decoration as betterment, which is a deduction of $6,300.

External Claddings

6.13 Mr Gordon also submits that a discount should be given against the costs of the external cladding, where the cladding is already halfway through its expected serviceable life. He appreciates that I have been unimpressed by previous claims for a discount on the basis of the 15 year period stipulated by legislation – refer to my Determination in *McKinney v Cassidy & Ors* (WHRS claim 1514, 16 August 2006), but submits that this claim is not the same. He says that the Glencladd system, which was the system that was originally intended to be used on this house, is typical of EIFS systems of the day. Glencladd stated that its product was "... expected to have a serviceable life of at least 20 years under normal conditions of exposure in New Zealand".

6.14 Mr Gordon is saying that there is no logical distinction in the approach to be taken to betterment between paint, carpet or cladding. Although this is fundamentally correct, one must compare apples with apples. The life expectancy of the external paint I have concluded was 8 years, so that after about 8 years it will be necessary to renew the paint finish. There is a reasonable body of information about the life expectancy of paint, and about what will happen if external paintwork is not renewed. I have little evidence to show that the life expectancy of the external cladding system was only 20 years, and that owners can expect to have to renew their external cladding after only 20 years. Mr Gordon appears to be suggesting that house owners, as a matter of normal maintenance and upkeep, can expect to completely re-clad their EIFS-clad houses every 20 years. I do not accept that suggestion. I do not accept that a discount should be given by these Owners on the grounds that they have received any betterment.

Summary of Repair Costs

6.15 I have found that the following costs should be accepted as remedial or repair costs for the various leaks that have occurred in this house:

• Total amount of remedial costs (see para 6.6)		$ 279,262
• Deductions		
- External paint (para 6.10)	$ 8,188	
- Internal decoration (para 6.12)	6,300	14,488
		$ 264,774

Allocation of Repair Costs

6.16 It is necessary to allocate the repair costs against the various leaks or leak locations. Mr Nevill has provided me with his suggested breakdown of these costs as a part of his Leaks List, and I will use this as the basis for my own allocation of the remedial costs. However, several of the defects that have been classified as leaks have made a contribution towards the need for a complete re-clad, so that I will need to consider how to assess the allocation of the cladding costs.

6.17 Mr Nevill had suggested the distribution of the re-cladding costs, and this distribution was agreed to by the other experts. Therefore, if I retain the proportions included in Mr Nevill's distribution, the repair costs (after making suitable deductions for betterment) become as follows:

A - General cracking over walls [included below]	$ 0
B – Main bedroom balcony balustrades	46,562
C – Main bedroom balcony/family room ceiling	11,870
D – Front balcony balustrade, wall & decking	57,597
E – Front balcony lounge windows	42,388
F – Family room window	3,244
G – Windows	89,259
H - Parapet lower edges	2,976
I – Cladding into ground/drainage	3,963
J – West wall of garage	2,066
K – Family room NE sub-floor	448
L – Bottom plate storeroom	4,401
	$ 264,774

7. OTHER CLAIMS FOR COSTS

7.1 The Owners are claiming for the reimbursement of other costs and expenses that are associated with the remedial work and its effects, together with general damages. I will consider them under the following headings:

- Consultants' costs for project management;
- Consultants' costs for plans and specifications;
- Costs for alternative accommodation;
- WHRS fees;
- Experts' fees;

- Medical expenses;
- Moving costs.

7.2 Consultants' costs for project management

7.2.1 The Owners are claiming an amount of $18,000.00 plus GST for the estimated costs of engaging consultants to project-manage the remedial work. In my consideration of the remedial costs I had already included an allowance for project management, as mentioned in paragraphs 6.3 to 6.6 above. Therefore, I do not consider that any further amounts should be added to these costs. I will not allow this claim.

7.3 Consultants' costs for plans and specifications

7.3.1 The Owners are claiming an amount of $20,000.00 plus GST for the estimated costs of engaging consultants to draw up plans and specifications for the remedial work. An allowance of $11,500 was included in the Ortus estimates, and in my consideration of the remedial costs I had assumed that there was a sufficient allowance for "... preparing plans, specifications, contract documentation and consent costs" in the re-clad figures prepared by the experts. Therefore, I do not consider that any further amounts should be added to these costs. I will not allow this claim.

7.4 Alternative Accommodation

7.4.1 The Owners are claiming for the costs of temporarily moving out of their house and renting alternative accommodation for the time that the remedial work will be underway. The claims are for rental accommodation for 42 weeks at $550.00 per week.

7.4.2 It is reasonable for the Owners to have to move out of their house whilst this work is being undertaken. There have been no obvious criticisms from any of the respondents regarding this claim, except to suggest that the remedial work will probably take only about 26 to 30 weeks. The rental costs have been substantiated by the fact that the house had been rented out to the Singapore High Commission at $550 per week up to June 2001.

7.4.3 I am satisfied that all of these costs will need to be incurred by the Owners, that the claimed weekly rental is reasonable under the circumstances, and that they are as a direct result of the leaks in this house. However, I do not think that the work will take as long as they fear, and I will allow them 6 months or

26 weeks. This means that the claim will be allowed for 26 weeks at $550, or a total of $14,300.00.

WHRS Fees

7.5.1 The Owners are claiming for the recovery of the $400.00 fee paid to WHRS to enable this matter to be referred to adjudication. This will be considered as a cost of the adjudication, and will be addressed at the end of this Determination.

7.6 **Experts' fees**

7.6.1 The Owners are claiming for the recovery of fees paid to their experts, which was claimed as $6,375.00 at the beginning of the hearing, but was to be updated. This claim will be considered as a part of the costs of the adjudication, and will be addressed at the end of this Determination.

7.7 **Medical expenses**

7.7.1 The Owners are claiming $358.20 for the recovery of medical expenses, which they say were caused by illnesses caused by the leaking house. I was given little further explanation of this claim, other than a number of invoices for doctor's fees and prescriptions. There was no medical evidence to support that the amounts claimed were as a result of moisture in the house. I will not allow this claim on the grounds that it has not been adequately proven.

7.8 **Moving costs**

7.8.1 The Owners are claiming $2,000.00 for the estimated costs of moving out of their house into rented accommodation, and moving back in after the remedial work has been completed.

7.8.2 I have already found that it is reasonable for the Owners to move out of their house whilst this work is being undertaken, and there will be the normal costs associated with moving. There have been no obvious criticisms from any of the respondents regarding this claim. I am satisfied that this is a reasonable claim, and the costs are realistic. I will allow the claim for $2,000.00.

7.9 **Summary of Other Costs**

7.9.1 I have found that the following costs should be recoverable by the Owners as being consequential to the remedial or repair costs:

Alternative Accommodation	14,300.00
Moving Costs	2,000.00
	$ 16,300.00

7.9.2 These costs will be allocated to the various leaks or leak location remedial costs as a proportion of the whole.

8. GENERAL DAMAGES

8.1 The Owners are claiming general damages in the amount of $20,000.00 for each of them for the distress, inconvenience and general disruption to their lives as a result of finding that their house had serious leaks. Both of the Owners told me, in their own words, how the situation has affected them personally.

8.2 At the time that the hearing was held, it had been held that adjudicators had the power to make awards of general damages, as confirmed by Judge F W M McElrea in the Auckland District Court in *Waitakere City Council v Smith* (CIV 2004-090-1757, dated 28 January 2005). I am aware of awards for general damages that have been made by adjudicators in previous WHRS determinations. General damages have been claimed in 23 of the 52 Determinations issued to date, and have been awarded in 17 cases. The amounts awarded have varied from a minimum of $2,000.00 (WHRS Claim 277 – *Smith*) to a maximum of $18,000.00 (WHRS Claim 27 – *Gray*), with the average amount being about $6,000.00.

8.3 Since the hearing, and after I had written a substantial part of this Determination, I became aware of a recent judgment by Stevens J in *Hartley v Balemi & Ors*, Auckland High Court, CIV 2006-404-002589, 29 March 2007. This judgment considered an appeal against a WHRS adjudication Determination, the learned judge held that general damages claims for mental stress did not fit comfortably within the overall scheme of the WHRS legislation and its underlying policy considerations. He concluded that WHRS adjudicators had no jurisdiction to make awards of general damages for any mental stress in the context of a claim brought before the WHRS concerning a leaky building.

8.4 I am aware that I am bound to follow this decision as it comes from the High Court, and overrules the previous decisions from the District Court. However, I feel obliged to say that I respectfully disagree with the conclusions reached by Stevens J. If the WHRS adjudicators had been getting it wrong for nearly four

years, I would have expected Parliament to have stepped in and passed clarifying legislation. If Stevens J is correct, why didn't Parliament make this correction when it drafted, debated and passed the 2006 Act?

8.5 This may be somewhat academic, and does not alter the current situation in that I have no jurisdiction to award the Owners any amounts for general damages. However, having received and considered the evidence relevant to this claim, I will give the conclusions that I would have reached if I had the authority to make an award.

8.6 When the Owners moved into the house, they were aware of a small patch on the ceiling in the dining room, which they understood had been as a result of an earlier leak that had been fixed. When it became apparent that this may not have been fixed, they filed a claim with WHRS. It was only after the WHRS assessor had carried out his thorough inspection of the house that the Owners learnt that there were serious leaking problems with many parts of the building. This must have been an unpleasant shock for them.

8.7 It was clear from their evidence that much of their stress and worry had been caused by the possible short term, and long term, effects on the health of their children and themselves. However, they both told me that the length of time that it had taken to get to a point of resolution of their claims had also added to the stress. They made references to the alleged delaying tactics employed by the respondents, which meant that they have had to live in the un-repaired house for a lot longer than should have been necessary. However, the Owners would not have been entitled to succeed with a claim that relied upon stress or anxiety caused by litigation, and the stress has to be as a direct consequence of a breach of a duty of care, whether the claim was based in contract or in tort. Therefore, I could not have made an award of general damages against any of the respondents on account of any tactics that they may have employed which had prolonged the dispute resolution process.

8.8 Having carefully considered the submissions and the evidence I was satisfied that both of the Owners would have been entitled to a modest award of general damages. They were claiming $20,000.00 each, but I considered that this was too much under the circumstances. I would have set the amount of general damages as being $4,000.00 for each of the Owners, being a total amount of $8,000.00. However, as I do not have the jurisdiction to award these damages I can only leave their claims as unresolved.

9. RIDVAN GARDEN DEVELOPMENTS LTD

9.1 The Owners' claims against Ridvan are in negligence, and based upon its acts or omissions in relation to the development of this property. They say that Ridvan was the owner of the property at the time that the building was erected, and that as a developer, Ridvan was not able to discharge its responsibilities by delegating them to others.

9.2 If it is found that Ridvan was not the developer, then the owners claim in the alternative that Ridvan supplied the labour to construct this house, and as such, was negligent in that it failed to warn the builder or owner that there were defects in the construction work.

9.3 Ridvan does not deny that a developer owes a duty of care to subsequent owners. It denies that it was negligent, because it says that this house was designed and built to a proper standard which met the requirements of the then current legislation and Building Code. In other words, Ridvan says that this house was built to the standards and details considered acceptable in 1995-6.

9.4 I have carefully considered the evidence about the involvement of Ridvan with the construction of this house. I accept that Ridvan was only the property owner in name. It had been agreed between Ridvan and Mr Muir (junior), before any work started on the building work, that the property would be transferred to Mr Muir (junior) as soon as the planning and subdivisional problems had been resolved. It was, to all intents and purposes, Mr Muir (junior)'s property, and Mr Muir (junior)'s house.

9.5 Ridvan did not organise the design, or prepare the application for a building consent. Ridvan did not arrange for the materials, or subcontractors. Ridvan did not quote for a labour-only contract. Ridvan did supply labour to Mr Muir (junior), rather like a labour hire company, but Ridvan had no involvement in the management or supervision of that labour whilst it was working on this house.

9.6 It is submitted by Mr Hazleton, on behalf of the Owners, that Ridvan was a labour-only builder, and that builders have an implied obligation to warn building owners of defects that they believe may exist. He has referred me to *Hudson's Building and Engineering Contracts*, 11th edition, at paragraph 4.100.

With respect, this is relevant in contract law, but does not apply to this situation. How would Ridvan warn subsequent purchasers of a possible defect?

9.7 There has been no evidence to show that Ridvan was involved with the design or construction of this house in such a way that would attract any liability for the defects that have resulted in the leaks. I will dismiss all claims being made against the company.

10. MR MUIR (Senior)

10.1 The Owners' claims against Mr Muir (senior) are that, as a director of Ridvan, he acted negligently in his management of the work carried out by Ridvan. Alternatively, it is alleged that he personally was involved in some of the construction work (particularly the application of the waterproofing membrane) which was carried out so that it was defective.

10.2 I have dismissed the claims against Ridvan, so that it must follow that all claims made against Mr Muir (senior) as a director of Ridvan must also fail. I am not satisfied that the evidence has established that Mr Muir (senior) was physically involved in any of the construction work. He did not help with the application of the waterproof membrane. He may have taken a keen paternal interest in the design and construction of his son's house, but this fell well short of being involved with the actual construction work. As a result of these findings, I will dismiss all claims being made against Mr Muir (senior).

11. MR MUIR (Junior)

11.1 The claims against Mr Muir (junior) are based in negligence. In this section of my Determination I will simply refer to him as Mr Muir, to avoid unnecessary repetition of the suffix. The Owners say that it was through his acts and omissions in the design and construction that the leaks were caused. They are claiming that Mr Muir either carried out the building work, or supervised and managed those persons who carried out the building work on this property in 1995-6. They say that he owed a non-delegable duty of care to all subsequent owners of the property to ensure that the work complied with the requirements of the Building Code.

11.2 Mr Gordon has responded to these claims on behalf of Mr Muir. He says that the house was designed and built to a proper standard which met the requirements of the then Building Act 1991 and the Building Code.

Furthermore, he submits, the house was built in accordance with all manufacturers' specifications, properly inspected by the Council, and appropriately issued with a Code Compliance Certificate.

11.3 The existence of a duty of care between builders and subsequent purchasers, has been clearly established in New Zealand, as can be seen by reference to two of the many court cases that have considered this issue:

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

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

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

  I look first as [the Builder's] position. In this respect the law can be stated as follows:

  1. The builder of a house owes a duty of care in tort to future owners.

  2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.

  3. The position is no different when the builder is also the owner. An owner/builder owes a like duty of care in tort to future owners.

11.4 None of the parties appears to have challenged this position, so I will proceed on the basis that it has been accepted. The standard of care required of a builder in performing his services is the care reasonably to be expected of skilled and informed members of his trade or profession judged at the time the work was done.

11.5 In this case Mr Muir was the individual who was in charge and in control of the complete development. He was the designer who prepared plans and specifications, and used these in the application for a building consent. He selected all of the materials used in the building. He selected the suppliers and the subcontractors who did the work. He, personally, worked on the project as a carpenter and supervisor for the entire construction period.

11.6 I am satisfied that Mr Muir was personally in control of this building project to the extent that he owed a duty to subsequent purchasers to use reasonable care to ensure that the building was properly built in accordance with the requirements of the Building Code. Was he negligent and, if so, did his negligence cause defects in the building work?

11.7 **Cracking to external walls (generally) – Location A** I have found that the cause of the cracking and consequential leaks through the exterior cladding has been caused by a combination of the lack of adequate construction detailing for the system and inadequate supervision and control during installation. Mr Muir was responsible not only for the design, but also for the supervision of all work being done on site. He should have either prepared or obtained better construction details from which tradesmen could work. He may claim that he relied upon the experience and knowledge of Mr Andreoli and Mr Barr, but that does not absolve him from the overall liability of design and supervision.

11.8 I find that Mr Muir was negligent in the way he failed to ensure that there was adequate construction detailing, and failed to ensure that the external cladding was properly completed. Mr Muir's negligence has led to serious damage and extensive remedial work.

11.9 **Main bedroom balcony – balustrade – Location B** This balustrade has been leaking for similar reasons to those that have caused the external cladding to crack and leak. It comes down to inadequate construction detailing and a failure to ensure that the work was properly carried out. It was Mr Muir's job to take reasonable steps to prevent these defects in the cladding of the balustrade. I find that Mr Muir was negligent in that he did not take these reasonable steps. Mr Muir's negligence has led to damage and the remedial work.

11.10 **Main bedroom balcony/family room ceiling – Location C** The leak or leaks in this area are probably caused by the lack of adequate protection around and under the door sill. It was Mr Muir's job to take reasonable steps to make sure that there was adequate protection, either in the form of a flashing or an upstand. I find that Mr Muir was negligent in that he did not take these reasonable steps. Mr Muir's negligence has led to damage and the remedial work.

11.11 **Front balcony balustrade, wall and decking – location D** I have found that the leaks in this area were predominantly caused by the failures in the waterproof membrane to the deck. Some of the damage has been caused by the failures in the top of the balustrades, and through the cracking to the sides of the balustrades. All of these problems have been caused by Mr Muir's negligence. He applied the waterproof membrane, and it was a part of his job to take reasonable steps to prevent the defects in the cladding to the balustrades.

11.12 **Front balcony, lounge windows – Location E** In this case I have found that the leak was caused by the inadequate methods used to weatherproof around this window. Once again, it was Mr Muir's job to ensure that the weatherproofing methods were adequate. His failure to take reasonable steps to see that the head, jambs and sill were properly weatherproofed amounts to negligence.

11.13 **Family room window – Location F** The situation with the family room window is similar to that found to exist at the lounge window. My findings are the same.

11.14 **Windows generally – Location G** The situation with the windows generally is similar to that found to exist at the lounge window. Although many of them were installed with head flashings, the weatherproofing methods at jambs and sills were inadequate. It was Mr Muir's job to ensure that the weatherproofing methods were adequate. His failure to take reasonable steps to see that the windows were properly weatherproofed amounts to negligence.

11.15 **Parapet – lower edge - Location H** I have found that the detailing of the construction of the lower edge of the parapets was carried out in way that was considered as acceptable in 1995. I find that Mr Muir is not liable for the damage that may have been caused by these leaks.

11.16 **External cladding into ground/drainage – Location I** I am not satisfied that it has been shown that Mr Muir backfilled the ground around the building to the levels that exist today. I find that it has not been proven that Mr Muir should be held responsible for the damage caused by this problem.

11.17 **West wall of garage – Location J** I have found that the cause of the leak in this area is a section of unfinished cladding at the end of the balustrade wall, and possibly assisted by some failures in the waterproofing membrane over the garage. Once again, it was Mr Muir's job to ensure that the membrane and cladding were properly completed. His failure to ensure that this work was completed, and done properly, amounts to negligence.

11.18 **Sub floor – NE below family room – Location K** This leak was caused by a disconnected downpipe. I am not satisfied that it has been shown that this downpipe was disconnected by Mr Muir. I find that it has not been proven that Mr Muir should be held responsible for the damage caused by this problem.

11.19 **Storeroom – bottom plate – Location L** The damage in this area has been caused by a failure of the field tile drain to operate effectively. The drain should have been set at a lower level. I was not shown a drawing that showed this drain, but clearly a sub-soil drain was required at the foot of the excavated bank in the underfloor area. Equally clearly, the drain needed to be set at a level, and to a grade that would prevent any surface water from collecting under the building. I find that it was Mr Muir's responsibility to have this drain installed so that it would do its job. His failure to ensure that this work was done properly amounts to negligence.

11.20 **Other Costs** In paragraph 7.9.1 of this determination, I found that the Owners were entitled to recover a total of $16,300.00 for other costs being directly consequential to the remedial or repair costs. I said that I would allocate them as a proportion of the whole of the remedial costs. As I have found that Mr Muir is liable for an amount of $257,387.00, which is 97.21% of the total costs of $264,774.00, then I find him liable to the Owners for 97.21% of $16,300.00, or $15,845.00.

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

A - General cracking over walls [included below]	$ 0
B – Main bedroom balcony balustrades	46,562
C – Main bedroom balcony/family room ceiling	11,870
D – Front balcony balustrade, wall & decking	57,597
E – Front balcony lounge windows	42,388
F – Family room window	3,244
G – Windows	89,259
J – West wall of garage	2,066
L - Storeroom – bottom plate	4,401
Other costs	15,845
	$ 273,232

12. WELLINGTON CITY COUNCIL

12.1 It is claimed by the Owners that the Council was negligent in the performance of its duties under the Building Act 1991. Mr Hazelton submits that the Council owed them a duty of care to exercise reasonable care and skill in performing the functions set out in ss. 24 and 76(1) of the Building Act. They claim that the Council was in breach of this duty by failing to carry out proper inspections, and thus issuing a Code Compliance Certificate when the building work was defective.

12.2 I told the parties at the hearing that it was my understanding that it was now well established in New Zealand that both those who build houses, and those who inspect the building work, have a duty of care to both the building owners and to subsequent purchasers. This has been established, not only by the cases that I have mentioned when considering the Mr Muir's liability (see paragraph 11.3 above), but also by court cases such as:

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

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

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

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

12.3 It is submitted by Mr Heaney, on behalf of the Council, that the Council was not negligent in this particular case, and their building inspectors carried out competent inspections as judged by the standards of 1995-6. He submits that the method of construction employed at the property complied with the minimum standards enforceable by the Council at that time. This covered the use of sealants to seal around windows, the absence of jamb and sill flashings, the continuation of the cladding down to decks and to below ground levels, and the method of finishing balustrade cappings and parapets.

12.4 I need to ask a fundamental question in relation to each particular leak location, that is whether a prudent building inspector (or certifier) carrying out all the inspections and tests that should have been done by a prudent inspector in 1995-6 should have noticed or detected the particular defect. The words of Greig J in *Steiller* should also be borne in mind "the standard of care can depend on the degree and magnitude of the consequences which are likely to ensue."

12.5 I have found that the Council had a duty to take reasonable care with its inspections so that it could conclude that it had reasonable grounds for saying that the provisions of the Building Code had been met. It is now necessary to review each of the leak locations that have caused damage to the building to ascertain whether the Council was in breach of its duty of care.

12.6 **Cracking to external walls (generally) – Location A** I have found that the cause of the cracking and consequential leaks through the exterior cladding has been caused by a combination of the lack of adequate construction detailing for the system and inadequate supervision and control during installation. The Council approved a recognised cladding system when it issued the building consent. Although there were few drawn details on the plans, it was a part of

the building consent that the work would be carried out in accordance with the technical requirements and specifications of the manufacturers of the cladding system.

12.7 I have already mentioned that there is no documentation to show that the Council's inspectors knew, or realised, that the Glencladd system had been changed to an Equus system. I have also stated that I do not regard this change as particularly significant, as the two systems are very similar. It was not the task of the Council's inspectors to act as clerks of works on this building site, or to provide construction details or on-site training for inexperienced builders.

12.8 I do not find that the Council was negligent in the way that it undertook the general inspections of the cladding work. There is no evidence to show that it did not take reasonable steps to make sure that the cladding system would comply with the requirements of the Building Code. That does not mean that the Council will not be found to be responsible for any of the leaks through the external cladding, and each leak will need to be considered on its particular facts.

12.9 **Main bedroom balcony – balustrade – Location B** The three reasons for water leaking into this balustrade are the flat top, the cracks on the sides, and from the bottom. I am satisfied that the Council's inspectors could not have reasonably noticed the defects at the top, or on the sides, for similar reasoning to that given in my review of the general defects in the external cladding. None of the evidence given to me has convinced me that flat tops to balustrades and cappings were considered to be defective in 1995-96.

12.10 However, the detail at the base of the balustrade at the junction with the deck is not quite the same. The inspectors should have realised that taking the cladding down hard onto the deck, and finishing the tiled surface in the way in which it had been finished on this deck, would probably lead to some failures. I find that the Council was negligent in allowing this defect to remain uncorrected, and that the probable damage that has been caused by this defect is 40% of the remedial costs of $46,562.

12.11 **Main bedroom balcony/family room ceiling – Location C** The leak or leaks in this area are probably caused by the lack of adequate protection

around and under the door sill. This item is similar to the previous item (Location B) in that the inspectors should have realised that having a minimal step between the deck surface and the internal floor level, and finishing the tiled surface in the way in which it had been finished at the door, would probably lead to some failures. I find that the Council was negligent in allowing this defect to remain uncorrected.

12.12 **Front balcony balustrade, wall and decking – location D** I have found that the leaks in this area were predominantly caused by the failures in the waterproof membrane to the deck. I accept the expert evidence that the Council's inspectors could not have reasonably realised that the waterproof membrane was defective. In 1995-96 it was an approved product, and would probably have appeared to have been applied correctly, assuming that the inspectors had happened to have been on site at a time when it would have been visible.

12.13 Some of the damage, however, has been caused by the failures in the top of the balustrades, through the cracking to the sides of the balustrades, and at the junction of the cladding and the deck. I have already decided that the Council's inspectors should have realised that taking the cladding down hard onto the deck, and finishing the tiled surface in the way in which it had been finished on this deck, would probably lead to some failures. I find that the Council was negligent in allowing this defect to remain uncorrected, and that the probable damage that has been caused by this defect is 10% of the remedial costs of $57,597.

12.14 **Front balcony, lounge windows – Location E** In this case I have found that the leak was caused by the inadequate methods used to weatherproof around this window. The questions that arise here are, firstly, whether the Council's inspectors could have seen, under normal circumstances, that the methods being used were inadequate; and secondly, whether it was reasonable to assume that the use of sealant would allow the windows to meet the performance requirements of the Building Code.

12.15 In answer to the second question, I have already accepted the opinion of Mr Nevill that, in 1996, it was considered acceptable to use sealant as the primary method of weatherproofing at jambs and sills of windows, provided that the

sealant was applied behind the window flange (for face fixing), or in a suitably dimensioned gap around the flange (for recessed fixing).

12.16 In answer to the first question, at the time that the inspectors visited the site for a final inspection, it would not have been possible to know whether the sealant had been applied correctly. The plaster and paint would have covered most of the traces of the sealant, and it would not be possible to use a feeler gauge behind the window flange to check for sealant. The Council inspectors cannot be expected to be on the building site at all times, and be able to check every detail.

12.17 In this case, the Council had approved the work to be carried out in accordance with the detailing specified by the manufacturers of the cladding products. This house was not being constructed in a way that was novel or unusual, and the materials being used were not novel or unusual. Although the inspection records for this property are not very detailed, they do confirm that inspectors visited the site reasonably regularly. I am not convinced that the Council failed in its duty to take reasonable care when inspecting the installation of the windows. I do not find that the Council was negligent in relation to this window.

12.18 **Family room window – Location F** The situation with the family room window is similar to that found to exist at the lounge window. My findings are the same. I do not find that the Council was negligent in relation to this window.

12.19 **Windows generally – Location G** The situation with the windows generally is similar to that found to exist at the lounge window. My findings are the same. I do not find that the Council was negligent in relation to the windows generally.

12.20 **Parapet – lower edge - Location H** I have found that the detailing of the construction of the lower edge of the parapets was carried out in way that was considered as acceptable in 1995. I find that the Council is not liable for the damage that may have been caused by these leaks.

12.21 **External cladding into ground/drainage – Location I** I am not satisfied that it has been shown that the ground had been backfilled at the time of the Council's final inspection around the building to the levels that exist today. I

find that it has not been proven that the Council should be held responsible for the damage caused by this problem.

12.22 **West wall of garage – Location J** I have found that the cause of the leak in this area is a section of unfinished cladding at the end of the balustrade wall, and possibly assisted by some failures in the waterproofing membrane over the garage. The unfinished section was not easily visible, and I think that it is unreasonable to conclude that it should have been picked up by the Council's inspectors. I find that the Council is not liable for the damage that may have been caused by these leaks.

12.23 **Sub floor – NE below family room – Location K** This leak was caused by a disconnected downpipe. It has not been shown that this downpipe was disconnected at the time when the Council carried out its final inspection. I find that the Council is not liable for the damage that may have been caused by this leak.

12.24 **Storeroom – bottom plate – Location L** The damage in this area has been caused by a failure of the field tile drain to operate effectively, because it should have been set at a lower level. The Council's inspectors should have picked this defect up when inspecting the drains, or when inspecting the sub-floor area for completion. I find that the Council was negligent in allowing this defect to remain uncorrected.

12.25 **Other Costs** In paragraph 7.9.1 of this determination, I found that the Owners were entitled to recover a total of $16,300.00 for other costs being directly consequential to the remedial or repair costs. I said that I would allocate them as a proportion of the whole of the remedial costs. As I have found that the Wellington city Council is liable for an amount of $40,655.00, which is 15.35% of the total costs of $264,774.00, then I find it liable to the Owners for 15.35% of $16,300.00, or $2,503.00.

12.26 **Conclusion** I find that the Council was negligent in the carrying out of its duties to inspect, as more fully explained in the preceding paragraphs, and negligent in its issuing of the Code Compliance Certificate, and thereby in breach of the duty to take care that it owed to the Owners. This negligence has led to water penetration and damage, to the extent that it is liable to the Owners for:

B – Main bedroom balcony balustrades	18,625
C – Main bedroom balcony/family room ceiling	11,870
D – Front balcony balustrade, wall & decking	5,760
L - Storeroom – bottom plate	4,401
Other costs	2,503
	$ 43,158

13. EQUUS INDUSTRIES LTD

13.1 The claims being made against Equus are based on the grounds that Equus was the manufacturer of the proprietary cladding system used on the house, and that the system has failed.

13.2 I have already considered the cladding system in paragraphs 5.6 to 5.13 above. I concluded that the exterior cladding was probably intended to be an Equus system, but was in fact a hybrid system which incorporated many of the Equus materials. Mr Muir (junior) told me that the cladding system on this house had a 15 year warranty, but this is denied by Equus. When asked to produce the warranty, Mr Muir (junior) explained that he did not have a specific written warranty, but had been advised by Dean Barr (on behalf of Equus) that the company would stand behind its products.

13.3 It is alleged that a representative from Equus visited the site during the construction period, and approved the installation and application work. The name of the representative was Dean Barr. Mr Barr did not give evidence at the hearing, but he did swear an affidavit in March 2006 which was produced in evidence by Mr Still. In this affidavit Mr Barr says that he was an employee of Statuus Ltd during the period July 1995 to the end of 1996, and that he never visited this site until November 2003, when asked to do so by the WHRS assessor. He says that, if the job had been an Equus cladding system, then a warranty would usually have been requested by the builder, and that he would have been required to visit the site to check that the work was being properly done. There was never any such request (that he was aware of) and no warranty was ever issued by Equus or by any approved Equus applicator.

13.4 I have considered all of the evidence on this matter, and I am not satisfied that it has been proven that any verbal warranties, guarantees, representations or promises were made by any authorised representatives of Equus about the

cladding on this house. No warranty was given by Equus, or by any of the contractors who were involved with the construction of the cladding, on this house.

13.5 None of the experts has given evidence that indicates that any of the materials used on the cladding of this house was faulty, or has failed. The only criticism that I would make of Equus is that, in 1995-96, the company did not issue a particularly good set of construction details, or installation instructions. It tended to rely on the experience of its applicators and the information provided by other cladding manufacturers. Whilst I do appreciate that this lack of helpful information may have contributed towards the situation that developed on this property, it is not a factor that will make Equus liable for the leaks that have occurred.

13.6 As the cladding system used on this house was not a complete Equus system, it must follow that the claims against Equus for a failure of its cladding system must fail. I have found that no warranties were issued by Equus for the work done on this house, so that any claims against a warranty must also fail.

14. MR ANDREOLI

14.1 The claims against Mr Andreoli are that he owed a duty of care to all subsequent purchasers of the property, in the same way that the builder did. It is claimed that Mr Andreoli had a duty to exercise reasonable skill and care when carrying out his work on the cladding of this house, and it is claimed that he breached that duty by failing to properly carry out his work.

14.2 Mr Andreoli contracted with Mr Muir (junior) to supply Equus materials, and to arrange for the plastering work to be done on this house. He did not supply, or fix, the polystyrene panels, nor did he fix the windows in place. He employed Mr Rona to carry out most of the plaster application, but he was responsible for the overall application. Mr Andreoli told me that he could not remember exactly which parts of the work he personally did, but he thinks that he did the fascias and some of the walls. He also thought that he probably applied the sealant around the windows.

14.3 I accept that Mr Andreoli owed a duty of care to these Owners, to exercise reasonable skill and care in his use of materials and workmanship, consistent

with the standards of the time. To see if he was in breach of that duty, I will need to review each area of leaks.

14.4 **Cracking to external walls (generally) – Location A** I have found that the cause of the cracking and consequential leaks through the exterior cladding has been caused by a combination of the lack of adequate construction detailing for the system and inadequate supervision and control during installation. Mr Andreoli was employed by Mr Muir (junior) because he was an approved Equus applicator, and it was an important part of his job to ensure that the exterior cladding system was completed properly.

14.5 I find that Mr Andreoli was negligent in the way he failed to ensure that the external cladding was properly completed. Mr Andreoli's negligence has led to the damage and extensive remedial work.

14.6 **Main bedroom balcony – balustrade – Location B** This balustrade has been leaking for similar reasons to those that have caused the external cladding to crack and leak. It comes down to a failure to ensure that the work was properly carried out. It was Mr Andreoli's job to take reasonable steps to prevent these defects in the cladding of the balustrade. I find that he was negligent in that he did not take these reasonable steps, and his negligence has led to damage and the remedial work.

14.7 **Main bedroom balcony/family room ceiling – Location C** The leak or leaks in this area are probably caused by the lack of adequate protection around and under the door sill. Mr Andreoli did not install the door, nor was it in his work scope to make the junction between the door sill and the deck. I find that he is not liable for this leak.

14.8 **Front balcony balustrade, wall and decking – location D** I have found that the leaks in this area were predominantly caused by the failures in the waterproof membrane to the deck. Mr Andreoli did not carry out the application of the waterproof membrane. However, some of the damage has been caused by the failures in the top of the balustrades, through the cracking to the sides of the balustrades, and at the junction of the cladding and the deck.

14.9 I have determined that 25% of the damage in this area has been caused by defects in the way in which the exterior cladding was installed. These are

defects that Mr Andreoli should have made sure did not happen. I find that he was negligent in that he did not take these reasonable steps to ensure that these defects were avoided, and his negligence has led to damage and the remedial work. I have assessed that the probable damage that has been caused by these defects is 25% of the remedial costs of $57,597.

14.10 **Front balcony, lounge windows – Location E** In this case I have found that the leak was caused by the inadequate methods used to weatherproof around this window. Mr Andreoli told me that he, personally, probably applied the sealant around the windows prior to the plaster coating being completed. Even if he did not do it, it was his responsibility to ensure that a weatherproof seal was applied around the perimeter of the window penetrations It was his job to ensure that the weatherproofing methods were adequate. His failure to take reasonable steps to see that the window perimeters were properly weatherproofed amounts to negligence. His negligence has led to damage and the associated remedial work.

14.11 **Family room window – Location F** The situation with the family room window is similar to that found to exist at the lounge window. My findings are the same. His negligence has led to damage and the associated remedial work.

14.12 **Windows generally – Location G** The situation with the windows generally is similar to that found to exist at the lounge window. Although many of them were installed with head flashings, the weatherproofing methods at jambs and sills were inadequate. It was Mr Andreoli's job to take reasonable steps to ensure that the weatherproofing methods were adequate. His failure to take reasonable steps to see that the windows were properly weatherproofed amounts to negligence, and his negligence has led to damage and the associated remedial work.

14.13 **Parapet – lower edge - Location H** I have found that the detailing of the construction of the lower edge of the parapets was carried out in way that was considered as acceptable in 1995. I find that Mr Andreoli is not liable for the damage that may have been caused by these leaks.

14.14 **External cladding into ground/drainage – Location I** Mr Andreoli was not involved with the backfilling of the ground around the building, and I find that he is not liable for the damage caused by these leaks.

14.15 **West wall of garage – Location J** I have found that the cause of the leak in this area is a section of unfinished cladding at the end of the balustrade wall, and possibly assisted by some failures in the waterproofing membrane over the garage. It was Mr Andreoli's job to ensure that the membrane and cladding were properly completed. His failure to ensure that this work was completed, and done properly, amounts to negligence.

14.16 **Sub floor – NE below family room – Location K** Mr Andreoli was not involved with the installation of the rainwater goods in this house, and I find that he is not liable for the damage caused by this leak.

14.17 **Storeroom – bottom plate – Location L** Mr Andreoli was not involved with the drains or sub-soil drains in this building, and I find that he is not liable for the damage caused by these leaks.

14.18 **Other Costs** In paragraph 7.9.1 of this determination, I found that the Owners were entitled to recover a total of $16,300.00 for other costs being directly consequential to the remedial or repair costs. I said that I would allocate them as a proportion of the whole of the remedial costs. As I have found that Mr Androli is liable for an amount of $197,919.00, which is 74.75% of the total costs of $264,774.00, then I find him liable to the Owners for 74.75% of $16,300.00, or $12,184.00.

14.19 **Conclusion** I find that Mr Andreoli was negligent in the manner in which he carried out or supervised the exterior cladding work on this house, and therefore was in breach of his duty of care that he owed to the Owners. His negligence has led to water penetration and resultant damage to the following extent:

A - General cracking over walls [included below]	$ 0
B – Main bedroom balcony balustrades	46,562
D – Front balcony balustrade, wall & decking (25%)	14,399
E – Front balcony lounge windows	42,388
F – Family room window	3,244
G – Windows	89,259
J – West wall of garage	2,066
Other costs	12,184
	$ 210,103

15. MR RONA

15.1 Mr Shane Rona was the person who was engaged by Mr Andreoli to apply the plaster to the EIFS cladding on this house. Mr Rona took little active part in this adjudication. He had sworn an affidavit dated 29 September 2005, and filed a single-page letter in June 2006 as his written Response. He did not attend the hearing. I am satisfied that Mr Rona was given every opportunity to participate in this adjudication, but has decided to remain relatively silent. It is unfortunate that he did not attend the hearing so that he could have answered my questions and given his side of the story, as it could only have helped me.

15.2 Mr Rona says that he was employed as a labour-only applicator of the Equus EIFS system, and that he fixed and applied the materials supplied for him by Mr Andreoli. He says that he did not carry out any painting work, and did not "glue" around the windows.

15.3 His situation is similar to that of Mr Andreoli. A plasterer or applicator of an EIFS system owes a duty of care to all subsequent owners of a property in the same way that a builder does. Mr Rona had a duty to exercise reasonable skill and care when carrying out his work on this dwelling, and if he breached that duty by failing to properly carry out his plastering work, he will be liable for any damages that flow from that breach.

15.4 **Cracking to external walls (generally) – Location A** I have found that the cause of the cracking and consequential leaks through the exterior cladding has been caused by a combination of the lack of adequate construction detailing for the system and inadequate supervision and control during installation. Mr Rona was employed by Mr Andreoli because he was an experienced tradesman who had worked with EIFS cladding systems for several years. It was a part of his job to ensure that the plaster coating of the exterior cladding system was completed properly. His work scope would include a responsibility to ensure that there were no obvious defects in the way in which the polystyrene panels were set and fixed. He had a duty to notify Mr Muir (junior) and Mr Andreoli if the substrate was defective.

15.5 I find that Mr Rona was negligent in the way he failed to ensure that the plastering to the cladding system was properly completed. Mr Rona's negligence has led to the damage and remedial work.

15.6 **Main bedroom balcony – balustrade – Location B** This balustrade has been leaking for similar reasons to those that have caused the external cladding to crack and leak. It comes down to a failure to carry out the work properly. It was Mr Rona's job to take reasonable steps to prevent these defects in the cladding of the balustrade. I find that he was negligent in that he did not take these reasonable steps, and his negligence has led to damage and the remedial work.

15.7 **Main bedroom balcony/family room ceiling – Location C** The leak or leaks in this area are probably caused by the lack of adequate protection around and under the door sill. Mr Rona did not install the door, nor was it in his work scope to make the junction between the door sill and the deck. I find that he is not liable for this leak.

15.8 **Front balcony balustrade, wall and decking – location D** I have found that the leaks in this area were predominantly caused by the failures in the waterproof membrane to the deck. Mr Rona did not carry out the application of the waterproof membrane. However, some of the damage has been caused by the failures in the top of the balustrades, through the cracking to the sides of the balustrades, and at the junction of the cladding and the deck.

15.9 I have determined that 25% of the damage in this area has been caused by defects in the way in which the exterior cladding was installed. These are defects that Mr Rona should have made sure did not happen. I find that he was negligent in that he did not take these reasonable steps to ensure that these defects were avoided, and his negligence has led to damage and the remedial work. I have assessed that the probable damage that has been caused by these defects is 25% of the remedial costs of $57,597.

15.10 **Front balcony, lounge windows – Location E** In this case I have found that the leak was caused by the inadequate methods used to weatherproof around this window. Mr Rona says that he did not apply the sealant, but the problem must have been apparent when he came to apply the plaster. He had a duty to tell Mr Muir or Mr Andreoli that there would be problems if the work was not corrected. His failure to take reasonable steps to see that the window perimeters were properly weatherproofed amounts to negligence. His negligence has led to damage and the associated remedial work.

15.11 **Family room window – Location F** The situation with the family room window is similar to that found to exist at the lounge window. My findings are the same. His negligence has led to damage and the associated remedial work.

15.12 **Windows generally – Location G** The situation with the windows generally is similar to that found to exist at the lounge window. Although many of them were installed with head flashings, the weatherproofing methods at jambs and sills were inadequate. It was Mr Rona's job to take reasonable steps to ensure that the weatherproofing methods were adequate. He failed to do that, and his negligence has led to damage and the associated remedial work.

15.13 **Parapet – lower edge - Location H** I have found that the detailing of the construction of the lower edge of the parapets was carried out in way that was considered as acceptable in 1995. I find that Mr Rona is not liable for the damage that may have been caused by these leaks.

15.14 **External cladding into ground/drainage – Location I** Mr Rona was not involved with the backfilling of the ground around the building, and I find that he is not liable for the damage caused by these leaks.

15.15 **West wall of garage – Location J** I have found that the cause of the leak in this area is a section of unfinished cladding at the end of the balustrade wall, and possibly assisted by some failures in the waterproofing membrane over the garage. It was Mr Rona's job to ensure that the cladding was properly completed. His failure to ensure that this work was completed, and done properly, amounts to negligence.

15.16 **Sub-floor – NE below family room – Location K** Mr Rona was not involved with the installation of the rainwater goods in this house, and I find that he is not liable for the damage caused by this leak.

15.17 **Storeroom – bottom plate – Location L** Mr Rona was not involved with the drains or sub-soil drains in this building, and I find that he is not liable for the damage caused by these leaks.

15.18 **Other Costs** In paragraph 7.9.1 of this determination, I found that the Owners were entitled to recover a total of $16,300.00 for other costs being directly

consequential to the remedial or repair costs. I said that I would allocate them as a proportion of the whole of the remedial costs. As I have found that Mr Rona is liable for an amount of $197,919, which is 74.75% of the total costs of $264,774.00, then I find him liable to the Owners for 74.75% of $16,300.00, or $12,184.00.

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

A - General cracking over walls [included below]	$ 0
B – Main bedroom balcony balustrades	46,562
D – Front balcony balustrade, wall & decking (25%)	14,399
E – Front balcony lounge windows	42,388
F – Family room window	3,244
G – Windows	89,259
J – West wall of garage	2,066
Other costs	12,184
	$ 210,103

16. THE BROADHEADS

16.1 Mr and Mrs Broadhead were joined as respondents in this adjudication by my Procedural Order No 15 on 8 June 2006, after an application by the first, third and fourth respondents. It was alleged that the house had been water blasted during the time that the Broadheads were the owners of the property.

16.2 Mrs Broadhead filed a response to the claim in which she vehemently denied ever having, or approving the use of, a water blaster on the property. Neither Mr nor Mrs Broadhead attended the hearing. The key issue with the claims against the Broadheads is whether or not it can be established that they were negligent in their maintenance of the house. I have found that there is insufficient evidence to show that the leaks in this house have been caused by the use of a water blaster. Therefore, the claims being made against the Broadheads must fail.

16.3 I should add that I have not found that using a water blaster to clean down a property, such as the house at 41 Vasanta Avenue, is an act of negligence. I

am prepared to accept that the indiscriminate use of a high pressure water jet against an EIFS cladding could lead to damage of the exterior cladding, but in this case I have found that there is insufficient evidence to show that this house has been damaged by the use of a water blaster.

17. DEFENCES

17.1 The respondents have raised a number of issues that they say are reasons why the Owners cannot or should not recover any damages or, as an alternative claim, that the Owners should not recover the full extent of the damages that they are claiming. Some of these issues are affirmative defences, and some are claims that the Owners should contribute towards the losses that have been incurred. I am going to consider all of these issues in this section of my Determination.

17.2 **Owners knew, or should have known, that house leaked.** It is submitted by Mr Gordon that the Owners were told about the leak in the ceiling of the family room prior to purchasing this property.

17.3 On the day that the Owners signed the Sale & Purchase Agreement, they were told by the real estate agent, Mr Thompson, that there had been a leak in the dining room ceiling. Mr Thompson told them that it had been fixed but the small stain on the ceiling had not been repaired or repainted. They were shown a small stain on the ceiling. They did not carry out any further investigations. They say that they did not notice any dampness or leaking from the ceiling until late 2002 or early 2003.

17.4 Having considered the evidence, I find that the Owners were aware at the time of purchase that there had been a leak through the dining room ceiling, and were told that the leak had been fixed. I would find that they were entitled to rely upon that assurance. The extent of the damage to the ceiling was minimal, and would not have indicated to a reasonably careful purchaser that there was a serious problem. Having received the assurance, there was no need to carry out further inspection.

17.5 **House was purchased at a discounted price.** It is submitted by Mr Gordon that the Owners purchased this house at a reasonable discount because they knew that it leaked.

17.6 Evidence was given by Mr Claasen, a real estate agent, that he had researched house sale prices in the area, and compared them with the Government Valuations ("GVs"). He told me that during the period in which the Owners purchased 41 Vasanta Avenue, houses in the immediate neighbourhood were selling at between 2% and 25% above GV. He concluded that the fact that No 41 sold for almost 10% less than GV suggested that it was either not presented in good condition, or that the purchasers bought it knowing that it required work.

17.7 This evidence was contested by the Owners, who produced sales statistics for a wider area, showing that many houses were selling at below GV at that time. Mr Yeoh told me that they did not reduce the offer price after they were told of the dining room ceiling leak, as could be seen from the fact that the typed figure of $350,000 was never altered. The typed figure was inserted before they were told of the ceiling leak.

17.8 I do not find the valuation evidence to be very convincing, either one way or the other. I was not given any evidence from qualified valuers, and the statistics that I was given were inconclusive. There is nothing to indicate that the property transaction was anything other than a willing buyer/willing seller situation. I do not find that the Owners purchased this property at a discounted price on account of their knowledge of any leaks.

17.9 **Owners failed to obtain a pre-purchase report.** It is submitted by Mr Gordon that the Owners should have obtained a report from a qualified building surveyor or inspector. He says that the Owners undertook no kind of pre-purchase inspection or investigation, and that if they had obtained such a report, it is probable that they would have realised that the house had leaking problems.

17.10 Similar claims to this have been made in previous WHRS adjudications, and I have considered them in several of my own Determinations. I have found that it was not essential for prospective purchasers of existing houses in 2001 to obtain pre-purchase inspection reports (refer to ***Hay v Dodds & Ors***, WHRS claim 1917, 10 November 2005). However, I did conclude that they must take the steps that a reasonably prudent purchaser would have been expected to have taken, under all the circumstances. This was also mentioned in my Determination in ***Hartley v Balemi & Ors***, WHRS claim 1276, 11 April 2006, a

case that was referred to by Mr Gordon in his submissions. I do not propose to repeat the detailed reasoning in this Determination.

17.11 I am not satisfied that this is a case where the Owners have failed to take all the steps that reasonably prudent purchasers would be expected to take under the circumstances. Therefore, I will not allow these claims for a reduction in the damages due to contributory negligence on the part of the Owners.

17.12 **Failure to repair leaks promptly.** It is submitted by the respondents that the Owners have failed to take steps to mitigate their losses, because they have not attempted to carry out the repairs necessary to stop the building leaking. Mr Gordon, in his submissions on this point, says that there were several events that should have alerted the Owners to the need for urgent remedial work. I will consider each of these events.

17.13 Firstly, he says, the Owners should have engaged professionals immediately after they had purchased the property, to repair the leak in the dining room ceiling. I have found that the Owners were entitled to rely upon the assurances given by Mr Thompson at the time of purchase, that the leak had been fixed. Mr Yeoh filled the crack in the dining room ceiling, and repainted the stained area. There was no need for the Owners to go looking for a leak at this time, as they did not know, and had no reason to suspect, that there was still a leak in this location.

17.14 The second event referred to by Mr Gordon was in late 2002, or early 2003, when the Owners say that they first noticed leaks in their house. The Owners told me that they immediately sought advice from the local Tile Centre, and were told to carry out temporary repairs in the form of sealing the deck tiles – which they did. They then filed a claim with WHRS (18 February 2003), and waited for the WHRS Assessor's report, which did not arrive until March 2004.

17.15 It is difficult to criticise the Owners for failing to carry out repairs during this period, because they did not know why the building was leaking, or the extent of the leaks, until they received the Assessor's report. They did contact the Muirs and told them that they had problems, but the response was unhelpful.

17.16 The third event mentioned by Mr Gordon was March 2004, when the Owners received the Assessor's report. They now knew that their house had serious

problems, and yet, he says, they failed to take any steps to prevent the house from deteriorating further. The Owners say that they had been led to believe that the WHRS dispute resolution scheme was a quick process, and they expected a quick result from mediation. They have told me about the frustrations and delays in the mediation system, which started in April 2004 and continued until May 2005, when they decided that they would have to go to adjudication.

17.17 The WHRS Assessor, Mr Nevill, told me that he has always been of the opinion that this house needed to be re-clad rather than have targeted repairs. Therefore, in his opinion, the house has not deteriorated in terms of the scope of the repair work since the time he first inspected in October 2003. I have accepted Mr Nevill's opinion earlier in this Determination that this house needs to be totally re-clad, and I accept his opinion on the state of the building in October 2003.

17.18 This means that the Owners have not caused any increase to the scope of the repair work by not carrying out the remedial work when they received the Assessor's report in March 2004, so that I do not need to consider whether they were justified in delaying the remedial work until the WHRS processes had been completed.

17.19 In conclusion, I find that the Owners have not failed to take steps to mitigate their losses by not attempting to carry out the repairs necessary to stop the building leaking.

18. CONTRIBUTION BETWEEN RESPONDENTS

18.1 I must now turn to the complex problem of considering the liability between respondents. I say that this is a complex problem, but only from the arithmetical point of view, and not for any other reason.

18.2 Our law does allow one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

> Where damage is suffered by any person as a result of a tort ... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is ... liable for the same damage, whether as joint tortfeasor or otherwise ...

18.3 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.

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

18.5 **Location B - Main bedroom balcony – balustrade.** The main burden or responsibility must fall upon those who were on site and carried out this work, which is Mr Muir (junior) and the plasterers. All of these respondents should have realised that the way in which the work was being carried out would probably lead to later problems with leaking. I find that they should make equal contributions. As far as the Council is concerned, I would set its contribution at 20% of the amount that I have found it to be liable for (20% of 40% = 8%), or in the ratio of 1:4 with those who actually did the work. Therefore, the contributions should be:

Mr Muir (junior)	31.67%	$ 14,279
Mr Andreoli	31.67%	14,279
Mr Rona	31.67%	14,279
Wellington City Council	8%	3,725
		$ 46,562

18.6 **Location C – Main bedroom balcony/family room ceiling.** This is a defect that did not involve the plasterers, and I will set the contribution as between the Council and Mr Muir slightly higher than for the previous item at a ratio of 1:3, because it really should have been noticed by the building inspector

Mr Muir (junior)	75%	$ 8,902
Wellington City Council	25%	2,967
		$ 11,870

18.7 **Location D – Front balcony balustrade, wall & decking.** I will set the contributions at similar levels to those adopted for Location B, and for the same reasons. Therefore, the Council will be liable for 20% of 10% or a total of 2%. The plasterers will be liable for one third of 80% of 10%, plus one third of 15% (being 25% less 10%). Mr Muir is liable for the same as the plasterers, plus the remaining 75% of the remedial costs.

Mr Muir (junior)	82.67%	$ 47,613
Mr Andreoli	7.67%	4,416
Mr Rona	7.67%	4,416
Wellington City Council	2%	1,152
		$ 57,597

18.8 **Location E – Front balcony – lounge windows.** This is a defect that must be shared equally between Mr Muir and the plasterers, so that the contributions will be:

Mr Muir (junior)	33.33%	$ 14,129
Mr Andreoli	33.33%	14,129
Mr Rona	33.33%	14,129
		$ 42,388

18.9 **Location F – Family room window** This is a defect that must be shared equally between Mr Muir and the plasterers, so that the contributions will be:

Mr Muir (junior)	33.33%	$ 1,081
Mr Andreoli	33.33%	1,081
Mr Rona	33.33%	1,081
		$ 3,244

18.10 **Location G – Windows generally.** This is a defect that must be shared equally between Mr Muir and the plasterers, so that the contributions will be:

Mr Muir (junior)	33.33%	$ 29,753
Mr Andreoli	33.33%	29,753
Mr Rona	33.33%	29,753
		$ 89,259

18.11 **Location J – West wall of garage.** This is a defect that must be shared equally between Mr Muir and the plasterers, so that the contributions will be:

Mr Muir (junior)	33.33%	$ 689
Mr Andreoli	33.33%	689
Mr Rona	33.33%	689
		$ 2,066

18.12 **Location L – Storeroom – bottom plate.** This is a defect that did not involve the plasterers, and I will set the contribution as between the Council and Mr Muir at the ratio of 1:3, because this is another matter that really should have been noticed by the building inspector

Mr Muir (junior)	75%	$ 3,301
Wellington City Council	25%	1,100
		$ 4,401

18.13 **Other costs.** The contributions that I will set for the Other Costs will be based on the average of the proportions as I have decided for all the various leak locations above. As the most that can be recovered by the Owners for these other costs is the extent of the liability that I have set against Mr Muir (junior), the total contributions cannot exceed $15,848.00.

Mr Muir (junior)	44.96%	$ 7,372
Mr Andreoli	24.50%	3,961
Mr Rona	24.50%	3,961
Wellington City Council	3.28%	551
		$ 15,845

18.14 **Summary** In the event of all respondents meeting their obligations as ordered in this Determination, then the amounts that they will pay to the Owners will be as follows:

Mr Muir (junior)

Location B	$ 14,279
Location C	8,902
Location D	47,613
Location E	14,129
Location F	1,081
Location G	29,753
Location J	689
Location L	3,301
Other costs	7,372
	$ 127,120

Mr Andreoli

Location B	$ 14,279
Location D	4,416
Location E	14,129
Location F	1,081
Location G	29,753
Location J	689
Other costs	3,961
	$ 68,309

Mr Rona

Location B	$ 14,279
Location D	4,416
Location E	14,129
Location F	1,081
Location G	29,753
Location J	689
Other costs	3,961
	$ 68,309

Wellington City Council

Location B	$ 3,725
Location C	2,967
Location D	1,152
Location L	1,100
Other costs	551
	$ 9,495

19. COSTS

19.1 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.

19.2 At the commencement of the hearing, Mr Hazleton asked that I first make my decision on liability and quantum, and then allow the parties to make submissions on costs. Due to the restricted ability to award costs, I indicated that I would prefer to receive any claims and submissions on costs at the end of the hearing in closing submissions.

19.3 The Owners are claiming for the extra costs that they have incurred as a result of the water blasting argument, which has be pursued by Ridvan and the Muirs. Mr Hazleton submits that the water-blasting defence never had any real merit, and the defence continued to evolve right up until the hearing. He says that the owners were obliged to obtain expert advice from Mr de Lisle, and were forced to incur extra legal costs. He submits that the water-blasting argument did not have substantial merit and that this is a situation that falls within the exception listed under s.43(1)(b) of the WHRS Act.

19.4 The water-blasting argument certainly took up a substantial part of this hearing. As I have already mentioned, 26 witnesses gave evidence about the use of water-blasters on this property. Several other witnesses were called to give evidence on the possible damage that can be caused by the use of water-blasters, and about publications that had been issued warning about using water blasters on houses. After hearing all of this evidence I have found that a

water blaster was used on this property on one occasion, but that it had not been shown that this house had been damaged by the use of water blasting.

19.5 Was this defence without substantial merit? Although the defence effectively failed, in that I did not accept that water basting was the cause of the leaks, I think that it would be wrong to conclude that the defence had no real merit. I am satisfied that the Muirs genuinely believed that most of the problems had been caused by the careless use of water blasters. It may have been an indication of the strength of their belief that they appeared to be so adamant that there were no other causes, but that does not mean that they were being unreasonable.

19.6 I am not convinced that the water blasting argument was without substantial merit, and I do not think that there are any other circumstances in this adjudication that would justify an award of costs. Therefore, I will make no orders as to costs and the parties will all pay their own costs.

20. ORDERS

20.1 For the reasons set out in this Determination, I make the following orders.

20.2 Mr Muir (junior) is ordered to pay to the Owners the amount of $273,232.00. Mr Muir (junior) is entitled to recover a contribution of up to $68,309.00 from Mr Andreoli, and/or a contribution of up to $68,309.00 from Mr Rona, and/or a contribution of up to $9,495.00 from the Wellington City Council, for any amount that he has paid in excess of $127,120.00 to the Owners.

20.3 Mr Andreoli is ordered to pay to the Owners the amount of $210,103.00. Mr Andreoli is entitled to recover a contribution of up to $127,120.00 from Mr Muir (junior), and/or a contribution of up to $68,309.00 from the Mr Rona, and/or a contribution of up to $9,495.00 from the Wellington City Council, for any amount that he has paid in excess of $68,309.00 to the Owners.

20.4 Mr Rona is ordered to pay to the Owners the amount of $210,103.00. Mr Rona is entitled to recover a contribution of up to $127,120.00 from Mr Muir (junior), and/or a contribution of up to $68,309.00 from the Mr Andreoli, and/or a contribution of up to $9,495.00 from the Wellington City Council, for any amount that he has paid in excess of $68,309.00 to the Owners.

20.5 Wellington City Council is ordered to pay to the Owners the amount of $43,158.00. The Council is entitled to recover a contribution of up to $127,120.00 from Mr Muir (junior), and/or a contribution of up to $68,309.00 from Mr Andreoli, and/or a contribution of up to $68,309.00 from Mr Rona, for any amount that it has paid in excess of $9,495.00 to the Owners.

20.6 As a clarification of the above orders, if all respondents meet their obligations contained in these orders, it will result in the following payments to the Owners:

From Mr Muir (junior)	$ 127,120.00
From Mr Andreoli	68,309.00
From Mr Rona	68,309.00
From Wellington City Council	9,495.00
	$ 273,232.00

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

Notice

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

Dated this 7th day of May 2007

A M R DEAN
Adjudicator

STATEMENT OF CONSEQUENCES

IMPORTANT

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

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