CLAIM NO: 00823

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN	**PETER LOMAS WARD** and **HEATHER JOY WARD** Claimants
AND	**MACCOL DEVELOPMENTS LIMITED** First respondent
AND	**MARK JOSEPH COLLINSON** Second respondent
AND	**NORTH SHORE CITY COUNCIL** Third respondent

DETERMINATION

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INTRODUCTION

[1] This is a claim concerning a “leaky building” as defined under section 5 of the Weathertight Homes Resolution Services Act 2002 (**the Act**).

[2] The Claimants, Peter and Heather Ward, are the Owners (**the Owners**) of a dwellinghouse located at 12B Ngataringa Road, Devonport, (**the property**) and it is the Owners’ dwelling that is the subject of these proceedings.

[3] The First Respondent, Maccol Developments Limited (**Maccol**), was the developer of the property and the vendor to the Owners pursuant to an agreement for sale and purchase dated 25 August 1996.

[4] The Second respondent, Mark Joseph Collinson, was at all material times a carpenter and a director of Maccol. Mr Collinson undertook certain of the construction work on the Owners’ dwelling.

[5] The Third respondent, North Shore City Council, (**the Council**) was the Local Authority that issued a building consent, carried out certain inspections of the building works during the construction process and ultimately issued a code compliance certificate for the Owners’ dwellinghouse under the Building Act 1991.

[6] For completeness it should be noted that David McKenzie Builders Limited (now struck off) (**DMBL**) was engaged by Maccol to build the Owners’ dwellinghouse. Mr David McKenzie (deceased) was the sole director of DMBL and was also a director of Maccol. Mr Collinson was Mr McKenzie’s stepson.

MATERIAL FACTS

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

[8] Maccol settled the purchase of the property at 12 Ngataringa Road, Devonport, in or about November 1995.

[9] The Council approved the subdivision of the property at 12 Ngataringa Road, Devonport, under section 223 of the Resource management Act 1991, on 14 February 1996.

[10] On 25 March 1996 the Council issued a building consent to David McKenzie for the construction of the Owners' dwelling. Work on the Owners' dwellinghouse commenced on or about that date and the first inspection (footings) was undertaken by the Council on 29 March 1996.

[11] The Council carried out a floor slab and bondbeam inspection on 9 April 1996, a pre-line inspection on 21 May 1996 and a further foundation inspection on 20 June 1996.

[12] The Owners entered into an agreement with Maccol to purchase the property at 12B Ngataringa Road, Devonport, on 25 August 1996.

[13] On 23 September 1996, Council building inspector, Peter Oden, carried out a final inspection of the Owners' property which resulted in Field Memorandum No. 12181 being issued to David McKenzie. The Field Memorandum stated that McKenzie was required to provide amended plans for the upper floor layout, the ground floor bathroom and the pergola structure at the garage entry; adequate subfloor venting to comply with the building code; a handrail to be fitted to the garage stairway; insulation to be confirmed as fully installed; and, flashings and

sealing of the garage entry door. The Field Memorandum recorded that the listed building items contravened the New Zealand Building Code and rectification and re-inspection was required before a code compliance certificate could issue.

[14] A re-inspection was undertaken by Council building inspector Geoff Merton on 7 October 1996. Mr Merton added a further note to Field Memorandum No. 12181 addressed to Mark Collinson. Mr Merton stated that he was still not happy with the subfloor ventilation and suggested that Mr Collinson cut 5 or 6 slots as large as possible out of the decking and fix galvanised or aluminium standard vents over. Mr Merton instructed Mr Collinson to call for a reinspection when the work was completed.

[15] A re-inspection was undertaken by the Council on 10 October 1996. The building work was approved and the Council issued a code compliance certificate on 14 October 1996.

[16] On 25 October 1996, the Owners settled the purchase of the property and they moved into the property either on that date, or within a day or two of that.

[17] In or about April 1997, the Owners noticed that nails had popped in the Gib Board linings and that some nails securing the exterior cladding had rusted. The Owners contacted Mr McKenzie and shortly thereafter the popped Gib Nails were repaired by DMBL. The Owners say that there was no evidence of water penetration at that time.

[18] On 30 June 2000, the Owners wrote to Mr McKenzie advising him that there were still some outstanding defects in the dwellinghouse which they wanted made good. The Owners listed 12 items of defective work

including cracking of the exterior plaster and rust stains on the plaster from cladding fastenings.

[19] Some time later, Mr Collinson went to the property to look at the plastering problems and advised the Owners that they should contact Plaster Systems Limited to advise them on the appropriate remedial work. I note for the record that Plaster Systems Limited (a supplier of exterior plastering products and claddings systems) had no involvement with the cladding installation at the Owners' property.

[20] Plaster Systems Limited referred the Owners to Gordon Brodie (an experienced exterior cladding contractor). Mr Brodie visited the property and advised the Owners that major work was required to repair the defective cladding and that they should take the matter up with the builder. Mr Brodie gave the Owners some sealant to apply to the cracks and Mr Ward duly followed his instructions in the ensuing period, sealing major cracks that appeared and painting over the sealant.

[21] Mr Ward telephoned Mr Collinson following Mr Brodie's visit but Mr Collinson refused or neglected to take any further action in relation to the cladding defects.

[22] Mr McKenzie passed away on 7 July 2001.

[23] On 21 March 2003, the Owners filed a claim with the Weathertight Homes Resolution Service (**the WHRS**).

[24] On or about 3 May 2004, the WHRS Assessor, Mr Warren Nevill, completed a report for the WHRS concluding that the Owners' dwelling was a leaky building. Mr Nevill's report disclosed the extent of the leaking

problem and the remedial work required. He assessed the cost of repairing the damage to the Owner's dwelling at $140,822.00.

[25] On or about 16 August 2006, the WHRS Assessor provided updated costings to repair the damage to the Owners' property prepared by Ortus International Limited that fixed the repair costs at that date at $228,713.00. The Owners also claim for alternative accommodation costs and removal and storage costs in the aggregate amount of $31,356.00 and costs and expenses of the proceedings in the further amount of $29,925.00.

THE HEARING

[26] The hearing of this matter was convened at 11.00am on 28 August 2006 at the WHRS Auckland Office, Level 8, AA Centre, 99 Albert Street Auckland.

[27] All parties were represented by counsel at the hearing.

[28] Mr Nevill, the independent building expert appointed by WHRS to inspect and report on the Owners' property, attended the hearing and gave sworn evidence. Mr Nevill's initial report contained a number of helpful photographs which I shall refer to in this determination using the same numbers as Mr Nevill.

[29] The witnesses (who gave sworn or affirmed evidence) in support of the claim were:

- Mr Peter Ward (Mr Ward is a Claimant in this matter).

- Mrs Heather Ward (Mrs Ward is a claimant in this matter).

- Mrs Bronwyn Hayes (Mrs Hayes is a neighbour of the Owners).

- Mr Craig Olliver (Mr Olliver is a director of Urban Living Limited, a construction contracting business).

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

- Mr Mark Collinson (Mr Collinson is a building contractor, a director of the First respondent, Maccol, and Mr Collinson is the Second respondent in this matter).

- Mrs Nancy McKenzie. (Mrs McKenzie is the widow of David McKenzie of DMBL, and the mother of the Second respondent, Mark Collinson. Mrs McKenzie was at all relevant times the company secretary of both DMBL and Maccol. Mrs McKenzie is a co-director with Mr Collinson of Maccol and she is the sole shareholder in Maccol).

- Mr Geoffrey Merton (Mr Merton is employed by the Third respondent, the Council, as a building inspector. Mr Merton has been in that role for 32 years and carried out certain of the inspections of the Owners' dwellinghouse during construction).

- Mr Brian Gunson (Mr Gunson is employed by the Council as a Team Leader – Weathertightness and is responsible for investigating claims relating to weathertightness issues).

[31] I undertook a site visit and inspection of the Owners' dwelling on the morning of 28 August 2006 in the presence of representatives of the Claimants, the First, Second and Third respondents, and the WHRS Assessor, Mr Nevill. Mrs Hayes was also present at the site visit and gave her evidence and answered questions in relation to that evidence raised by me and all parties to the dispute.

[32] Following the close of the hearing, all parties presented helpful and detailed closing submissions and copies of authorities relied upon. In late January 2007, Mr Rooney, counsel for the Claimants, provided a copy of the much awaited High Court decision of Baragwanath J in the case of *Dicks v Hobson Swan Construction Ltd (In Liquidation) & Ors* HC AK CIV 2004-404-1065 [22 December 2006] which he said was relevant to a number of issues which were raised by the parties to the adjudication in their opening and closing submissions. The other parties were subsequently invited to file further submissions in relation to the judgment in the *Dicks* case and further submissions were subsequently filed by the First, Second and Third respondents in early April 2007. I believe those further submissions, together with the earlier closing submissions, helpfully canvass all of the relevant issues and matters in dispute.

THE OWNERS' CLAIMS

[33] The Owners seek against each of the respondents:

- Repair costs in the amount of $228,713.00.

- The costs of alternative accommodation during the undertaking of the repair work in the amount of $29,601.00

- The costs of removal and return of the Owners' possessions in the amount of $1,755.00.

- Costs and expenses of the adjudication proceedings in the amount of $29,925.00.

[34] All amounts referred to in this determination are inclusive of GST unless specifically noted otherwise.

Case against the First respondent, Maccol

[35] The Owners claim against Maccol in contract for breach of vendor warranties contained in the agreement for sale and purchase (**the Agreement**). The Owners say Maccol owed them direct and express contractual duties as set out in clauses 6.1(8) and (9) of the Agreement which Maccol breached because the dwelling was not constructed in accordance with the building consent and it did not comply with clauses E2 and B2 of the regulations made under the Building Act 1991.

[36] The Owners also claim against the First respondent, Maccol in tort. The Owners say at law, Maccol owed them as immediate (and subsequent) purchasers, a non-delegable duty of care as the developer of their property to ensure that proper care and skill was exercised in the construction of the dwellinghouse on the development property.

[37] The Owners claim that Maccol breached the duty of care by failing to exercise proper care and skill in constructing the dwelling and in particular failed to construct the dwelling in accordance with the building consent or clauses E2 or B2 of the regulations made under the Building Act 1991.

[38] The Owners claim that because the duties owed to them by Maccol, contractually and in tort were non-delegable, unqualified, and absolute, Maccol is liable to the full extent of their losses.

Case against the Second respondent, Mark Collinson

[39] The Owners claim against the second respondent in negligence. The Owners say that Mark Collinson is liable in his personal capacity because he personally undertook the building work and because he had a leading or supervisory role in the construction of the dwelling.

Case against the Third respondent, the Council

[40] The Owners claim against the Council is also in negligence. The Owners say that the Council issued the building consent on inadequately detailed plans and on specifications which were general in nature and of little relevance, failed to inspect the construction with sufficient frequency or at times most relevant to potential weathertightness issues, failed to inspect adequately when inspections were undertaken and carelessly issued a code compliance certificate.

THE DEFENCE FOR THE FIRST RESPONDENT, MACCOL

[41] Maccol denies liability for the Owners' losses, either for breach of contract, or breach of the duty of care.

[42] Maccol rejects the allegations of the Owners and in its defence says that it did not plan, design, or build the dwelling and it relied on David McKenzie Builders Limited to have constructed the property in

accordance with good trade practice and the applicable building code at the time and that it did not owe a duty of care to the Owners.

[43] Maccol argues that the Owners' tort cause of action is time barred because it was first pleaded in the amended adjudication statement.

[44] Maccol asserts that the Owners have contributed to their loss by failing or omitting to undertake remediation work at an earlier time when the cost would have been significantly less than the amount now claimed.

THE DEFENCE FOR THE SECOND RESPONDENT, MARK COLLINSON

[45] In essence, Mr Collinson denies liability for the Owners' loss and says he was employed by DMBL and followed all of that company's directions and instructions, he did not undertake any defective building work, and he did not supervise others.

[46] Mr Collinson also asserts that the Owners have contributed to their loss by failing or omitting to undertake maintenance or remediation work at an earlier time when the cost would have been significantly less than the amount now claimed.

[47] Mr Collinson submits that he is not a tortfeasor and therefore there is no liability to make a contribution to other parties. However, if he is found to be liable (which is denied), he seeks a full contribution from the Council as a tortfeasor under section 17(1)(c) of the Law Reform Act 1936 on the ground that he was obliged to cut ventilation slots in the deck at the specific instruction of Mr Merton.

THE DEFENCE FOR THE THIRD RESPONDENT, THE COUNCIL

[48] The Council accepts that it owes a duty of care to Owners of dwellinghouses to exercise reasonable care and skill in the discharge of its functions and duties under the Building Act 1991. However, the Council denies that it breached the duty of care that it owed to the Owners and denies that it is liable for the defects said to exist at the Owners' property and/or denies that the facts in the present case entitle the Owners to relief against it.

[49] The Council submits that its involvement with the Owner's property was of a standard typical at the time the property was constructed in 1996 and as a result the Council's involvement with the property did not fall below a reasonable standard.

[50] The Council asserts that it can have no liability for costs associated with repainting the Owners' property as repainting ought to have occurred within 5 years from the date the dwelling was constructed.

[51] The Council asserts that the Owners have failed to mitigate their losses by failing to take any steps to protect their property from further damage since 1996/1998 to the present and that the amount claimed should be reduced by 20% due to their failure.

[52] The Council asserts the Owners' claim is time barred pursuant to section 4 of the Limitation Act 1950 due to the expiry of 6 years between the date the defects were discovered and the date of the Owners' application to the WHRS.

[53] The Council asserts that its liability (which is denied) should not exceed 20% of the Owners' losses. The Council claims contribution and/or

indemnity from Maccol and/or Mr Collinson under section 17(1)(c) of the Law Reform Act 1936.

ARE THE OWNERS' CLAIMS TIME BARRED?

[54] A claimant's right of action may be extinguished by the effluxion of time in accordance with the provisions of the Limitation Act 1950.

[55] Maccol argues that the Owners' tort cause of action is time barred because it was first pleaded in the amended adjudication statement and the Council asserts the Owners' claim is time barred pursuant to section 4 of the Limitation Act 1950 due to the expiry of 6 years between the date the defects were discovered and the date of the Owners' application to the WHRS.

[56] By section 4(1) of the Limitation Act 1950, an action founded on simple contract or tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. The section does not in fact prevent a claimant from bringing an action and succeeding (subject to the merits), but it provides a defendant with a good defence if he or she decides to use it.

[57] For the purposes of the Limitation Act 1950, the making of an application for an Assessor's report is deemed to be the date of commencement of the proceedings (Section 55(1) of the Act).

[58] The Owners' application for the appointment of an Assessor in this claim was lodged with the WHRS on 21 March 2003.

Pleading

[59] Adjudication under the Act is not a pleadings based jurisdiction and specific causes of action are not required to be stated by a claimant when a claim is lodged, or indeed at any time. Accordingly the Owners' tort cause of action is not time barred by reason that it was first stated (pleaded) in the amended adjudication statement.

Action founded on contract

[60] The Owners submit that their contract cause of action is not time barred.

[61] The Owners' claim in contract is brought against Maccol as vendor for breach of contractual warranties contained in clauses 6.1 (8) and (9) of the agreement for sale and purchase (**the Agreement**). Pursuant to clause 6.1(9), Maccol warranted and undertook that all obligations under the Building Act 1991 would be fully complied with at settlement date.

[62] The normal rule is that a cause of action accrues when all the facts giving rise to the cause of action are in existence, regardless of whether they are known to the plaintiff. There are certain recognised exceptions in tort claims involving latent defects in buildings, in personal injury cases, and in sexual abuse cases. Where the facts disclose a breach of contract, the long-held view is that a cause of action accrues when the breach occurs, from which moment time begins to run against the plaintiff (*White v Taupo Totara Timber Co* [1960] NZLR 547; *Manson v NZ Meat Workers Union* [1993] 2 NZLR 602; *Rabadan v Gale* [1996] 3 NZLR 220; *Stuart v Australasian Guarantee Corporation* (NZ) Ltd (2002) 16 PRNZ 139).

[63] Settlement date was 25 October 1996. Therefore, according to the general rule, that was the date on which the Owners' cause of action in

contract (in relation to the vendors' warranties at settlement date) accrued and the moment time (the 6 year limitation period under s4 of the Limitation Act 1950) began to run against the Owners. The Owners' claim was filed with the WHRS on 21 March 2003, more than 6 years after the date on which the cause of action accrued. Accordingly, the insuperable problem the Owners face is that unless a "reasonable discoverability test" could be held to apply to the accrual date, the Owners' claim in contract is statute barred.

[64] Mr Rooney submits that there is Court of Appeal authority to the effect that where the contractual duty is not to cause damage by negligence, which he further submitted was the case here, the cause of action accrues at the date of the damage (*Day v Mead* [1987] 2NZLR 443 at 450 and *Mouat v Clark Boyce* [1992] 2NZLR 559 at 568). Mr Rooney submits the damage in this case was caused not earlier than April 1997 when nails began popping and cosmetic cracks appeared, but more likely much later when cracks appeared in the external plaster in 2007 i.e. from the date of reasonable discovery.

[65] In *Day v Mead* Cooke P, suggested, although did not decide, that as regards negligent breach of contract, subject to special contractual terms the same duty of care arises in both contract and tort and has the same incidents. One implication being that the cause of action, however founded, would accrue at the date of the damage. His Honour reiterated the argument in *Mouat v Clark Boyce*. He said that on this view the duty is a duty not to cause damage by negligence and whilst the cause of action in contract arises on breach, the breach is not complete until damage has been caused.

[66] Where a tort is actionable only on proof of damage, as in negligence and nuisance, the date of the wrongful act is not material and the general rule

is that time runs from the date of that damage, i.e. a cause of action in negligence does not accrue until the damage is sustained.

[67] I do not apprehend that Cooke P intended his argument to apply universally and in the absence of "special contractual terms creating a duty not to cause damage by negligence", any attempt to import into a general contract an implied term creating a contractual duty not to cause damage by negligence would inevitably be taken as an attempt to artificially extend the time within which a party to a contract must sue and to introduce by default a "reasonable discoverability" rule for application to all causes of action.

[68] Two recent Court of Appeal cases are helpfully instructive in relation to these issues. First, although not of direct import, in *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) the Court of Appeal held that there is no duty in tort to take reasonable care to perform a contract. At most there is a duty to take reasonable care in or while performing the contract, which is quite a different concept. Secondly, in the case of *Murray & Ors v Morel & Co Ltd & Ors* [2006] (CA) CA86/04 2 NZLR 366, the Court of Appeal rejected the appellants' broad proposition that "reasonable discoverability" now applies to all causes of action and declined to extend the law any further in relation to the damage rule; Chambers J stating at para [53] that if the law is to adopt "reasonable discoverability" as the norm, that would require legislative change.

[69] In the present case, the Agreement was in the form of the ADLS Agreement for Sale and Purchase of Real Estate Sixth Edition May 1995. Mr Rooney has not identified, and the evidence has not established, that the Agreement contains any "special contractual terms" creating a duty on the part of the Vendor, Maccol, not to cause damage by negligence.

[70] Accordingly, in the absence of any "special contractual terms" the date on which a cause of action accrues in contract in the present case is the date of the breach. The date of the breach was settlement date, 25 October 1996. The Owners' claim was filed with the WHRS on 21 March 2003. More than 6 years had elapsed between the breach and the filing of the claim and accordingly the Owners' claim in contract is time barred.

Actions founded on tort

[71] The respondents assert that the Owners' claim is time barred pursuant to section 4 of the Limitation Act 1950 due to the expiry of 6 years between the date the defects were discovered and the date of the Owners' application to the WHRS.

[72] The Owners claim against each of the respondents in negligence. A claim in negligence is only actionable on proof of damage. The date of the wrongful act is not material and the general rule is that time runs from the date of that damage. It will be a question of fact in each case whether damage has occurred, and if so, when it occurred.

[73] In claims involving latent defects in buildings causing economic loss i.e. cases concerning defective foundations or leaky building claims, the damage may not manifest itself until some considerable time after the act or omission that created the defect took place.

[74] This difficulty has often arisen over the years. The question as to when the date of accrual of a cause of action in tort in respect of latent defects in property arises in New Zealand was answered clearly by the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC). Their Lordships held (at 526):

> Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before.
>
> And:
>
> …the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not.

[75] *Hamlin* represents the current state of the law in New Zealand in relation to cases involving latent defects in buildings. *Hamlin* has clearly established that the owner of a dwellinghouse which is found to contain latent defects, sues not for physical damage to the house but for loss to his or her pocket and that the homeowner's loss occurs, and time begins to run, when the market value of the house is depreciated by reason of the latent defect.

[76] The application of the "reasonable discoverability" doctrine in cases involving latent defects in buildings is not unlimited however and Parliament has intervened to mitigate any serious injustice by imposing a 10 year longstop in the case of claims in respect of defective building work. By section 91(2) of the Building Act 1991 (and now by section 393(2) of the Building Act 2004) any civil proceeding relating to any building work may not be brought more than 10 years from the date of the act or omission on which the proceeding is based.

[77] In the present case, the position is really quite straightforward. The essential facts as to when cracks appeared in the dwelling and when the defects said to give rise to the Owners' loss became obvious are all set out in the witness statement of Peter Ward and are neither problematic in my view nor indeed the subject of any controversy.

[78] Mr Ward said in evidence that in April 1997 nails popped in the gib board throughout the house and some exterior cladding nails rusted but there was no sign of leaking at that stage. Mr Ward said that DMBL repaired the nail pop and repainted the interior surfaces but the contractors did not repair the rust stains at upper levels on the exterior of the house because they could not access them.

[79] Mr Ward said that in 2000 cracks appeared in the exterior plaster to the extent that he believed they might have led to leaks and he wrote to DMBL by letter dated 30 June 2000 requesting that the defects be remedied. Mr Ward said that there was no response to his letter which he then followed up with a phone call to Mr McKenzie. As a result of that communication, Mr Collinson visited the property and referred him to Plaster Systems Ltd, who in turn referred him on to Mr Brodie. Mr Ward further stated that by this time in 2000 there were cracks around the windows, cracks between the cladding sheets, and occasional blistering.

[80] I am left in absolutely no doubt that by 30 June 2000 the "cracks were so bad and defects so obvious that any reasonable homeowner would call in an expert". That is precisely what Mr Ward did when he wrote to DMBL on 30 June 2000 and subsequently met with the cladding expert, Mr Brodie. Therefore 30 June 2000 is the date upon which the Owners' loss occurred when the market value of the house was depreciated by reason of the latent defects and the date upon which the Owners' cause of action in negligence against the respondents accrued.

[81] The Owners' claim was filed with the WHRS on 21 March 2003. Less than 6 years had elapsed between the occurrence of the loss (30 June 2000) and the filing of the claim with WHRS and the claim was filed with 10 years of the act or omission on which the claim is based. Accordingly, the Owners' claims against the respondents in tort are not time barred.

[82] For completeness, I record that I am not persuaded that the events of 1997 came even remotely close to establishing the accrual date for the present causes of action. I am satisfied that the nail popping was related to lining already wet timber framing with Gib board, that the mention of a few rusting nails in the cladding is not of any relevance for the present purposes and that the events were therefore separate and discrete from those giving rise to the present proceedings. But even if I were wrong, the result remains the same because less than six years elapsed between April 1997 and the filing of the claim with WHRS on 21 March 2003 (although marginally so), the claim was filed within 10 years of the acts or omissions on which the claim is based and accordingly the Owners' claims against the respondents in tort would not be time barred in any event.

THE DAMAGE TO THE OWNERS' DWELLING

[83] It is a significant factor in this claim that the existence and the nature of the damage caused by water ingress and the extent and scope of the remedial work recommended by the WHRS Assessor, Mr Nevill, is not challenged by any of the parties to this claim.

[84] In summary form, the evidence establishes that the damage to the Owners' dwelling includes:

- Cracks in the cladding at the junction of window frames, at the leading edge of the narrow reveal strip, at the joint between the reveal strip and the cladding sheets and at the sheet joins.

- Framing has suffered water damage and decay to varying degrees under all windows and exterior doors. The decay extends into the bottom plate and boundary joists.

- Floor joists, boundary joists along the north, east and west walls of the family room, the entrance and the kitchen adjacent to the deck have suffered decay extending from 200mm to 750mm into the dwelling. The lower sections of the wall framing at these locations have early infestation of decay fungi.

[85] Mr Nevill's evidence was that the remedial work will involve re-cladding the dwelling and all associated works; removing and replacing certain decayed timber framing in the walls of the dwelling; removing and replacing the ground level deck on the northern and western elevations of the dwelling; removing and replacing the T&G flooring and certain of the floor joists in the kitchen, dining room and family room areas on the lower floor; removing and reconstructing the timber pergola; repairing or replacing the existing field tile drain around the perimeter of the building in order to remove the build up of surface water under the deck; and, adjusting the ground levels at the base of the cladding to conform to code and manufacturer's requirements.

THE CAUSES OF THE DAMAGE TO THE OWNERS' DWELLING

[86] Following inspections of the property in late 2003, Mr Nevill reported that water was entering the dwelling as a result of the following construction:

[a] Lack of window flashings.

[b] Cracks in the cladding - cracks around windows.

[c] The decking and deck supporting structure was hard against unsealed cladding.

[d] The pergola was skew nailed through the cladding.

[e] Paving was installed against the cladding.

[f] An untidy area of flashing on the roofing above the bathroom.

[87] In his evidence, Mr Nevill described the principle causes of water penetration and damage to be first, cladding related i.e. a lack of control joints and the window construction and installation detail and secondly, the deck construction. Mr Nevill apportioned the causative effect of water ingress on the resultant damage at 75% for windows and 25% for deck and other matters.

[88] Mr Gunson gave evidence that 70-80% of the water ingress is likely to have occurred through the jamb and sill areas.

[89] I accept that the evidence of Mr Nevill and Mr Gunson (which evidence was not challenged) establishes two principle sources of water ingress and causes of damage: window and cladding installation and the deck construction against which I fix the causative effects in the proportions of 75% and 25% respectively.

Window and cladding installation

[90] The building consent plans (appendix 5 to Mr Nevill's report) indicate face fixed aluminium windows and specified "Harditex Textured Sheathing" as the exterior cladding.

[91] The dwelling was constructed with recessed aluminium windows. The cladding is Harditex with an unknown coating system applied over.

[92] Mr Nevill says that the cladding has been installed without control or relief joints which has caused cracking in the body of the cladding and that the windows have been installed other than in accordance with the manufacturer's instructions or any other any recommended practice of which he is aware which has led to cracking and water penetration at the heads, jambs and sills of most windows and exterior doors.

[93] The Technical Information relating to the installation of Harditex cladding sheets and jointing & exterior finishing systems was, for the purpose of the present case, contained in the James Hardie Building Products Technical Information Manual (**the Hardie Manual**) dated February 1996. The Hardie Manual runs to some 32 pages and contains detailed product, fixing, installation and finishing information and instructions and includes 69 drawings that graphically illustrate recommended installation, fixing and finishing details.

[94] The Hardie Manual states that vertical and horizontal relief joints and vertical control joints must be provided at 5400mm and 10800mm maximum centres respectively to limit the area of monolithic cladding and panelise elements to allow for; frame movement, component shrinkage, and temperature related expansion and contraction.

[95] It is no great step in the circumstances to conclude, as Mr Nevill has, that the absence of control and relief joints in the cladding on the Owners' dwellinghouse has caused cracking in the body of the cladding and that water penetration and damage has resulted.

[96] However, it is common ground (Nevill and Gunson) that the major source of water entry above floor level is around the windows and exterior doors, particularly around the jambs and sills, which comes as little surprise when the cladding and window installation is examined in detail.

[97] The windows have been recessed approximately 20mm. This recess has been clad with narrow strips of fibre cement sheet overlaying the cladding at sill level. Some filling of this joint has occurred. No head or sill flashings have been used (Nevill report at 4.1.3).

[98] The Hardie Manual states at page 3 that "Harditex must be installed in accordance with the details of this specification". At page 5 under the heading 'Flashings' it provides:

> The tops of windows and doors must be flashed with a head flashing (ref Fig.13). Use pre-shaped aluminium flashings. The side of windows can be sealed with Inseal 3109 (U100) strips or a paintable silicone. When aluminium joinery is used sill flashings give good long-term protection (my emphasis added).

[99] Figure 13 shows the typical window or door head detail for face fixed joinery. Figures 58 to 62 inclusive show alternative sill and jamb details for recessed window installations.

[100] The installation of the windows in the Owners' dwelling has not been undertaken in accordance with any of the details specified in the Hardie Manual.

[101] First, there are no head flashings which requirement is mandatory. Secondly, there are no jamb flashings which is the only means specified and detailed in the Hardie Manual of forming jambs for recessed window installations. Instead, narrow strips of Harditex sheeting have been fixed to the studs to clad the return at the jambs. Thirdly, the sill construction does not conform with any of the three alternative construction details specified in the Hardie Manual. Whilst one alternative sill detail provided for the use of a Harditex strip over a shaped timber packer ripped to fall, it was specifically noted on Fig. 58 that the wall cladding and sill section were to be formed with recessed edges and a tape reinforced joint formed at that juncture, that there were to be two beads of flexible sealant, one either side of the bottom flange of the aluminium window, and moreover, that the sill area must be coated with a waterproofing membrane such as AGA Superflex 1 before coating commences (my emphasis added). The note continued with a warning that failure to coat the sill area with a waterproof membrane can allow water penetration through the coating due to the near horizontal sill surface and that this can then cause long term coating breakdown. There were no recessed edges or tape reinforced joints formed at the junctions of the wall cladding and sill strips and the sill area was not coated with a waterproofing membrane. The evidence is unclear as to whether there were sealant beads on both sides, or indeed on any side, of the bottom flange of the aluminium joinery.

[102] The manufacturer's details are clear and easy to follow; compliance would be readily ascertained at any stage of the construction process. The warning in relation to the requirement to coat the sill area with a waterproofing membrane, and the likely consequences of any failure to do so, is unequivocal.

[103] It comes as no surprise therefore that the cladding has cracked around the window openings and that water has penetrated the dwelling through those cracks causing decay and degradation of the building structure and associated building elements.

The deck construction

[104] This issue has not unsurprisingly thrown up a few red-herrings, but in the end the matter is really quite straightforward.

[105] Mr Nevill gave evidence that the deck structure is hard against, and fixed over and through, unsealed Harditex cladding, that moisture is entering via the fixing points and is likely wicking up from the wet unventilated area under the deck, and that that moisture is causing decay to occur in the subfloor area.

[106] There was considerable debate in relation to the installation of galvanised vents in the decking by the builder, on the instruction of Mr Merton. But in the end there is simply no evidence that this work has caused or contributed to water penetration and damage.

[107] It was, as I understood it, an argument largely in relation to whether or not there was adequate subfloor ventilation and the hypothesis at least that a lack of subfloor ventilation caused moisture to penetrate the subfloor timbers and led to decay. Mr Gunson opined that there was crossflow ventilation by virtue of gaps/holes between the joists/through the boundary joists above the bedplate on the western side of the dwelling below the deck, aided by the base vents fixed to the decking over. Against that Mr Nevill said that any such holes or gaps would likely only allow water to penetrate the subfloor area causing or contributing to dampness and decay in the subfloor timbers.

[108] No evidence was led to establish that there was either inadequate ventilation in the subfloor area (by calculation and/or by reference to any standard) and/or that the subfloor area was unduly damp. In fact, the evidence of Mr Gunson, supported by Mr Nevill, was that the subfloor earth was relatively dry.

[109] It seems absolutely clear to me, and I accept Mr Nevill's evidence on this point as compelling, that the decay and damage to the subfloor timbers has been caused (almost) entirely by water penetrating the unsealed Harditex cladding, to, and through which, the timber deck bearers, joists, closure nogs and decking were fixed to the boundary joists of the dwelling.

[110] The lawn area to the north of the dwelling falls toward the dwelling. The lawn surface is almost level with the top surface of the deck where it abuts the timber decking about a metre out from the dwelling on the northern side of the dwelling and the photographic evidence of Mr Nevill established that water ponds (unsurprisingly) in the area below the deck and against the reinforced masonry perimeter foundation walls.

[111] Where a section of the decking was removed on the north western corner of the dwelling by Mr Nevill, the bottom of the deck bearer could be seen to be almost at ground level (Photo 10 to his report) and it is not difficult to conclude that the bearer would in all probability be partially submerged in ponding ground water from time to time, which water would readily be transmitted through the porous, unsealed Harditex cladding, to the boundary joist and connected building elements of the dwelling beyond.

[112] Even if that were not the case, rain water would obviously soak the deck timbers and because they were fastened through and hard against the unsealed Harditex cladding, the moisture would be transmitted through

the porous cladding and through the fixings to the boundary joists of the dwelling and to other building elements in contact with same. On this point I accept Mr Nevill's evidence, which was unchallenged, unreservedly.

[113] I am not persuaded that the evidence has established that the installation of the base vents in the decking, or the alleged but unproven inadequate subfloor ventilation, has caused water penetration of the dwelling. I accept that it is possible that poor or inadequate subfloor ventilation in the northwest corner of the dwelling may have contributed to the extent of the damage and decay that has resulted from moisture entering the subfloor through the cladding and boundary joists by slowing or delaying the drying process, but in my view, no amount of ventilation would have prevented the decay and degradation to the boundary joists and associated timbers and I am not persuaded that any such contribution to the extent of decay as may have occurred was any more than *de minimis* in the circumstances.

The pergola construction

[114] There is no challenge to Mr Nevill's evidence that the pergola had been skew nailed through the cladding and movement of the timber has pulled the nails and allowed moisture to enter.

[115] There was some debate as to whether the pergola was constructed prior to the parties' involvement with the project concluding. In the end the matter was resolved indisputably by reference to Field Memorandum 12181, which document was issued by the Council to DMBL some three weeks before the code compliance certificate was issued, and which document specifically referred to the pergola construction and required

DMBL “to provide amended elevations/plans to cover the pergola structure at garage entry”.

[116] The discrete damage in relation to moisture penetration as a result of the pergola construction has not been separately quantified in the Ortus assessment of cost of the remedial work. In the overall scheme of things however, it is, I think, of marginal moment, and any consequential damage is likely to be minimal. The cost of the removal and replacement of the pergola is allowed for as a head of repair cost and I am satisfied in the absence of any evidence to the contrary, that the cost of any consequential remedial work will be captured in the overall allowances for cladding replacement, framing timber removal and the contingency allowance.

Paving

[117] Once again there is not, and could not be, any credible challenge to Mr Nevill’s evidence that the paving has been laid against the Harditex cladding and this will allow moisture to wick up behind the cladding,

[118] The Hardie Manual specifies a minimum of 100mm clearance between the base of the Harditex cladding sheets and any paved surface to prevent moisture from entering the sheet and causing long term coating breakdown and to ensure compliance with the building code clause E2: External Moisture.

[119] There was some debate as to when the paving was installed. In the end however, I accept Mrs Ward’s evidence (which was not challenged) as definitive on this point. She said that the paving was installed by the time her family began to move some of their possessions into the house, which she said was shortly after entering into the agreement to purchase

the property in August 1996. I am satisfied that any owner would have little difficulty recalling whether access to their dwelling for the purpose of moving possessions into the dwelling was by way of a paved surface or otherwise.

[120] The Ortus estimate of cost for repair includes an allowance for adjusting levels at the base of the cladding. I am satisfied in the absence of any evidence to the contrary, that the cost of any consequential remedial work will be captured in the overall allowances for cladding replacement, framing timber removal and the contingency allowance.

Roof leak

[121] Mr Nevill reported that there was an untidy area of soft edge (flashing) on the roofing above the bathroom that will be contributing to a leak in strong winds although he concluded that cracks in the cladding around the bedroom window above are more likely to be the prime cause of moisture ingress at that location.

[122] There is no specific allowance for remedial work to the flashing and I am not persuaded that it is really of any moment in relation to the claim. In the absence of any evidence to the contrary, I am satisfied that any cost associated with attendance on this item as a separate activity would be so minor as to be insignificant.

Lack of eaves

[123] I deal with this item only for completeness in this section because I understand the Owners to suggest that the absence of eaves may have contributed to water penetration of their dwelling.

[124] The evidence establishes that the Owners' dwelling was built with minimal width eaves despite the building consent plans showing 400mm wide eaves lined with Hardisoffit.

[125] No explanation has been provided by any person as to how this change came about.

[126] Whilst wide eaves undoubtedly provide some degree of protection to exterior walls and openings in those walls from wind and rain, there is no requirement at law to construct a dwelling with eaves at all. It is a matter of personal choice, aesthetics, and sometimes cost, as to whether a dwelling is constructed with eaves.

[127] In the end there is simply no evidence in the present case that the reduction in the width of the eaves has caused or contributed to water penetration of the dwelling or any loss on the part of the Owners.

THE OWNERS' LOSSES AS A RESULT OF THEIR DWELLING BEING A LEAKY BUILDING

[128] The Owners claim that they have suffered damage and loss in the aggregate amount of $260,069.00 as a result of their dwelling being a leaky building, calculated as follows:

a.	Remediation costs	$228,713.00
b.	The costs of alternative accommodation during the undertaking of the repair work	$ 29,601.00
c.	The costs of removal and return of the	

Owners' possessions	$ 1,755.00
Total	$260,069.00

[129] The Owners also seek costs and expenses of the adjudication proceedings in the amount of $29,925.00.

[130] The respondents deny that the amount claimed by the Owners is a proper amount in the circumstances of the present claim on three grounds. First, betterment in relation to the costs of repainting the dwelling, secondly, on the ground that the costs include unreasonable charges for project management, and thirdly, on the ground that the Owners failed to mitigate their losses by undertaking appropriate and necessary remedial work at an earlier time when the damage and the cost of the associated remedial work would have been significantly less. There was no challenge to the Owners' evidence in relation to the costs claimed for alternative accommodation or storage costs. None of the respondents have provided alternative costings for the remedial work.

Betterment

[131] This issue may be dealt with in short order. The Owners have not challenged the legitimacy of the respondents' assertions that the cost of repainting the dwelling some 10 years after construction is a cost that would in all the circumstances have properly fallen on the Owners as part of the routine maintenance of the dwelling.

[132] Mr Nevill and Mr Gunson both gave evidence that the property ought to have been repainted before now and I am satisfied that the respondents have established that betterment will occur as result of painting the dwelling as part of the proposed remediation work.

[133] Mr Nevill accepted in cross examination that the reasonable cost of repainting the dwelling would be $8,000 - $12,000.

[134] That assessment of the value of the painting work by Mr Nevill was in the circumstances, somewhat arbitrary and not supported by, or referenced to any calculations. However, I am satisfied in all the circumstances that the greater amount of $12,000.00 for repainting the Owner's dwelling would not be inconsistent with the various component costs contained in the Ortus estimate of the cost of the remedial work and upon which the Owners' claim is based.

[135] In the present case however, there is an obvious disadvantage to the Owners in the nature of more extensive preparation and additional coating work associated with the involuntary nature of applying a complete paint system over new surfaces (replacement) as opposed to the work that would ordinarily be required for a 'repaint' (the investment for which allowance ought to be made) See: *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 per Fisher J.

[136] Accordingly I see no good reason to depart from the established practice adopted by Adjudicators in other WHRS claims of valuing that additional work at 55% of the total cost of painting the dwelling and discounting the claimed cost of painting by 45% to reflect the reasonable cost of a 'repaint' and the degree of betterment obtained by an Owner in circumstances where routine repainting/maintenance of the subject property has been delayed or fallen out of sync with normal maintenance cycles due to the property being a leaky building.

[137] Accordingly I uphold the claim for the painting work to the extent of 55% to reflect the cost of the additional work required and I am satisfied that the justice of the matter will be served if I set the amount that the

Owners' claim should be reduced on account of betterment for painting at $5,400.00, being 45% of $12,000.00.

Project management

[138] Maccol and Mr Collinson challenge the (net amount) of $16,000.00 allowed by Ortus for project management by a remediation specialist on the ground that the level of project management is too high and unnecessary. The amount of $16,000.00 includes design and supervision of the remedial works and is calculated on the basis of 4 hours attendance per week for a 4 month period together with miscellaneous administration.

[139] The First and Second respondent gave no evidence as to the proper amount for design and project management services that should be included in any assessment of the cost of remedial work recommended by Mr Nevill. In the circumstances, I am satisfied that the Owners should not have to bear the risk that some undefined but lesser amount would be adequate and I accept the evidence submitted by Ortus, through Mr Nevill, that the net amount of $16,000.00 is reasonable for design and project management services in relation to the proposed remedial work and uphold the claim for remediation specialist services to the full extent claimed.

Failure to mitigate cost of remedial work

[140] Maccol and Mr Collinson contend that the loss claimed by the Owners is higher than it would have been had they undertaken remedial works sooner at the property and the failure and/or omission on the part of the Owners to undertake remediation earlier has contributed to this increase and to the alleged loss. Maccol and Mr Collinson do not quantify the

extent to which they say the Owners have contributed to their losses/failed to mitigate their losses by allegedly failing or omitting to undertake remediation work at an earlier time.

[141] The Council also contends that the remedial costs have increased substantially as a result of the Owners taking no steps to effect repair work and to mitigate consequential losses having by 2000 discovered problems with their property to the extent that they corresponded with David McKenzie and Mark Collinson.

[142] The Council submits that the Owners' property ought to have been repainted with a protective coating twice since construction was completed in October 1996 irrespective of the existence of any defects at the property.

[143] The Council further submits that following the determination in *WHRS Claim No. 1276: Hartley v Balemi & Ors – Adjudicator Dean*, the amount of the Owners' claim should be reduced by 20% due to their failure to undertake any remedial work or mitigate their losses

[144] In response to the respondents' assertions in relation to the Owners' alleged failure to mitigate their losses, Mr Ward gave evidence that:

- In 2000, following Mr Brodie's visit, he and his wife finally realised there was a problem with the dwelling but Mr Collinson gave the impression that it was a cosmetic issue only. Mr Collinson refused to accept that the work was substandard or to undertake any remedial work and that they had a young family and modest incomes and lacked the resources to pay for substantial work which Mr Brodie had indicated would be required.

- Notwithstanding that position, in 2000 they had no idea of leaking problems with their house, or the wider leaky building problems, and had no idea of the extent of the necessary work in any event.

- He sealed the cracks in the cladding with the sealant that Mr Brodie provided when he visited the property and painted over the sealant as he was advised to do by Mr Brodie. Over the following years he continued that process and to seal around the windows and the pergola and he also applied a paint-on treatment to the underfloor to prevent further decay.

- Neither Mr McKenzie nor Mr Collinson gave any information about maintenance of the plaster. He was not aware that there was any requirement to paint the exterior every five years and had always believed that any house needs to be painted every five to ten years, but usually closer to ten. Accordingly it would not have been due for painting before 2001 and by 2002/2003 it was becoming obvious that major remedial work was needed on the plaster and painting would have been pointless.

- It was not until after Mr McKenzie's death in 2001 that he began to become aware of leaky building problems through the media and when the WHRS was established, he and his wife filed a claim in March 2003.

- They had no idea of the extent of the leaking problem until they received the WHRS Assessor's report in May 2004 and that despite their attempts to set up a mediation through the WHRS in September and October 2004, Maccol and Mr Collinson declined to participate.

[145] The law does not allow a plaintiff to recover damages which are due to his or her negligence and would not have been suffered if he or she had taken reasonable steps to mitigate the loss (*British Westinghouse Electric and Manufacturing Co v Underground Electric Rly Co of London* [1912] AC 673):

> The law imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damages which is due to his negligence to take such steps.

[146] Counsel for the Council has quite properly acknowledged that the assessment of whether a plaintiff has suffered additional loss by reason of his or her own neglect is a question of fact, not law, and is dependant on the particular circumstances of each case. It must be noted that the plaintiff is not required to do anything more than is reasonable in the circumstances and the burden of proving that reasonable steps have not been taken rests upon the defendant.

[147] The perennial problem is the extent to which a plaintiff is required to mitigate loss. However the general principle is that a plaintiff cannot reasonably be required to spend money where he or she lacks the means to do so (*Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 [HL]).

[148] In evidence, Mr Ward stated that at first, the Owners understood the problems with their house to be merely cosmetic, but that when they finally realised there was a significant problem with the dwelling they had a young family and modest incomes and lacked the financial resources to pay for substantial remediation work. I found Mr Ward to be a credible witness and I accept Mr Ward's uncontroverted evidence as establishing that the Owners lacked the necessary financial means to take any

substantial steps toward mitigating the losses consequent upon the dwellinghouse being a leaky building. Therefore, in accordance with the general principle that an impecunious plaintiff should not be required to take any steps he or she cannot afford, I find the Owners' failure or omission to undertake major repair work to mitigate loss was not unreasonable in the circumstances.

[149] Moreover, I am satisfied that the evidence establishes overwhelmingly that the Owners took such positive action as it was reasonable for them to take in the circumstances to mitigate their losses. They asked Mr McKenzie and Mr Collinson to fix the cladding; when they failed or neglected to take any positive action to remedy the defective works the Owners sought the advice of Plaster Systems Ltd and Mr Brodie. Mr Ward followed Mr Brodie's advice and sealed the cracks in the cladding and around windows and the pergola and painted over that sealant on an ongoing basis and Mr Ward applied a paint-on treatment to the underfloor timbers to prevent further decay.

[150] It is clear that the facts of the present case are readily distinguished from those in the *Balemi* case (supra) where the recorded evidence suggests that apart from lodging a claim with the WHRS, the Owners took no other steps to mitigate the damage that was occurring to the house. In that case, the Adjudicator found that the Owners' failure to take any steps whatsoever to try and stop the leaks to mitigate the obvious damage to the house was unreasonable in the circumstances [para 12.25]. That finding was plainly open to the Adjudicator on the evidence, as was the finding that the damage increased in severity over the intervening period (*Hartley v Balemi and Ors* HC AK CIV 2006-404-002589 [29 March 2007] per Stephens J).

[151] Finally, I do not accept that there is any merit in the Council's argument that the Owners' property ought to have been repainted with a protective coating twice since construction was completed in October 1996 irrespective of the existence of any defects at the property. In the first place, Mr Ward's evidence is that he filled cracks as they appeared in the cladding and around windows and then painted over the sealant and secondly there is simply no evidence that goes to establishing that water has penetrated the dwelling through the general surface of the cladding as a result of inadequate paint coverage/protection causing damage.

[152] I do not consider that the respondents have established even hesitantly, that the Owners failed to take reasonable steps in the circumstances to mitigate their losses as a result of their dwellinghouse being a leaky building. Accordingly the claim by the Council that the amount of the Owners' losses should be reduced by 20% due to their failure to undertake any remedial work or mitigate their losses fails accordingly.

Summary of the Owners' losses

[153] To summarise the position therefore, I find the Owners' losses are in the aggregate amount of $254,669.00 after deducting $5,400.00 from the claimed amount of $260,069.00 for betterment in relation to the cost of painting the dwelling (See Para [137] supra).

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

The liability of the First respondent, Maccol, in contract

[154] Maccol's contractual liability is said to arise out of warranties contained in the Agreement for Sale and Purchase made between the Owners' as purchasers of the property on one hand, and Maccol as vendor on the other.

[155] The right of action for breach of contract may be extinguished by the effluxion of time in accordance with the provisions of the Limitation Act 1950 (See paras. 54 – 70 supra).

[156] I have already determined that the Owners' claim in contract was brought out of time, more than 6 years having elapsed between the date of the alleged breach and the date upon which the Owners' claim was filed with the WHRS. Maccol has discharged the onus of proving that the Owners' cause of action in contract accrued outside the period of limitation and the Owners' claim in contract is statute barred.

The liability of the First respondent, Maccol, in tort

[157] I have already determined that the Owners' claims against the respondents in tort are not time barred.

[158] The Owners contend that Maccol was the developer of the property. The Owners assert that as the developer of the property, Maccol owed a non-delegable duty of care to future purchasers of the property to ensure that the dwelling was constructed with due care and skill and in accordance with reasonable building practice and so as to comply with all statutory and regulatory requirements including the requirements imposed by the Building Act 1991. The Owners assert that Maccol breached the duty of care that it owed causing them loss and damage.

[159] Mr Rooney submitted that in *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, the Court of Appeal held that where a developer has acquired land, subdivided it and built homes on it for sale to members of the public, the company owes a non-delegable duty of care to the immediate and subsequent purchasers. Mr Rooney further submitted that this principle has been settled law since 1979 and has been followed and applied consistently since then.

[160] Finally Mr Rooney submitted that Maccol breached the duty of care by failing to exercise proper care and skill in constructing the Owners' dwelling and in particular failed to construct the dwelling in accordance with the building consent or clauses E2 and/or B2 of the building code.

[161] Against that, Maccol asserted that it did not plan, design, or build the Owners' dwelling and that it relied on DMBL to have constructed the property in accordance with good practice and the applicable building code at the time. Maccol denies any liability for the defects at the Owners' property and submits that it did not owe any duty of care to the Owners, or breach any alleged duty of care.

Maccol as developer

[162] The documentary evidence established that Maccol purchased the property directly from the former owner, subdivided the property, sold the front lot, entered into an arrangement with DMBL to build the Owners' dwelling and then sold that dwelling on the rear lot to the Owners.

[163] In *Body Corporate No. 187820 & Anor v Auckland City Council and Ors* HC AK CIV-2004-404-6508 26 September 2005, a case that involved inter alia, determining whether a company was a developer or a financier for the purpose of a summary judgement application, Doogue J identified

what he saw as being the two essential characteristics of a "developer", namely that the person had direct involvement or control over what occurred on a property (for example by way of planning, supervising or directing the building process) and secondly, that the person stood to profit from the sale to the end buyer. To the second characteristic, I think could helpfully be added "or to obtain a valuable benefit", as some development product is not put to the market immediately. This is particularly so in circumstances where a developer elects to take the property for his or her own immediate personal or commercial use. In such cases a developer obviously benefits by not having to pay market value for the property as a result of not having to pay a premium to another to plan, direct or control the building process, or for the risks, responsibilities and liabilities attendant upon those duties.

[164] Clearly Maccol owned the property, had direct involvement and control over what occurred on the property and stood to profit from the sale of the property.

[165] Notwithstanding the loose corporate arrangements between Maccol and DMBL (to which I shall return later), it simply defied logic in the circumstances for Maccol to have asserted up until the conclusion of the hearing that it was not the developer of the Owners' property.

[166] In the end Mr Turner quite properly acknowledged in his closing submissions that "the arrangement was a turn-key type of contract whereby Maccol as developer engaged DMBL as the builder to build the property … and that [DMBL] would ultimately take responsibility for the property and completion of the works".

Liability as developer

[167] Following a long line of cases including *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, *Mt Albert Borough Council v Johnson* (CA) [1979] 2 NZLR 234, *Morton v Douglas Homes Limited* [1984] 2 NZLR 548, *Brown v Heathcote County Council* [1986] 1 NZLR 84, *Lester v White* [1992] 2 NZLR 483, *Chase v de Groot* [1994] 1 NZLR 613, *Riddell v Porteous* [1999] 1 NZLR 1, 12 (CA), and most recently in *Dicks v Hobson Swan Construction Ltd (In Liquidation) & Ors* HC AK CIV 2004-404-1065 [22 December 2006] it is settled law in New Zealand, that those who build and/or develop properties owe a non-delegable duty of care to Owners and subsequent purchasers.

[168] As the Court of Appeal said in *Mount Albert Borough Council v Johnson* at p.240:

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

[169] The non-delegable duty on the builder and/or developer is not merely to take reasonable care for the safety of others, it generates a special responsibility or duty to see that care is taken by others, for example, by

an agent or independently employed contractors. Non-delegable duties need not be discharged by the employer personally, but liability rests with the employer if their discharge involves negligently inflicted harm or damage.

[170] Maccol was the developer of the Owners' property. As developer, Maccol owed a non-delegable duty of care to the Owners to see that reasonable care and skill were exercised in the construction of their home. The Owners dwelling is a leaky building. Therefore the Owners have established that Maccol breached the non-delegable duty of care that it owed them as purchasers of the property and accordingly Maccol is liable to the Owners to the full extent of their losses in the amount of $254,669.00.

The liability of the Second respondent, Mark Collinson, in tort

[171] The Owners say Mr Collinson is liable for their loss in his personal capacity because he was personally responsible for the building work. It is the Owners' case that Mr Collinson personally undertook the building work and had a leading or supervisory role in the construction of the dwelling. In particular, the Owners contend that Mr Collinson was consistently present at, and working on the dwelling during its construction and that Mr Collinson was responsible for all regulatory and statutory compliance requirements in respect of the dwelling including arranging inspections by the Council and dealing with the Council for the purpose of obtaining the code compliance certificate.

[172] The Owners submit that Mr Collinson therefore owed them a duty of care to ensure the dwelling was constructed with due care and skill and in accordance with reasonable building practice and so as to comply with all statutory and regulatory requirements including the requirements

imposed by the Building Act 1991. The Owners say Mr Collinson breached the said duty by reason of the building defects that have led to their dwelling being a leaky building.

[173] At all material times, Mr Collinson was a carpenter employed by Maccol and was engaged on building work at the property. Mr Collinson was also a director and shareholder of Maccol. Mr Collinson was the stepson of David McKenzie.

[174] David McKenzie was also a director of Maccol and was the sole director of DMBL. I am satisfied that the evidence has established that DMBL was 'the builder' of the Owners' dwelling engaged by Maccol as developer. Therefore DMBL owed a non-delegable duty of care to the Owners as 'builder' of the dwelling, which duty was breached by reason of the Owners' dwelling being a leaky building. DMBL was removed from the register of companies on 25 November 2000 and therefore cannot be a party to these proceedings.

[175] The more difficult questions in the present case however are whether Mark Collinson was a joint tortfeasor with Maccol so as to be personally liable for that company's negligence and/or whether Mark Collinson was negligent and a concurrent tortfeasor with Maccol so as to be personally liable for any or all of the Owners' losses that have been attributed to Maccol's negligence.

The liability of a builder in tort

[176] Those who build owe a duty of care to owners and subsequent owners of a domestic dwellinghouse to build the dwellinghouse in accordance with the building consent and the building code and to take reasonable care in carrying out and overseeing building operations to avoid foreseeable

losses to others arising out of defective construction. The liability of a builder in tort to a subsequent owner of a domestic dwelling for defects in such dwellings has been a feature of New Zealand case law since *Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor* [1977] 1 NZLR 394. This position was upheld by the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 in relation to a council although it is assumed that the liability of a builder would be no less extensive (*Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA)). The liability of a builder to a subsequent owner of a domestic dwelling has also been upheld in Australia (See: *Bryan v Maloney* (1995) 182 CLR 690).

[177] A builder cannot defend a claim in negligence made against him or her by a third party on the ground that he or she complied with the requirements of his or her contract with the owner although the nature of the contractual duties may be relevant in defining or limiting the duty of care owed to third parties (*Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor* [1977] 1 NZLR 394 (CA)).

[178] Whilst the terms of a building contract may operate to discharge a duty of care to persons who are parties to the contract, it cannot discharge that duty to strangers to the contract or determine what a builder must do to satisfy his or her duty to such persons because, per Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 “that duty is cast upon the builder by law, not because he made a contract, but because he entered upon the work.”

[179] The real issue to be considered however is what defines a builder in the New Zealand context for the purpose of establishing liability to subsequent owners in tort. Is it only the traditional “head contractor” or does the definition extend to include all persons who provide any

services whatsoever in connection with or in relation to the management, supervision, construction or alteration of any part of any building works, structure or dwellinghouse.

[180] Residential building in New Zealand, at least for the past 30 years, has been characterised by a process whereby almost every single aspect of the construction of any dwelling is undertaken by specialist contractors (persons possessed of specialist knowledge and skills in some trade or construction process). The builder *per se* has in the main become a mere project manager and coordinator of specialist contractors, including in many cases carpentry contractors and sub-specialists in that field.

[181] What has occurred in practice in 'leaky building' claims is that the term "builder" as used in *Bowen* and *Chase* has been expanded and given the widest meaning possible to include all persons involved in the building or construction of a dwellinghouse as any attempt to differentiate between the respective roles of those persons in the contractual chain that delivers up dwellinghouses in New Zealand creates an artificial distinction that does not accord with the practice of the building industry, the expectations of the community, or the statutory obligations incumbent on all of those persons.

[182] A 'builder' has been held to include for the purpose of liability in tort in such claims, any person that provides any service whatsoever in connection with or in relation to the management, supervision, construction or alteration of any part of any building work, structure or dwellinghouse. The duty imposed on those persons has been held to be a duty of care to future owners of a dwellinghouse to carry out the building works in accordance with the building consent and the Building Act and Regulations including the Building Code (that is the minimum statutory requirement imposed on all those who carry out building work

under the Building Act 1991 and now the Building Act 2004) and to take reasonable care in carrying out and overseeing building operations to avoid foreseeable losses to others arising out of defective construction.

The personal liability of a director in tort

[183] The debate as to whether or not directors of building companies should be personally liable in tort to others arising out of defective construction has raged over recent years in the leaky building context.

[184] The recent High Court decision of Baragwanath J in *Dicks v Hobson Swan Construction Limited (In Liquidation) & Ors* HC AK CIV 2004-404-1065 [22 December 2006] is important and has been helpful in resolving the debate, at least thus far. The Court found McDonald, the sole director and shareholder of Hobson Swan Construction Ltd, the building company that undertook the construction work for the plaintiff, Mrs Dicks, personally liable to the plaintiff in tort on the ground that he directed and performed the construction of the house and was personally responsible for the omission of seals to the windows. Justice Baragwanath referred to various essays and judgments bearing on the issue of director liability, reviewed the competing factors pointing toward and away from liability, and concluded at para [62]:

> The point can be argued either way. While a New Zealand appellate court might choose a different approach, *Morton v Douglas Homes* has stood for two decades. It cannot be said that the decision is so lacking in principle that litigants should be subjected to inconsistent judgments at first instance. I have therefore decided to follow *Morton v Douglas Homes* on the present point. It applies a fortiori: Mr McDonald did not merely direct but actually performed the construction of the house and was personally responsible for the omission of the seals. His carelessness is, on the *Morton v Douglas Homes* analysis, a breach of a duty of care owed by him to Mrs Dicks. He is

> therefore personally a tortfeasor (as well as having his conduct attributed to Hobson Swan as its tort).

[185] In *Morton v Douglas Homes,* Hardie Boys J found the directors of a building company personally liable because of the control they exercised over the building work. Whilst they did not personally undertake or perform the building work found to have caused the plaintiff's loss (defective foundations in that case), they each had and exercised control over the building operations and they each made decisions and gave, or failed to give, directions concerning the proper extent of the necessary foundation and piling work and the manner in which that work was to be undertaken. He reasoned:

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

[186] In the end the matter seems quite straightforward. Following *Dicks*, a director may be personally liable in tort to others in relation to defective construction where it can be demonstrated that his or her personal carelessness in undertaking or directing building operations caused foreseeable damage to another insofar as the act or omission said to have caused the loss was conduct subject to his or her control. The duty of care arises as a result of the control the person exercises over the said conduct and the liability arises not because the person is a director (the

status as director is irrelevant) but because the person breaches the duty of care and is an actual tortfeasor.

[187] It follows that a director of a company will be personally liable where he or she has actually carried out defective building works and/or has carelessly exercised control over the building operations and/or carelessly given directions that have caused defective work to be undertaken by others. In the case of a one man building company it will be an almost insuperable hurdle for a director to avoid personal liability for defective building work as the issue of control is one of mere physical control rather than control being removed from the company or exercised inconsistently with the director's routine involvement in the company.

Mr Collinson's role

[188] The Owners' case for the liability of Mr Collinson is first, that he personally undertook the building work and secondly, that he had a leading and supervisory role in the construction of their dwelling.

[189] In relation to their claim that Mr Collinson had a leading and supervisory role the Owners say that there are seven evidential bases that support that proposition:

1. Mr Collinson had a significant financial interest and administrative involvement in Maccol.

2. Mrs Ward says that when she first went to the property she was directed to Mr Collinson as the person in charge of the site.

3. The Council's Field Memorandum 18251 is expressly addressed to Mr Collinson and refers to tasks to be undertaken before a code compliance certificate would be issued.

4. A hand written note attached to Field Memorandum 12181 is expressly addressed to Collinson.

5. Mr Ward says that Mr Collinson told him that he built their house.

6. Mr Ward says that he was told by Mrs McKenzie that Mr Collinson was the builder.

7. Mrs Hayes, the neighbour, says that Mr Collinson was consistently working on site throughout the construction of the dwelling and his presence was more frequent than anyone else's.

[190] In his response to the claim, Mr Collinson said that he was one of seven persons employed by DMBL on the construction of the Owners' dwellinghouse, that he was paid a wage by that company and had PAYE deducted from it, that he turned up to work for the company and was engaged to do building work as instructed and supervised by Dave (McKenzie) as his employer, that he followed all of the company's directions and instructions, and that he did not supervise others.

[191] During the hearing Mr Collinson acknowledged that he would have undertaken work in relation to the installation of the cladding and windows and the deck construction but he could not recall or be precise as to exactly what work he did and which windows he worked on. It was his evidence that the work was undertaken by all of the people on site.

Employee or independent contractor

[192] It is fair to say that Mr Collinson's evidence as to who employed him and/or who paid him and how he was paid when he worked on the Owners' property was unclear and confused. I do not mean this as a criticism of Mr Collinson neither am I to be taken as suggesting that he was being untruthful or deliberately protean or evasive. I am satisfied that Mr Collinson's difficulties in relation to the recollection of the detail of his employment arrangements at the time of the construction of the Owners' dwelling was simply a function of the passage of time (10 years having passed since the Owners' dwelling was constructed) and what I apprehend from the evidence to have been his subservient and submissive relationship with Dave McKenzie whilst he was alive and the lack of knowledge and the lack of control he exercised over the functions and financial affairs of DMBL and Maccol.

[193] It became apparent during the course of the hearing that Mr Collinson was not paid a wage by DMBL. The evidence established that DMBL paid Maccol for Collinson's time whilst working on the Owners' property, charged at a rate of $22.00 per hour plus GST, and that Mr Collinson was in turn paid a fixed but much lesser amount of $600.00 per week by Maccol. It was Mrs McKenzie's evidence that David McKenzie kept all profits from the companies' business activities and that Mr Collinson did not share in those. As I understand the evidence of Mr Collinson and Mrs McKenzie, these were not matters over which Mr Collinson exercised any control or indeed in respect of which he had any real say or choice (notwithstanding his directorship in Maccol) whilst he remained employed within the corporate matrix that comprised David McKenzie's building, joinery and development business interests.

[194] Mr Rooney submits that there is no independent evidence such as time and wage records or tax returns to establish that Mr Collinson was an employee at all.

[195] Notwithstanding the lack of independent evidence referred to by Mr Rooney, I am not persuaded that the evidence has disclosed that Mr Collinson engaged himself to perform services on his own account or that he had any right of ultimate managerial authority or control as to what work was to be done, how it was to be done, or how to manage his time to make a profit from the work within the totality of the relationship with Maccol/Dave McKenzie. I am satisfied on balance that the arrangement between Mr Collinson and Maccol was a contract of service as opposed to a contract to perform services on his own account. Accordingly I am satisfied in the circumstances that Mr Collinson was indeed an employee of Maccol as opposed to having been an independent contractor (See the fundamental test for distinguishing an employee from an independent contractor approved by the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 1 AC 374 at 382).

Financial and administrative involvement

[196] The relationship between Maccol and DMBL was informally structured (if it was consciously structured at all) and was a family arrangement of sorts over which David McKenzie exercised complete and absolute control. That much was made manifestly clear by Mrs McKenzie's. evidence. In particular, she said:

> Dave always controlled his business and never at any time during his life did anyone ever have a say in how things were done. He was a very bloody minded person who did things his way.
>
> …and

> I remember Dave decided to make Mark Collinson a director of Maccol. I believe he said this was for the sole reason of having a company that Mark, if he so wished, could use in the future after Dave's retirement. I know he has not, because I am aware the company has been dormant since Dave's retirement. While Dave was still working he continued to run the company as his own. Dave still made the decisions and I do not recall Mark ever having any influence or control over Dave.
>
> …and
>
> My Husband was a very strong minded person who did things his way, especially when it came to work. He was in charge on every site and did not share any responsibility with anyone. Similarly, he kept the profits as well, that was the way things were. In regard to the running of DMBL and Maccol, I know that he made the decisions, that is the way it always was for as long as I knew him and for as long as I was with the company.

[197] In the circumstances I have no hesitation in rejecting the Owners' assertion that Mr Collinson had a significant financial interest and administrative involvement in Maccol. In my view the evidence simply does not support that broad proposition.

Supervisory role

[198] There is simply no direct evidence that Mr Collinson exercised any control over what work was done on site (or off site), or how it was to be done, or by whom it was to be done. His discussions with the Council building inspector in relation to the deck and his undertaking of the work recommended by the Council officer points more toward his taking directions from others in control of the building operations in my view, than it evidences any sort of control over the building operations. His letter to the Council regarding water rates was, as I understand it, penned at the request of his mother, but even if I were wrong, that act goes no way to establishing the degree of control over the building

operations contended for by the Owners. It was Mr Collinson's evidence that his visits to the Owners' property and his discussions with them in relation to building defects post settlement date occurred only because David McKenzie asked him to go because he was terminally ill with cancer at that time and was too ill to go himself. Finally, I am not persuaded that Mr Collinson told the Owners that he 'built their home' to the extent and for the purpose contended for by them in this proceeding. There is no clear evidence as to the context in which the statement is alleged to have been made. It would seem to me to be no more than the stuff of generalisation and poetic license (and perhaps a (now misplaced) sense of achievement and pride) and not intended to be an accurate and absolute statement of fact to be relied upon.

[199] The only evidence from any persons that had direct knowledge of what actually occurred on site was that of Mr Collinson who strongly asserts that David McKenzie supervised the work and directed how and when it was to be undertaken. Mr Collinson's uncontroverted evidence is to a fair measure, corroborated by Mrs McKenzie's evidence as to Mr McKenzie's personality, conduct and management style. She said:

> Dave always controlled his business and never at any time during his life did anyone ever have a say in how things were done. He was a very bloody minded person who did things his way…He was in charge on every site and did not share any responsibility with anyone…and…In regard to the running of DMBL and Maccol, I know that he made the decisions, that is the way it always was for as long as I knew him and for as long as I was with the company.

[200] In the context of the present case, I am not persuaded that the evidence of Mrs Hayes and the Owners, or the Councils Field Memoranda establish even hesitantly that Mr Collinson had a leading and supervisory role in relation to the construction of their dwelling such that he owed the

Owners a duty to see that reasonable care and skill were exercised in the construction of their home, as did Maccol. Accordingly, I find Mark Collinson was not a joint tortfeasor with Maccol so as to be personally liable for the negligence attributed to that company.

Building work

[201] It is also claimed that Mr Collinson is liable in his personal capacity because he personally undertook the building works which have led to water penetration and damage.

[202] Mr Collinson acknowledges that he would have undertaken certain of that work along with the other employees of DMBL but he could not recall precisely which windows he worked on or of course those that he did not. I accept his evidence that he, along with his fellow workers, took instructions from Dave McKenzie who directed how and when the work was to be undertaken on the Owners' dwelling.

[203] I have already determined for the purposes of the present case that Mr Collinson was an employee of Maccol, that he had no control over the building operations nor any supervisory or decision making role in relation to the building works.

[204] There is no evidence in the present case that Mr Collinson intentionally created defective work, or acted recklessly or carelessly, or ought to have known that his work would prove a source of danger to third parties. In the end there is no evidence that Mr Collinson acted other than strictly in accordance with the instructions of his employer or that any of the work that has led to water penetration and damage was subject to Mr Collinson's control. Accordingly, on the *Morton v Douglas Homes* analysis, viz:

> There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and those with whom the company deals insofar as that dealing is subject to his control.

as applied by Baragwanath J in *Dicks,* the "dealing" (being the defective construction work) was not subject to his control, Mr Collinson did not owe a duty of care to the Owners in the circumstances and therefore Mr Collinson is not a tortfeasor and is not liable in his personal capacity for the Owners' loss.

The liability of the Third respondent, the Council, in tort

[205] There is properly no denial that the Council owed the Owners a duty of care, but there is a dispute as to the nature of that duty and whether it has been breached.

[206] The Owners submit that the Council owed them a duty to take reasonable care to ensure that the dwelling was built in accordance with the requirements of the Building Act 1991.

[207] The Owners further submit that in breach of the said duty, the Council:

- Issued a building consent for the dwelling on inadequate plans and without sufficient details about the proposed construction of the dwelling; and,

- Allowed the dwelling to be constructed other than in accordance with the plans in reliance on which the building consent was issued, and in particular, with recessed windows and no eaves; and,

- Failed to undertake enough inspections of the dwelling during construction so as to ensure that it was constructed in accordance with the building code; and,

- Failed to inspect the construction of the dwelling adequately so as to ensure that the work was being carried out in accordance with the building code; and,

- Issued a code compliance certificate without reasonable grounds for belief that the construction of the dwelling was in accordance with the building code.

[208] In response, the Council submits:

- There is no evidence to suggest that the Council ought not to have issued the building consent based on the plans and specifications provided.

- There is no evidence to suggest that the changes in construction from the plans and specifications caused water ingress.

- When undertaking inspections, the Council requires the Owner and/or builder to call for the appropriate inspections pursuant to section 7 of the Building Regulations 1992.

- The inspections as dictated by section 7 of the Building Regulations concern structural issues and health and safety issues. The Council undertakes its inspections in order that it might eventually issue a code compliance certificate. A code compliance certificate under the Building Act certifies that the

council is satisfied upon “reasonable grounds” that the works comply with the Building Act and the building code.

- It is important to recognise that the council, as a matter of law, is not a clerk of works.

- Given the levels of knowledge within the building industry during 1996 and taking into account the standards in force at the time, the Council acted reasonably in undertaking the inspections and issuing the code compliance certificate.

[209] The Council submits that the test of whether the Council breached any duty of care it might owe to the Owners must necessarily be measured against the levels of knowledge and practices in force at the time the building work was completed in 1996 and this is reflected in the test adopted in both *Lacey v Davison*, Auckland High Court, A546/65, 15 May 1986 and *Askin v Knox* (1989) 1 NZLR 248 where Cooke P (as he then was) said:

> A council officer will be judged against the conduct of other council officers. A council officer’s conduct will be judged against the knowledge and practice at the time at which the negligent act/omission was said to take place.

[210] The Council further submits that the courts have held that compliance with a fairly established practice is likely to weigh heavily in favour of the respondent and is a burden the claimant will not easily discharge in establishing negligence (*Baker v Suzuki Motor Company* (1993) 17 CCLT 2D (241) and *Adams v Rhymmey Valley District Council* (2000) Lloyds Reports PN777).

The relevant legal principles

[211] Following a long line of authorities, the law is well settled in New Zealand that a Council owes a duty of care when carrying out inspections of a residential dwellinghouse during construction and that position was confirmed in *Hamlin v Invercargill City Council* [1994] 3 NZLR 513:

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

[212] The duty of care owed by a Council in carrying out inspections of building works during construction is that of a reasonably prudent building inspector and the standard of care will depend on the degree and magnitude of the consequences which are likely to ensue.

> The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonably prudent Council would do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect in which can cause very substantial damage to a building.
>
> *Stieller v Porirua City Council* (1983) NZLR 628

[213] The duty of care imposed upon Council building inspectors does not extend to identifying defects within the building works which are unable to be picked up during a visual inspection. This principle was confirmed by the High Court in *Stieller* where it was alleged the Council inspector was negligent for failing to identify the omission of metal flashings concealed behind the exterior cladding timbers:-

> Before leaving this part of the matter I should refer to some further item of claim made by the plaintiffs but upon which their claim fails. They are as follows:

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

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

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

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

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

[216] The number and timing of inspections is a matter solely at the Council's discretion and the number and duration of the inspections is not limited in any way by cost, policy or legislation. The Court of Appeal dealt with the matter summarily in *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) at 94:

> A further point made on behalf of the Council by Mr Hancock was that the standard code did not make inspections by the Council mandatory at the stage where the exterior of the house was being clad.…
>
> Mr Hancock said the judge had failed to take into account that it might be common practice for the local authority to make no inspections at all at certain stages and yet it might be fixed with liability for work done thereafter. The short answer to this submission is that the Council's fee for the building permit is intended to include it's charges for making inspections in the course of construction, and it does not limit these in numbers or by stages (my emphasis added).

[217] The test for liability in negligence was stated by the Court of Appeal in *Askin v Knox* [1989] 1 NZLR 248 as the exercise of reasonable care. The standard of care exercised by a council officer in the execution of the council's duties will be measured in the first instance by reference to the knowledge and practice of other council officers at the time but always subject to the determination of the Court that "independently of any actual proof of current practice, common sense dictated" the use of particular methods, measures or precautions: *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 CA, at 102 per Turner P and applied by Baragwanath J in *Dicks v Hobson Swan Construction* ("Turner P's test").

[218] The duty of care owed by a council to a home owner extends to establishing and enforcing an operational system (proper inspections and checks at appropriate intervals and stages during the construction process) to give effect to the building code (*Dicks v Hobson Swan Construction*).

The functions and obligations of the Council under the Building Act 1991

[219] The Councils functions and obligations relevant to this matter include inter alia:

- Process building consent applications (s24(b))

  (The Territorial Authority must only grant the building consent if satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with plans and specifications submitted with the application s34(3))

- Inspect building work (s76(1)(a))

  (Inspection is defined as "the taking of all reasonable steps to ensure….that any building work is being done in accordance with the building consent")

- Enforce the provisions of the Act and the Regulations made under it (s24(e))

  (The building code is the First Schedule to the Building Regulations 1992)

- Gather information and monitor (s26)

  (Every Territorial Authority shall gather such information, and undertake or commission such research, as is necessary, to carry out effectively its functions under the Act)

- Issue Code Compliance certificates (s24(f))

  (A Territorial Authority may only issue a code compliance certificate if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code in all respects…)

Application of the principles to the Council's conduct

The issue of the building consent

[220] The Council issued a building consent for the construction of the Owners' dwelling on 25 March 1996.

[221] I accept the Owners' assertion that the plans contained minimal detail and that the specification was general in nature. However, there is no evidence that the plans were of any lesser standard than was typical for the time, neither is there any evidence of anything in the plans or specifications which could be said to have caused water penetration. The plans show inter alia: the location of the dwelling on the site; drainage, plumbing, foundation, wall, floor and roof framing details; elevations; cross sections; a roof plan of the dwelling; Colorsteel roof; Harditex textured sheathing; and, what appear to be face fixed aluminium windows and external doors. The specification provided that all work was to comply with the relevant New Zealand Standards, particularly NZS 3604. At law (s7 BA91), all building work undertaken on the dwelling was required to comply with the building code.

[222] In the circumstances I am satisfied that it was entirely possible for the Owners' house described in the plans and specifications approved by the Council for the purpose of issuing the building consent to have been built sound, safe and sanitary, and weathertight in accordance with the

building code and that the Council was entitled to expect and permit any competent builder to adopt methods and systems that would achieve that result.

[223] Clearly in those circumstances it would fall to the Council to ascertain the nature and detail of the methods and systems adopted by the builder of the dwelling for the purpose of complying with the building consent and the building code and ultimately to approve or disapprove of those methods and systems pursuant to the regulatory inspection and approval regime provided for under the Building Act. That process had its checks and balances because the Council was entitled to issue a notice to rectify pursuant to section 42 BA91 in the event of failure on the part of the builder to undertake the building work in accordance with the building code.

[224] Clearly where a council elected to adopt such an approach to issuing building consents, council building inspectors would need to be competent, informed and knowledgeable in all aspects of building science, relevant standards and building code compliance and the council would need to have in place adequate and robust inspection, checking, and approval procedures, to discern whether the work in critical areas was in fact up to standard and the objectives and functional requirements of the building code would be met in the circumstances. Whether it did or not will be a question of fact in each case.

[225] For the above reasons and rejecting all arguments to the contrary, I am not persuaded that the Council acted negligently in issuing the building consent for the Owners' dwelling.

The inspections

[226] The Council conducted five inspections of the Owners' dwelling during the course of construction and three post-construction inspections including a final re-check.

[227] The Owners say the Council failed to inspect with sufficient frequency or at times most relevant to potential weathertightness issues and failed to inspect adequately when inspections were undertaken.

[228] The number and timing of inspections is tied inextricably to a council's obligation to issue a code compliance certificate which it may only do if and when it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code in all respects.

[229] How a council satisfies itself that the building work to which the certificate relates complies with the building code in all respects is a matter for each council. Whether its assessment and its means of making that assessment is reasonable will be a question of fact.

[230] Clearly the most obvious and effective method for assessing compliance with the building code is by visual inspection. Pursuant to section 7 of the Building Regulations 1992 a building owner, or any person undertaking any building work, is required to call for mandatory inspections prior to closing in, or covering up:

- Drainage, plumbing, gas fitting or electrical work; and,
- Excavation for a foundation; and,
- Reinforcing steel for a foundation; and,
- Timber required to have a specified moisture content; and,

- **Any other building work in respect of which such notice is required as a condition of the building consent** (emphasis added).

[231] The Council's submission that the number of inspections is dictated by Section 7 of the Building Regulations and that it is the owner/builder's obligation to call for the "appropriate inspections" is not strictly correct. Certainly the owner/builder is required to call for the inspections required to be undertaken by the Council as a condition of the building consent, but it is for the Council to determine the appropriateness and the timing of any further inspections in addition to the mandatory ones prescribed in section 7(b)(i-iv) and may require the owner/builder to call for inspection of any building work as a condition of the building consent (section 7(b)(v). Bond beam and floor slab inspections are the obvious and most common ones, as in the present case, but there is no limit to the number of inspections that a council may call for (*Stieller* supra).

Cladding and window flashings

[232] It would appear that the Council in 1996 approved the use of Harditex as a cladding material/system to the extent that when it was used in accordance with the manufacturer's specification it would meet the relevant provisions of the Building Code. No other conclusion can be drawn in the circumstances - there is no allegation in this case that the Council had not approved the use of Harditex as a cladding material/system or that it had done so other than in accordance with the manufacturer's recommendations and/or negligently.

[233] Insofar as it is relevant to the present case, the following matters were critical (according to the manufacturer's technical literature) to its use meeting the requirements of the building code:

- The installation of the windows
- Ground clearance
- Vertical and horizontal relief joints

[234] The details provided at figs. 14-19 of the Hardie Manual show exactly how the ground clearance was to be achieved and relief joints were to be formed. I am satisfied that whether the specified ground clearance to the sheets had been maintained and whether vertical and horizontal relief joints had been constructed in accordance with the manufacturer's specification were matters that could have been established by visual inspection (*Stieller*) at any stage of the construction following the fixing of the Harditex sheets, up to and including the time of the final inspection. I accept that it may not have be until a final inspection that the ground clearance could be checked if paving was to be laid adjacent to the dwelling.

[235] The Council owed the Owners a duty to exercise reasonable care and skill when carrying out inspections of the dwelling during construction (*Hamlin*). I am satisfied that the Council breached the duty of care owed to the Owners by failing to identify that there were no relief joints installed on the Owners' dwelling or that the paving was in contact with the cladding and by reason of the said breach the Owners have suffered loss and damage to their property for which the Council is liable.

[236] The window installation is potentially more problematic, but for the reasons that are to follow, in the present case the issue is really quite straightforward.

[237] The argument for the Council, *per* Mr Gunson, is that the use of sealants was permitted and accepted in 1996 as a means of flashing/sealing windows and accordingly a Council officer undertaking a final inspection

would not be able to visually identify whether appropriate sealings and flashings had been installed without ripping apart the construction.

[238] I accept that it would be difficult to ascertain when undertaking a final inspection whether or not sealant had been used on the jambs of face fixed windows and external doors, but it would certainly have been possible to identify whether a seal of any description (Inseal or silicone) had been used with only minimal investigation prior to the application of the coating system. It was within the control of the Council to call for an inspection at that stage but it did not do so.

[239] Dealing with a similar issue in the *Dicks* case in relation to a dwelling built two years earlier, Baragwanath J concluded:

> …It was a task of the Council to establish and enforce a system that would give effect to the Building Code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present. That was the standard required by Hardie Boys in *Morton v Douglas Homes* in relation to foundations. The Council accepts that flashings warranted specific precaution to check to ensure their presence; so too must their substitute.
>
> [117] I have concluded that the absence in this case of both any instructions and of any system to discern whether seals were in place infringes Turner P's test. There has been a simple abdication of responsibility by the Council. If there is need to apply an *Anns* test, I accept Mr Jordan's explanation that it would be easy to do so simply by the use of a key to probe the joint. But while it is unnecessary for the decision in the present case, I am of the opinion, that like the respondent in *Wilsons and Clyde Coal Company v English,* the Council should in addition be held liable at the organisational level.

[240] The Council owed the Owners a duty to put in place and enforce an operational system (proper inspections and checks at appropriate

intervals and stages during the construction process) to give effect to the building code (*Dicks*). I am satisfied that the Council breached the duty of care owed to the Owners by failing to establish/ensure whether seals were present and by reason of the said breach the Owners have suffered loss and damage to their property for which the Council is liable.

[241] Perhaps even more significantly in the present case, the windows were not face fixed as shown on the plans, instead they were installed into rebates formed in the cladding. Mr Nevill said this method of installation was "unusual and the rebate was so small as to raise eyebrows" such that the inspector should have checked for compliance with the manufacturer's instructions.

[242] Mr Gunson said the Harditex design details and literature dated February 1996 represented one method of constructing the window details and the construction of the sill area to the windows is similar to the method of construction detailed at fig.58 of the Harditex literature.

[243] The principal difficulty with that proposition is that the manufacturer states that Harditex must be used in accordance with the details in the specification to meet the relevant provisions of the building code i.e. no other installation methods or details were approved as capable of meeting the requirements of the building code in 1996. The evidence has established overwhelmingly that the window installation was not carried out in accordance with the manufacturer's specification in a number of significant and (some) obvious ways:

- The windows were installed without any head flashings.
- The method of sill construction was not similar to the method detailed in fig 58 (or indeed fig 59 or fig 60). The evidence has established there were no recessed-edge tape-reinforced joints or

metal flashings at the junctions of the wall and sill cladding or any waterproofing membrane coating the sill area.

- The only methods of forming the jambs approved by the manufacturer for recessed windows involved the installation of metal jamb flashings and there were none fitted. The use of sealant as a substitute for head and/or jamb flashings was not an approved alternative for recessed window installations using Harditex.

[244] In my view, it is simply not possible in the circumstances to say that the installation/construction method for the recessed windows and cladding surrounds was similar to the specified method - it was not.

[245] The absence of mandatory metal head flashings and jamb flashings would have been obvious upon a visual inspection (*Stieller*).

[246] There was simply no way of establishing whether the recessed-edge tape-reinforced joints had been formed and the mandatory waterproofing membrane coating had been applied to the sill area post application of the coating system. In order to ensure that the cladding joints were properly formed and the sill properly waterproofed and sealed (a substitute for metal sill flashings) the subject work required to be inspected prior to the application of the coating system. It was within the control of the Council to call for an inspection at that stage but it did not do so (*Dicks*).

[247] The Council's approach to inspecting cladding in 1996 (notwithstanding that issues of water penetration and defective cladding installation had been well publicised in trade journals and articles since the early 1990's)

was graphically illustrated by Mr Merton's answer to my questioning. When asked:

> Would you have typically checked a house such as this, clad in Harditex, for construction or installation details such as control joints, mid-floor control joints? To what extent would you have checked the cladding installation at all?

Mr Merton answered:

> Not at all. Could I add a bit to that Mr Green? If we were suspicious of the builder, for example if he had shown poor performance in the past, I would have been more inclined to take a closer look, but, not being responsible for the cladding myself, probably not much more than a cursory glance would be carried out on a with [sic] a competent builder.

[248] The Council's approach to its duties clearly fell far short of establishing and enforcing an operational system that would give effect to the building code. In this case the reliance on DMBL was simply misplaced and misconceived. The Council's practice was a clear abdication of its obligations and duties and renders the purpose of independent inspection nugatory.

The pergola

[249] There is no evidence that the pergola timbers were warped at the time of the Council's final inspection or that there was any outward appearance of irregular or improper fixing practices.

[250] I am not persuaded that a building inspector would have picked up any defect in this construction upon a visual inspection. In my view it would have been impossible to determine without testing, whether the Harditex to which the pergola timbers were fastened was sealed and/or that the

pergola fixings were sealed where they penetrated the Harditex and wall framing (*Stieller / Otago Cheese Co*.)

The deck

[251] The evidence in relation to this issue was confused with most attention directed to whether or not adequate subfloor ventilation had been provided in this area. I am not persuaded that any amount of subfloor ventilation would have prevented the decay and degradation to the timber floor and wall framing that has occurred as a direct result of the transfer of moisture through the unsealed Harditex cladding where the deck structure abuts the dwelling on the north and west walls of the dwelling.

[252] This is an area of the exterior of the dwelling to which Mr Merton's attention was specifically drawn because of his concerns regarding subfloor ventilation. Mr Merton's evidence discloses that he is a qualified builder and a building inspector with thirty two years experience yet he did not observe anything untoward in relation to the deck construction. I am not persuaded that the evidence establishes even hesitantly that a reasonably prudent building inspector would have picked up any defect in this construction upon a visual inspection (*Stieller*).

[253] I am satisfied that the building work that has caused the water penetration at this location is not the detail which a council building inspector ought to have discovered or indeed which can be discovered on any reasonable inspection by the building inspector. It would not have been possible for a building inspector to have detected the defective construction without requiring a specific inspection prior to the decking being laid or by requesting the builder to remove a section of the decking.

[254] There is simply no evidence that other Councils at the time (or even since) required an inspection of decks that are essentially a substitute for paving and a landscaping feature and that do not pose any threat of danger to home owners in the event of collapse or failure of any kind (*Askin v Knox*). I am not persuaded in the circumstances that common sense dictates that any prudent council would have required an inspection of the deck structure before the decking was laid or the removal of decking to ascertain the method of construction and support for the deck structure (*McLaren Maycroft & Co/ Dicks*).

The untidy area of soft edge on the roof

[255] I accept Mr Gunson's evidence that this is a very minor detail of construction work which is unlikely to have caught the eye of a Council officer during inspections.

Code Compliance Certificate

[256] While it is unnecessary for the determination in the present case, I am of the opinion that in the absence of proper and timely inspections of the cladding and window installation and the weatherproofing of same, there was simply no reasonable ground upon which a building inspector could be satisfied that the cladding/window construction/installation complied with the building code in all respects and the Council was negligent to have issued the code compliance certificate in those circumstances.

Summary of the Council's liability

[257] To summarise the position therefore, I determine that the Council breached the duty of care it owed to the Owners in the following ways:

- Failing to establish and enforce an operational system that would give effect to the building code, viz. a system of proper inspections and checks at appropriate intervals and stages during the construction process to ensure that the building work was undertaken to the required standards (in this case, the construction and sealing of the window and door penetrations in the external envelope of the dwelling); and,

- Failing to discover the absence of control and relief joints in the Harditex cladding; and,

- Failing to discover the absence of metal head and jamb flashings on windows and external doors; and,

- Failing to discover the lack of clearance at the base of the Harditex sheets where paving was laid against the cladding.

- Issuing a code compliance certificate in circumstances where in the absence of inspections or checking processes, there was simply no reasonable ground upon which a building inspector could be satisfied that the cladding/window construction and installation complied with the building code in all respects.

[258] Accordingly, I find the Council liable to the Owners for damages in the aggregate sum of $189,552.75 calculated as follows:

Owners' losses (See para. 153)	$254,669.00
Less damage associated with deck	
Calculated at 25% (See para 89)	($ 63,667.25)
Less pergola repair costs	($ 1,449.00)
(Ortus cost estimate $1,000.00 plus margin,	

contingency allowance and GST)

Total	**$189,552.75**

CONTRIBUTION

[259] I have found that the First respondent, Maccol, breached the duty of care that it owed to the Owners. Maccol is a tortfeasor or wrongdoer and is liable to the Owners in tort for the full extent of their loss, namely $254,669.00.

[260] I have found that the Third respondent, the Council, breached the duty of care it owed to the Owners and is liable to the Owners in tort for their losses to the extent of $189,552.75. Maccol and the Council are concurrent tortfeasors because they are responsible for different acts/torts (i.e. negligent development/construction on the part of Maccol and negligent inspection on the part of the Council) that have combined to produce the same damage giving rise to concurrent liability. Concurrent liability arises where there is a coincidence of separate acts which by their conjoined effect cause damage (*Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 at 584 (CA)).

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

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

> Where damage is suffered by any person as a result of a tort…. any tortfeasor liable in respect of that damage may recover contribution from

> any other tortfeasor who is…liable for the same damage, whether as a joint tortfeasor or otherwise…

[263] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides 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.

[264] What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim. In *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), the Court apportioned responsibility for the damages at 80% to the builder and 20% to the Council on the basis that primary responsibility lay with the builder as the person responsible for construction in accordance with the bylaws and that the inspector's function was supervisory. That position was upheld and adopted recently in *Body Corporate 160361 & Anor v Auckland City Council* HC AK CIV 2003-404-006306 25 June 2007, Harrison J.

[265] As in *Mount Albert v Johnson* primacy for the damage to the Owners' dwelling rests with the First respondent, Maccol, as the developer. It was Maccol's responsibility to carry out, or to have carried out, the building works in accordance with the building code and the building consent. It is a condition of every building consent that the building work is to be undertaken in accordance with the plans and specifications so as to comply with the building code and the observance of that requirement was Maccol's primary responsibility.

[266] The Council's role, on the other hand is essentially supervisory and to that extent I consider that its role should be significantly less than that of the principal author(s) of the damage.

[267] Whilst the First respondent, Maccol, is liable for the entire amount of the Owners' losses caused by water ingress and associated damage in the amount of $254,669.00 and the Third respondent, the Council, is liable for the Owner's losses in relation to the cladding and window installation in the amount of $189,552.75, each is entitled to a contribution toward those amounts from the other, according to the relevant responsibilities of the parties for the damage that I have determined above. Therefore I determine that the respondents' contributions *inter se* in relation to the damage and repairs are as follows:

<u>Damage associated with the deck</u>			
The First respondent, Maccol	100%	$ 63,667.25	
The Third respondent, the Council	NIL		
Subtotal	100%	$ 63,667.25	$ 63,667.25
<u>Damage associated with the pergola</u>			
The First respondent, Maccol	100%	$ 1,449.00	
The Third respondent, the Council	Nil		
Subtotal	100%	$ 1,449.00	$ 1,449.00
<u>Damage associated with the cladding and windows</u>			
The First respondent, Maccol	80%	$151,642.20	
The Third respondent, the Council	20%	$ 37,910.55	
Subtotal	100%	$189,552.75	$189,552.75
TOTAL			**$254,669.00**

[268] Accordingly, if each respondent meets its obligations under this determination, this will result in the following payments being made by the respondents to the Claimants for special damages:

First respondent:

Special damages **$216,758.45**

Third respondent:

Special damages **$ 37,910.55**

[269] Accordingly, I determine that the First respondent, Maccol, is entitled to a contribution in the amount of $37,910.55 from the third respondent, the Council, towards the amount of $254,669.00 that the Claimants would otherwise be entitled to obtain from it in damages pursuant to this determination.

[270] The Third respondent, the Council is entitled to a contribution in the amount of $151,642.20 from the First respondent, Maccol, towards the amount of $189,552.75 that the Claimants would otherwise be entitled to obtain from it in damages pursuant to this determination

COSTS

[271] The Owners claim to have incurred legal costs in the amount of $29,925.00 and have sought a determination that their legal costs be met by one or more of the respondents in these proceedings.

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

> **43 Costs of adjudication proceedings**
>
> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by-

(a) bad faith on the part of that party; or

(b) allegations or objections by that party that are without substantial merit

(2) If the adjudicator does not make a determination under subsection (1) the parties must meet their own costs and expenses.

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

[274] Maccol has succeeded in its defence to the Owners' claim in contract on the ground that the claim in contract was statute barred although the net result of the adjudication remains the same. Maccol has also succeeded with its defence of betterment to the extent of $5,400.00 although I am in absolutely no doubt that in the greater scheme of things, had Maccol properly surrendered to its inevitable liability in tort, the Owner's passive objection to a reduction of the claimed amount on the ground of betterment would have yielded in the first blush of enthusiasm for a negotiated settlement. Maccol failed in its defence on the ground of failure to mitigate loss on the part of the Owners.

[275] It is clear that Maccol's' unyielding resistance to the Owner's claim that Maccol was the developer of the property and thus that it owed a non-delegable duty of care to the Owners was misconceived and without foundation in fact or at law. The insuperable problem for Maccol was that it was the developer of the Owner's property and absent a valid limitation defence, the Owners had at all times, a prima facie case against it. Maccol's limitation defence against the Owners' claim in tort had no prospect of success. Therefore in my view, Maccol's allegations and objections in relation to its liability in tort as the developer of the property were simply without substantial merit in the circumstances.

[276] I have found that the Owners' claim against the Second respondent, Mark Joseph Collinson, fails, and that he has no liability to the Owners for their losses in this matter. A reasonable amount of the hearing time was devoted to his role in this matter and I apprehend that a corresponding proportion of the Owner's legal costs and expenses related to preparation time in respect of this claim which did not succeed.

[277] The Owners' claim against the Council has succeeded to the extent of $189,552.75. The Council has succeeded in its defence to the Owners' claims brought in relation to the damage resulting from the deck and pergola construction to the extent of $65,116.25 and the Council succeeded in its defence on the ground of betterment to the extent of $5,400.00. The Council failed on its limitation defence and on its defence on the ground of failure to mitigate loss on the part of the Owners. Notwithstanding that the Owners have succeeded against the Council in this matter, the Council has succeeded in its claim for contribution from Maccol to the extent that its liability may be no more than 15% of the Owners' losses. In the circumstances I am simply not persuaded that the Council's allegations and objections in relation this adjudication were without substantial merit such that the grounds in section 43 are made out against it.

[278] The Owners have clearly been successful in this adjudication. In the end, I must conclude that Maccol's refusal to admit that it was the developer of the Owners' property and its neglect or failure to appreciate its tortious obligations has undoubtedly caused the Owners to incur significant legal costs and expenses in relation to this adjudication, which costs and expenses were, in the circumstances of this case, simply unnecessary and avoidable in my view. Each party took the risk as to whether its stance on the matters at issue would be vindicated in an adjudication and on that issue it is the Owners' view that has prevailed entirely in respect

of its claim against Maccol in tort. In the circumstances I am driven to conclude that Maccol's allegations and objections were simply without substantial merit, that the grounds in section 43 have been made out, and therefore this is a case where it is appropriate to depart from the general principle that the parties will bear their own costs.

[279] There has been no suggestion by any respondent that the Owners' costs and expenses in the amount of $29,925.00 are unreasonable or have been unreasonably or unnecessarily incurred. In the circumstances, I am satisfied that the Owners are entitled to a reasonable contribution toward their costs and expenses from the First respondent, Maccol, but that that contribution should be somewhat less than full reimbursement. I am satisfied that the justice of the matter will be served if I determine that the First respondent, Maccol shall meet two thirds of the Owners' costs and expenses in this matter in the amount of $20,000.00.

[280] I make no orders for costs against the Second respondent, Mark Joseph Collinson, or against the Third respondent, North Shore City Council.

CONCLUSION AND ORDERS

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

[a] The First respondent is in breach of the duty of care owed to the Claimants is liable to the Claimants in damages for the loss caused by that breach in the sum of $254,669.00.

[b] The Third respondent is in breach of the duty of care owed to the Claimants and is liable to the Claimants in damages for the loss caused by that breach in the sum of $189,552.75.

[c] The claim against the Second respondent, Mark Joseph Collinson, fails and I make no order against him.

[d] As a result of the breaches referred to in [a] and [b] above, the First respondent on the one hand and the Third respondent on the other hand are concurrent tortfeasors.

[e] As between the First respondent on the one hand and the Third respondent on the other hand, the First respondent is entitled to a contribution from the Third respondent for the same loss that each has been found liable for being $37,910.55.

[f] As between the Third respondent on the one hand and the First respondent on the other hand, the Third respondent is entitled to a contribution from the First respondent for the same loss that each has been found liable for being $151,642.20.

[g] As a result of the breaches referred to in [a] and [b] above, the gross entitlement of the Claimants is $254,699.00.

[h] The Claimants are entitled to reimbursement of their costs and expenses from the First respondent, Maccol Developments Ltd, in the amount of $20,000.00

Therefore, I make the following orders:

(1) The First respondent, Maccol Developments, is liable to pay the Claimants the sum of $254,699.00.

(s42(1))

(2) The Third respondent, North Shore City Council, is liable to pay the Claimants the sum of $189,552.75.

(s42(1))

(3) In the event that the First respondent, Maccol Developments Ltd, pays the Claimants the sum of $254,699.00, it is entitled to a contribution of $37,910.55 from the Third respondent, North Shore City Council in respect of the amount which the First respondent on the one hand and the Third respondents on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(4) In the event that the Third respondent, North Shore City Council, pays the Claimants the sum of $189,552.75, it is entitled to a contribution of $151,642.20 from the First respondent in respect of the amount which the Third respondent on the one hand and the First respondent on the other hand have been found jointly liable for breach of the duty of care.

(s29(2)(a))

(5) The First respondent, Maccol Developments Ltd, shall meet the Claimants' costs and expenses in this matter in the amount of $20,000.00

(s43(2))

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

To the Claimants by:

<u>The First respondent</u>		
Special damages	$216,758.45	
Costs	$ 20,000.00	
	$236,758.45	$236,758.45
<u>The Third respondent</u>		
Special damages	$ 37,910.55	$ 37,910.55
Total amount of this determination:		$274,669.00

Dated this 21st day of August 2007

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JOHN GREEN

ADJUDICATOR

STATEMENT OF CONSEQUENCES

IMPORTANT

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

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