CLAIM NO: 02437

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN	**PETER YEUJOON YOON** and **JIN HI SON** Claimants
AND	**JONG BOO AHN** First Respondent
AND	**NORTH SHORE CITY COUNCIL** Second Respondent
AND	No third respondent, John Gardiner having been struck out
AND	No fourth respondent, Simon Barnes having been struck out
AND	No fifth respondent, Albert Vance having been struck out
AND	No sixth respondent Stephen Lloyd Woodhams having been struck out
AND	No seventh respondent, Equus Industries Ltd having been struck out
AND	No eighth respondent, Marion Chiswell not having been served
AND	**PAUL RICHARD SALTER** Ninth Respondent
AND	No tenth respondent, Robert Campton having been struck out

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DETERMINATION OF ADJUDICATOR
(Dated 20 September 2007, and corrected on 25 September 2007)

BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS02 Act"). The claim was deemed to be an eligible claim under the WHRS02 Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS02 Act on 30 May 2005

1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged and held in the Weathertight Homes Resolution Service ("WHRS") meeting rooms in Auckland on 27 June 2005, for the purpose of setting down a procedure and timetable to be followed in this adjudication.

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

1.4 I conducted a site inspection of the property in the afternoon of 3 September 2007 in the presence of Mr Yoon, the WHRS Assessor, Mr Sean O'Sullivan, Mr Paul Read and Mr Gary Still.

1.5 On the Friday before the Hearing was due to start, I was advised that the second respondent, the North Shore City Council ("the Council"), had come to a settlement with the claimants, whereby the Council would pay to the claimant the sum of $170,000 in full and final settlement of the claim. In return, the claimants agree to assign all of their rights relating to their claims against all of the other respondents to the Council.

1.6 On the morning of 4 September 2007, being the day that the Hearing was due to commence, I was advised that the Council had reached a settlement with five of the respondents, and wished these respondents be removed from the adjudication. However, the Council wished to pursue the claims that were being made against the remaining two respondents. The Hearing was adjourned for one day, which allowed the experts to finalise their Leaks Lists

and attempt to reach agreement on the damage, the quantum, and the cost of the repairs.

1.7 The Hearing reconvened on 5 September, and all the parties who attended this hearing were given the opportunity to present their submissions and evidence. I was given the agreed Leaks List as compiled by the experts, and they had managed to reach agreement on all matters, for which I was most grateful, as it was not necessary to take or test the technical evidence any further.

1.8 I have been asked to proceed to make my Determination on the basis of the submissions, witness statements, and documents presented as a part of the claims, responses and replies.

2. THE PARTIES

2.1 The Claimants in this case are Peter Yoon and Jin Hi Son. I am going to refer to them as "the Owners". They purchased the townhouse and property at Unit 1, 98-100 Anzac Street, Takapuna, in October 2002. It was their first home.

2.2 The first respondent is Mr Jong Boo Ahn, a director of J B Ahn Holdings Ltd (now in liquidation) the company that developed this property into eight townhouses. Mr Ahn was also the owner of Unit 1, and the person from whom the Owners purchased the property in 2002. I am satisfied that Mr Ahn has been served with all the documents relating to this adjudication, but he has never attended any preliminary meetings, nor responded in written form to any of the claims being made against him. He did not attend the Hearing.

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

2.4 The third respondent was Mr Gardiner, a professional architect who had designed and prepared the drawings and specifications for the application for a Building Consent. The Council asked that Mr Gardiner be removed, or struck out, from this adjudication. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that Mr Gardiner is no longer a party in this adjudication.

2.5 The fourth respondent was Mr Barnes, who it was alleged was the project manager for the development. The Council asked that Mr Barnes be removed, or struck out, from this adjudication. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that Mr Barnes is no longer a party in this adjudication.

2.6 The fifth respondent was Mr Vance, a director of Vance Commercial Ltd (now in liquidation), and it was alleged that Mr Vance had a hands-on role in the supervision of much of the construction work. The Council asked that Mr Vance be removed, or struck out, from this adjudication. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that Mr Vance is no longer a party in this adjudication.

2.7 The sixth respondent was Mr Woodhams, who was also a director of Vance Commercial Ltd (now in liquidation), and it was alleged that Mr Woodhams had a hands-on role in some of the construction work, including Unit 1. I had already removed Mr Woodhams by Procedural Order No 7 on 15 December 2005, so that Mr Woodhams is no longer a party in this adjudication.

2.8 The seventh respondent was Equus Industries Ltd ("Equus"), the supplier of the texture coating materials that were applied to the exterior of the units, and who it is alleged provided technical advice and observed the application of the coatings. The Council asked that Equus be removed, or struck out, from this adjudication. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that Equus is no longer a party in this adjudication.

2.9 The eighth respondent was Ms Marion Chiswell, who was the developers on-site representative, and attended all weekly site meetings. It is alleged that she made operational decisions on behalf of the developer, and approved parts of the work. Ms Chiswell cannot be located and has never been served, so that I directed that she should be removed from this adjudication.

2.10 The ninth respondent is Mr Paul Salter, who is the person who applied the textured coatings on this development. I am satisfied that Mr Salter has been served with all the documents relating to this adjudication, but he has never attended any preliminary meetings, nor responded in written form to any of the claims being made against him. He did not attend the Hearing.

2.11 The tenth respondent was Mr Robert Campton, a director of Progressive Building Systems Ltd (now in liquidation) who supplied the Eterpan cladding boards used on this project. It was alleged that Mr Campton assumed personal responsibility for the manner in which the boards were installed. The Council asked that Mr Campton be removed, or struck out, from this adjudication. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that Mr Campton is no longer a party in this adjudication.

3. THE CLAIMS

3.1 The claims that were being made by the Owners in their final Particulars of Claim were as follows;

• Average of two quotations for repairs	$ 152,342.44
• Allowance for work at interface of next unit	5,000.00
• Increased costs since February 2006	7,867.12
• Alternative accommodation during repairs	9,800.00
• Consultants' costs to date	11,017.00
• Consultants' costs during repairs	30,000.00
• Repair costs already incurred	1,186.88
• General damages	30,000.00
Total amount claimed	$ 247,213.44

3.2 At the Hearing I was advised of some adjustments that had been made to the amounts being claimed, so that the claims that I have been asked to consider are as follows (rounded up to the nearest whole dollar);

• Quotation for repairs from Re-Construct Ltd	$ 143,847
• Allowance for work at interface of next unit	5,625
• Increased costs since February 2006	7,474
• Alternative accommodation during repairs	9,800
• Consultants' costs to date	11,017
• Consultants' costs during repairs	33,750
• Repair costs already incurred	1,187
• General damages	30,000
Total amount claimed	$ 242,700

3.3 I am aware that Ms Divich asked me to make amendments to the list that she provided in her closing submissions, as she thought that the $5,000 allowance for work needed at the interface of the next unit had been omitted. On checking the figures, I have concluded that she is mistaken. It appears that the only error was a typing one, because the total already included for the $5,000 allowance, although not the GST content.

4. TECHNICAL ANALYSIS OF CLAIMS

4.1 There is no need for me to make detailed findings on the technical issues in this adjudication, as the experts have prepared an agreed Leaks List, together with an agreed table of repair costs. This Leaks List provides me with agreed answers to the following questions;

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

4.2 The experts have identified that leaks can be classified under five separate headings, although each heading can be further separated into several causes. The five headings are;

- Cladding issues, which have caused by far the most damage,
- Window and recessed flashings,
- Garage floor falls,
- Roof perimeter details,
- Balustrade and decking.

4.3 The allocation of the estimated future repair costs against these five headings is as follows, which includes the allowance for the work at the interface with the next unit and the increased cost component;

• Cladding issues,	$ 74,235
• Window and recessed flashings,	56,501
• Garage floor falls,	12,556
• Roof perimeter details,	1,883
• Balustrade and decking.	11,771
Total repair costs	$ 156,946

4.4 To this list must be added the costs of repairing the leak in the roof and skylight, which has already been fixed by the Owners at a cost of $1,187.

5. OTHER DAMAGES

5.1 As mentioned in paragraph 3.3 above, the Owners are making other claims for damages which, they say, are a direct result of the leaks and consequential repair work.

5.2 **Alternative Accommodation.** The Owners are claiming the costs of alternative accommodation, as they will have to move out of their house whilst the repair works are being undertaken. I consider that it is reasonable to vacate the dwelling whilst the exterior cladding is replaced, as this will entail the removal and reinstallation of windows and exterior doors. I will allow this claim of $9,800 for alternative accommodation.

5.3 **Consultants' costs to date.** The Owners elected to engage a building consultant to investigate the leaks, after it had received the WHRS Assessor's report. The WHRS process of adjudication is fundamentally costs neutral. This means that the parties will usually have to bear the costs of preparing for, and attending the adjudication, which will include the costs of legal representation and experts' costs. The WHRS bears the costs of its Assessor, and all the costs associated with having the Assessor available at the site inspection and Hearing. I think that the Owners choice to have an additional expert's report in support of their claims in this adjudication is a choice that they made knowing that they would probably not recover those extra costs.

5.4 I accept that the Owners are entitled to recover all the reasonable costs of carrying out the repair work, and this will include the costs of writing specifications and calling tenders. Some of the Prendos costs that have already been incurred are associated with this work. I will allow those costs, but I will not allow the costs of the main report, or any costs associated with preparations for this adjudication. I will allow this claim in the amount of $4,000.

5.5 **Future Consultant's costs.** The Owners are entitled to recover the costs of a consultant to supervise the repair work, and ensure that it has been carried out in a complete and proper manner. In this case, I note that the quotation is from a building contractor who has specialised in the repairs to leaky buildings. In my view the proposed costs of $33,750 to supervise repair work that will be done by a specialist contractor and will cost about $150,000 is too high. I will allow this claim in the amount of $20,000.

5.6 **General damages.** The Owners are claiming general damages in the amount of $30,000 for the distress, inconvenience, pain and suffering as a result of finding that their house had serious leaks. It is not clear from the claim whether this amount is for one of both of the Owners, but I have assumed from the evidence that it is a claim made for both of them.

5.7 Jin Hi Son ("Jenny") did not file a witness statement for this adjudication, and I was not given a good reason to explain the absence of evidence from her. Under these circumstances I am not prepared to allow her claim for general damages on the grounds that it is not supported by sufficient evidence.

5.8 Peter Yoon has filed a witness statement, and was available for questioning at the Hearing. Much of his evidence concerned the frequent illnesses of their daughter, Sophia, and the need for Jenny to be absent from her workplace to look after Sophia. He connected Sophia's illness with the dampness in their house, but produced no medical evidence to support the connection.

5.9 Having carefully considered the evidence I am satisfied that Peter Yoon is entitled to a modest award of general damages. They are claiming a total of $30,000, which is presumably $15,000 each. As indicated above, I will not allow the claim by Jenny, and I consider that the claim by Peter is too much under the circumstances. I will set the amount of general damages as being $4,000 for Peter Yoon.

6. THE LIABILITY OF MR AHN

6.1 The Owners are claiming that Mr Ahn was not only a director of the company that developed this property, but also was the vendor of the property to the Owners. They say that he was in breach of the warranty given in the sale and purchase agreement, and that he is liable for all of the damages that the Owners are claiming.

6.2 Mr Ahn chose to take no part in these proceedings. He did not file a Response to the claims made against him. He did not present any witness statements or documents in his own defence. He did not attend the Hearing. Therefore, I have not had the benefit of hearing his side of the story. This does not affect my ability to determine the claims being made against him, as is made quite clear by s.37 of the WHRS02 Act. Furthermore, s.38 of the Act allows me to draw any inferences from these failures that I think fit, and to reach my determinations on the basis of the evidence that is available to me.

6.3 The Owners signed a Sale and Purchase Agreement in the Standard ADLS Real Estate Institute form, 7th edition. Clause 6.2(5) in that Agreement is a warranty by the vendor that all work done or caused or permitted to be done on the property purchased by the Owners, for which a permit or building consent was required by law, was completed in compliance with the building consent and all obligations under the Building Act 1991 (as it applied at that time) were fully complied with.

6.4 The Building Act required all work to comply with the New Zealand Building Code, which was found in the first Schedule to the Building Regulations 1992. The Building Code contained mandatory provisions for meeting the purposes of the Act, and was performance-based. That means it said only what was to be achieved, and not how to achieve it.

6.5 I do not think that it is necessary to repeat in detail all of the provisions in the Building Code, and so will simply summarise by saying that water ingress or leaks into a building contravene parts of E2, E3, B1 and B2 of the Code.

6.6 I find Mr Ahn to be in breach of his warranty in the Sale and Purchase Agreement, and that his breach has resulted in leaks and resultant damage. Therefore, he is liable to the Owners for the full amount of the damages assessed in sections 4 and 5 of this Determination, which are:

Repair costs (para. 4.3)	$ 156,946
Repairs already completed (para. 4.4)	1,187
Alternative accommodation (para 5.2)	9,800
Consultant' costs to date (para 5.4)	4,000
Future consultants' costs (para 5.5)	20,000
General Damages (para 5.9)	4,000
TOTAL	$ 195,933

7. THE PAINTER – MR SALTER

7.1 The Owners are claiming that Mr Salter was the actual on-site applicator of the exterior coating applied to the cladding, and he was responsible for

supervising the work. Therefore, he must be responsible for all of the defects in the exterior coating.

7.2 Mr Salter chose to take no part in these proceedings. He did not file a Response to the claims made against him. He did not present any witness statements or documents in his own defence. He did not attend the Hearing. Therefore, I have not had the benefit of hearing his side of the story. As was the case with Mr Ahn, this does not affect my ability to determine the claims being made against him, as is made quite clear by s.37 of the WHRS02 Act. Furthermore, s.38 of the Act allows me to draw any inferences from these failures that I think fit, and to reach my determinations on the basis of the evidence that is available to me.

7.3 The evidence that I have does indicate that Mr Paul Slater was one of the persons who was responsible for organising the application of the exterior coatings, and may have actually applied some of the coatings himself. He was using materials manufactured by Equus Industries, and he would have been required to apply these materials in accordance with the technical details and written instructions of the manufacturers.

7.4 The experts have suggested that there has been widespread failure in the sheet joints because an inadequate tape or reinforcing mesh was used. This has caused cracking to occur at joint lines, which has allowed moisture penetration into the building. Also, they say, the coatings have been applied over flashings to the extent that they have become embedded within the cladding system. The final criticism that has been made of the exterior coating is that it was not properly finished on the tops of the wing walls, which has been the cause of some of the worst leaks and consequential damage.

7.5 I find that the failures at the sheet joints were caused by defects in the workmanship of Mr Salter or the workers under his direction. I am not satisfied that the positioning of, or the problems with the flashings, were the responsibility of Mr Salter. The failure to properly finish off the coatings at the tops of the wing walls is a defect that has caused me considerable

difficulty, because it would appear from the building consent drawings that it was intended to install a cap flashing over the tops of these walls. I am not sure when the decision was made to omit these cap flashings, or whether Mr Salter was made aware that there were to be no cappings, so that I must conclude that there is insufficient evidence to find that it was Mr Salter's responsibility to coat the top of the walls.

7.6 I find that Mr Salter was negligent in the manner in which he carried out some of his work, and thereby was in breach of his duty of care that he owed to the Owners. His negligence has led to water penetration and resultant damage to the following extent:

Cladding issues (para. 4.3) 50%	$ 37,117
Remaining items calculated proportionally,	
Alternative accommodation (para 5.2)	2,318
Consultants' costs to date (para 5.4)	946
Future consultants' costs (para 5.5)	4,730
General Damages (para 5.9)	946
TOTAL	$ 46,057

8. LIABILITY OF THE COUNCIL

8.1 Although the Council has entered into a settlement with the Owners, it is still a respondent in this adjudication, and it is still necessary for me to make findings as to its liability to the Owners. The matter is make much easier as a result of the Response filed by the Council after the settlement had been reached.

8.2 The Council accepts that it owed a duty of care to the Owners when issuing the Building Consent and undertaking the inspections of the work as construction was underway. The Council also accepts that it was in breach of that duty when it failed to identify a number of the defects during the course of its inspections.

8.3 Therefore, I find that the Council is liable to the Owners for the full amount of the damages assessed in sections 4 and 5 of this Determination (with the exception of the repairs to the roof and skylight), which are:

Repair costs (para. 4.3) less roof	$ 155,063
Alternative accommodation (para 5.2)	9,800
Consultants' costs to date (para 5.4)	4,000
Future consultants' costs (para 5.5)	20,000
General Damages (para 5.9)	4,000
TOTAL	$ 192,863

9. CONTRIBUTION BETWEEN RESPONDENTS

9.1 I now turn to the matter of considering the liability between the remaining respondents. Our law does allow one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

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

9.2 The approach to be taken in assessing a claim for contribution is provided in s.17(2) of the Law Reform Act 1936. It says in essence that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage. What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.

Cladding Issues

9.3 The main burden of responsibility for the problems with the cladding must be borne by those who failed to carry out this work properly. This must mean that Mr Ahn will shoulder the main proportion of the responsibility. I have found that Mr Salter was responsible for causing about 50% of the cladding defects in that the joints were one of the main points of failure. I would set

his contribution at half that of Mr Ahn and others, which means that the proportions will be 4:1 (Ahn:Salter) of the total cost of the cladding defects. When setting these contributions I have carefully reviewed the influence that each party had, or should have had, on the performance of the work; and the contribution that each party made towards the defects that unfortunately occurred. It is a process of reducing levels of responsibility to a statistical formula. There is some case law that considers and sets percentage contributions between builder, engineer and territorial authorities, but there is not much case law that compares site developers, supervisors, labour-only builders, specialist subcontractors, or the like.

9.4 As far as the contribution that should be made by the Council is concerned, Ms Divich has referred me to the recent judgment of Harrison J in *Body Corporate 160361 & Jackson v Auckland City Council & Others*, Auckland High Court, CIV-2003-404-006306, 25 June 2007. His Honour said that in his experience the normal apportionments of liability accepted by Courts in these circumstances are in the range of 75-85% against the builder and 25-15% against the local authority. I am not persuaded by my own experience in cases that involve defective or leaky buildings that such a narrow range should be taken as having been set in concrete by precedent, or has been established by compelling statistical logic.

9.5 The first reported case in New Zealand where apportionment of responsibility was made in a defective building matter was *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 235. In that case the Court of Appeal allowed the Council to recover a contribution from the builder of 80%. This was a case that concerned defective foundations, and was not a leaking building. In WHRS adjudication Determinations there has been a tendency to set the contribution of the Councils (and Certifiers) at around the 20% level, although it has been set as high as 35%. In the recent *Dicks* case in the High Court, the contribution was set at 20% but for no apparent reason except that this was the contribution for defective foundations set back in 1979. However, I would note that Judge Hubble in *Standen v Waitakere City Council & Ors,* Waitakere District Court CIV 2657/04, June 2007, set the Council's

contribution at 60% in a Leaky Home case. This does indicate that the level of contribution is not settled.

9.6 With the greatest of respect to the learned judges in our own Courts, I sincerely believe that each case must be judged on its merits, and in this case I would tend to follow the logic that I applied in the *Ponsonby Gardens* Determinations. When considering the backing to the exterior cladding, I decided that the Council's liability should be at no less than half of that allocated to the builder. This case is not quite the same, although similar. The Council certainly should have noticed that there were no vertical control joints, but this is different from failing to notice a change in the type of backing board being used on site. Under the circumstances of this case I would accept that a 20% contribution is appropriate and I will set the Council's contribution at that level.

9.7 Therefore, the damages relating to the cladding issues will be paid by the respondents to the Owners as follows:

Mr Ahn	64%	$ 47,510
Mr Salter	16%	11,878
The Council	20%	14,847
		$ 74,235

Window and recessed flashings

9.8 This is a matter that must be shared between the Council and Mr Ahn. This is similar to the cladding issues and I will set the Council's contribution at the 20% level. Therefore, the damages relating to the window and recessed flashings will be paid by the respondents to the Owners as follows:

Mr Ahn	80%	$ 45,201
The Council	20%	11,300
		$ 56,501

Garage floor falls

9.9 This matter is similar to the window and recessed flashings in terms of the allocation of contributions. Therefore, the damages relating to the garage floor falls will be paid by the respondents to the Owners as follows:

Mr Ahn	80%	$ 10,045
The Council	20%	2,511
		$ 12,556

Roof perimeter details

9.10 This is a defect that should be borne entirely by Mr Ahn, so that he will pay the full amount of $1,883 to the Owners.

Balustrade and decking

9.11 The two problems with the balustrade were the absence of saddle flashings at junctions with vertical walls, and the inappropriate timber used as the handrail. Both of these are difficult to detect when the work has been completed, without carrying out checks that go beyond the duties that should reasonably been undertaken by a Council building inspector. It is straying into the field of the clerk of works. Therefore, I will set the Council's contribution at a 10% level. Therefore, the damages relating to the window and recessed flashings will be paid by the respondents to the Owners as follows:

Mr Ahn	90%	$ 10,594
The Council	10%	1,177
		$ 11,771

Roof and skylight

9.12 The defects that caused the leak in the roof and skylight, which have already been fixed by the Owners should be borne entirely by Mr Ahn, so that he will pay the full amount of $1,187 to the Owners.

Summary

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

Mr Ahn

Cladding issues,	$ 47,510
Window and recessed flashings,	45,201
Garage floor falls,	10,045
Roof perimeter details,	1,883
Balustrade and decking.	10,594
Repairs already completed	1,187
Alternative accommodation	7,215
Consultant' costs to date	2,945
Future consultants' costs	14,724
General Damages	2,945
TOTAL	$ 144,249

Mr Salter

Cladding issues,	$ 11,878
Alternative accommodation	736
Consultant' costs to date	300
Future consultants' costs	1,502
General Damages	300
TOTAL	$ 14,716

The Council

Cladding issues,	$ 14,847
Window and recessed flashings,	11,300
Garage floor falls,	2,511
Balustrade and decking.	1,177
Alternative accommodation	1,849
Consultant' costs to date	755

Future consultants' costs	3,773
General Damages	755
TOTAL	$ 36,967

9.14 However, as I have already mentioned, the Council has already settled with the Owners, and the Owners have assigned their rights relating to these claims against all of the other respondents to the Council. Therefore, I will not order the Council to make any further payments to the Owners, and I will order Mr Ahn and Mr Salter to make the payments that they would have made to the Owners, to the Council.

9.15 I have found that the Council has a liability to pay $36,967 to the Owners, which liability it extinguished by reaching a settlement with the Owners. However, it would not be appropriate for the Council to make a profit from this Determination, and this was conceded by Ms Divich in her closing submissions. The Council would have already negotiated the recovery of some monies from the other five respondents with whom it has reached a settlement. I will be ordering Mr Ahn to pay $144,249, and Mr Salter to pay $14,716, both payments to be made to the Council. However, any monies that the Council receives from all of the respondents that is in excess of $170,000 plus its reasonable costs incurred after 4 September 2007, must be passed on to the Owners.

10. COSTS

10.1 It is normal in adjudication proceedings under the WHRS Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s.43(1) of the WHRS Act, an adjudicator may make a costs order under certain circumstances. Section 43 reads:

> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by -
>
> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit.

> (2) If the adjudicator does not make a determination under sub-section (1), the parties to the adjudication must meet their own costs and expenses.

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

11. ORDERS

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

11.2 Mr Ahn is ordered to pay to the Council as assignee for the Owners, the amount of $195,933. Mr Ahn is entitled to recover a contribution of up to $14,716 from Mr Salter, and/or a contribution of up to $36,967 from the Council, for any amount that he has paid in excess of $144,249 of the amount of $195,933 to the Council as assignee for the Owners.

11.3 Mr Salter is ordered to pay to the Council as assignee for the Owners, the amount of $46,057. Mr Salter is entitled to recover a contribution of up to $31,341 from Mr Ahn, and/or a contribution of up to $31,341 from the Council, for any amount that he has paid in excess of $14,716 of the amount of $46,057 to the Council as assignee for the Owners.

11.4 The Council will pay to the Owners any monies it receives from all of the respondents that is in excess of $170,000 plus its reasonable costs incurred after 4 September 2007.

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

NOTICE

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

Dated this 25th day of September 2007.

A M R DEAN
Adjudicator

792-2437-Determination