CLAIM NO: 02832

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **DONALD WILLIAM KENNEDY** and **CATHERINE ANN KENNEDY**

Claimants

AND **SCANNER INVESTMENTS LTD**

First Respondent

AND **WELLINGTON CITY COUNCIL**

Second Respondent

AND **CALLY CONSTRUCTION LTD**

Third Respondent

AND **CLIVE LEWIS** trading as **Clive Lewis Draughting Service**

Fourth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 24 January 2007)

INDEX TO DETERMINATION

1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS Act"). The claim was deemed to be an eligible claim under the WHRS Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS Act on 10 March 2006.

1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged and held by telephone on 29 August 2006, for the purpose of setting down a procedure and timetable to be followed in this adjudication.

1.3 I have been required to issue seven 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 may need to be referred to in this Determination.

1.4 The hearing was held on 5 December 2006 in the WHRS meeting rooms at the Copthorne Plimmer Towers, in Boulcott Street, Wellington. The Claimants were represented by Mr Tim Cleary barrister; the Wellington City Council, the second respondent, was represented by Mr Ashley Cornor of Phillips Fox; and Mr Clive Lewis, the fourth respondent, represented himself; no appearance for or by Scanner Investments Ltd (first respondent) or Cally Construction Ltd (third respondent).

1.5 I conducted a site inspection of the property at 9.00 am on 5 December 2006, immediately prior to the start of the hearing in the presence of Mr and Mrs Kennedy, the WHRS assessor and representatives of the respondents.

1.6 All the parties who attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses. Evidence was given under oath or affirmation by the following:

- Mrs Catherine Kennedy, one of the claimants;
- Mr Donald Kennedy, the other claimant;
- Mr Terry O'Connor, a registered architect and building consultant, called by the claimants;

- Mr John Lyttle, the WHRS Assessor, called by the adjudicator;
- Mr Stephen Cody, a team leader in the building consents division of the Council, called by the Council;

1.7 Mr Clive Lewis did not formally give evidence, but he had filed comprehensive submissions and expert observations prior to the hearing, and he did endorse these opinions whilst asking questions of the other witnesses. As none of the parties had any questions to ask Mr Lewis, and as he did not wish to add anything further, he was not required to take the stand.

1.8 All parties were invited to make closing submissions at the hearing after all the evidence had been given. Before the hearing was closed the parties were asked if they had any further evidence to present or submissions to make, and all responded in the negative. I would like to record my thanks and appreciation to all those who attended the hearing for their thorough preparations, and the courtesy that was maintained throughout the hearing.

2. THE PARTIES

2.1 The Claimants in this case are Mr and Mrs Kennedy. I am going to refer to them as "the Owners". They purchased the house and property at 3/93 Washington Avenue, Brooklyn, Wellington, in March 2000, from a Daphne Smith. I understand that they are the second owners of his dwelling, which was built in 1995-96.

2.2 The first respondent is Scanner Investments Ltd ("Scanner"), a company wholly owned and run by Mr Vladimir Barbalic. This company owned the property and arranged for the design and construction of the dwelling in 1995. Neither Scanner nor Mr Barbalic took any part in this adjudication, did not attend any of the preliminary conferences, did not provide the documentation that was required, did not file any Response or submissions in defence of the allegations made against it, and did not attend the hearing.

2.3 The second respondent is the Wellington City Council ("the Council"), which is the territorial authority responsible for the administration of the Building Act in the area. The Council reviewed the application for a building consent, issued the consent, and carried out the inspections during construction. There is no record on the Council's files of a Code Compliance Certificate having been issued for this dwelling.

2.4 The third respondent is Cally Construction Ltd ("Cally"), which is alleged to be the company that carried out the main building work on this house. This company is owned and controlled by Mr Malcolm Ross, according to the information held on the Companies Office records, and Mr Ross was present at our first preliminary telephone conference. Since that conference, the company has taken no other steps to assist in this adjudication. A letter was received by WHRS signed by a Cally Puryer-Ross which appeared to be a Response to the claim, although there was no explanation as to whether this was intended to come from the company or from an individual, as it was written on blank paper in the first person singular.

2.5 The fourth respondent is Mr Clive Lewis who was the person who prepared the working drawings and specifications for the construction of the house. It appears that he was not engaged to supervise or observe the construction work as it was carried out.

3. CHRONOLOGY

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

18 April 1995	Application for building consent for units 3-5;
26 October 1995	Building consent issued for units 3-5;
11 September 1996	Code Compliance Certificate issued for unit 4;
28 March 2000	Owners settle purchase of property (unit 3);
November 2001	Leak internally from shower cubicle;
December 2003	Leak through Lounge ceiling;
1 November 2004	Owners make application to WHRS;
6 December 2004	WHRS Assessor report completed;
10 March 2006	Owners file Notice of Adjudication;
31 October 2006	WHRS Assessors addendum report completed.

4. THE CLAIMS

4.1 The original claims made by the Owners in their Notice of Adjudication (10 March 2006) were for the estimated costs of the repairs of $15,450.00 exclusive of GST, plus mention of general damages in an amount to be determined by the adjudicator.

4.2 These claims were amended in the Amended Adjudication Claim (6 October 2006) to remedial work of $79,000.00, whilst no mention was made of any claim for general damages. Therefore, I will be addressing this revised claim for the estimated value of the repair costs, which includes for professional fees and contingencies, as detailed in the estimates by Octa Associates (submitted as an appendix to Mr O'Connor's report).

4.3 The claims against Scanner are in tort and based on allegations of negligence. The Owners say that Scanner owed them a non-delegable duty of care to ensure that all building work was carried out in compliance with the building regulations. They claim that it breached that duty by failing to carry out, or have carried out, the building work in a compliant manner.

4.4 The claims against Cally are similar, in that the Owners say that it was negligent in carrying out its work, or ensuring that its work was carried out in compliance with the building regulations.

4.5 The claims against the Council are also based upon allegations of negligence. The Owners say that the Council was in breach of its duty of care owed to them by failing to check that the building consent documents were adequate to prevent leaks, and then failing to properly inspect the work as it was progressing.

4.6 The claimants are not actively pursuing any claims against Mr Lewis, but are relying on the claims as articulated by the Council. The Council claims that if the details in the design of the work are found to be deficient, then Mr Lewis must be liable for any negligent design work that has caused the leaks.

5. FACTUAL ANALYSIS OF CLAIMS

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

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

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

5.3 The WHRS Assessor has identified in his Leaks List that there are ten areas or locations in which it was probable that moisture was getting into this dwelling. Therefore, I will consider the following areas or locations.

1 & 2. Deck to party wall junction – both upper and middle decks;
3 & 4. Deck to western wall junction – both upper and middle decks;
5 & 6. Doors leading on to both upper and middle decks;
7. Parapet in north-west corner;
8. Parapet on southern elevation;
9 & 10. Outside edges of both upper and middle decks;

5.4 I received evidence from three independent experts in this adjudication, as well as Mr Lewis who, although he was a respondent in this adjudication, I was prepared to allow to give his opinion on technical matters because he has valuable experience in the design of buildings. There was a high level of agreement between these experts. This does make my task slightly easier, as it has reduced the number of technical matters on which I am required to make a determination.

5.5 The experts all agree that there are currently leaks in all of the areas and locations mentioned in the Leaks List, with one exception. They all agree that there is no evidence of moisture penetration in location No 8 (parapet on southern boundary), although Mr Lyttle thinks that it is only a matter of time. Under these circumstances I will not be considering Leak No 8 any further as it is outside my jurisdiction under the WHRS Act.

5.6 The experts are also in general agreement as to the causes of all of the leaks. I will summarise the general findings:

Leaks 1 & 2 Moisture entry at the junction of the deck and the party wall is caused by a failure to adequately flash the complex junction at the front of the decks. The bottom of the polystyrene where it meets the deck is not sealed.

Leaks 3 & 4 The leaks at the western ends of the decks, where they abut the house, are caused by similar problems.

Leaks 5 & 6 The worst leaks were initially found at the sill of the upper deck doors, and were caused by a combination of an unsealed window frame junction member, and no adequate flashings at the sill and jambs. This was later found to be the situation with all three doors opening onto the middle and upper decks.

Leak 7 As with other leaks, this was caused by a failure to adequately flash the parapet at its junction with the western wall. The bottom of the polystyrene was not sealed, and water is able to enter at the plaster/fascia junction.

Leaks 9 & 10 The front edge of the two decks is finished by the liquid applied membrane (LAM) being applied over a timber fillet that is intended to form a drip mould along the edge. The LAM has not been properly applied and does not adequately cover the front edge of the plywood deck.

5.7 Mr Lyttle has had the proposed repair work costed by Ortus Project Economics, a firm of professional quantity surveyors. The other experts did not disagree with these levels of costs, and I have taken it that they agree that these estimates are appropriate for the scope of work outlined in Mr Lyttle's Addendum Report. However, Mr O'Connor does not accept that the targeted repairs suggested by Mr Lyttle will repair all the damage that has been caused by these leaks. He is of the opinion that a partial re-clad will be necessary to the north elevation, and the rear portion of the western elevation. Therefore I now need to decide whether the targeted repairs (as proposed by Mr Lyttle, and accepted by Messrs Cody and Lewis) will satisfactorily repair the damage and stop the leaks, or whether a partial re-clad will be necessary (as proposed by Mr O'Connor).

6. TARGETTED REPAIRS OR RECLAD?

6.1 Mr O'Connor is of the opinion that the extent of damaged framing is probably greater than that assumed by Mr Lyttle. He points to the elevated moisture

levels at the ground floor level as a clear indication that the leaks higher up the building are gravitating down through the wall framing. He says that this means that a considerable area of framing has been affected by moisture over a considerable period of time. His conclusion is that there is a large area of framing that must be checked, as much of this framing could have been damaged to the extent that it needs replacing.

6.2 The experts have had every opportunity to inspect and carry out tests on this building. Only Mr Lyttle has seen fit to take cutouts so that he could inspect the framing timber, and take samples to determine the level of deterioration that it had suffered. Therefore, the conclusions that Mr O'Connor has reached, have been reached largely on the testing that was carried out by Mr Lyttle. As it is well known, the testing by taking moisture levels will not tell you the state of the timber, or whether it is treated, or whether it has been damp for a short or long time.

6.3 Having carefully considered the evidence and the competing opinions of the experts, I have come to the conclusion that the opinion of Mr Lyttle is to be preferred. The leaks can be stopped, and the resultant damage can be properly repaired, by carrying targeted or localised repairs. I am not convinced that Mr O'Connor is correct in the conclusions that he has reached on this house about the extent of the probable damage.

6.4 Another matter in which the experts were not completely in agreement was whether the repair work could be carried out without a Building Consent. Both Mr Lyttle and Mr O'Connor thought that a Consent was essential, whereas Mr Cody suggested that the work could be done without a Consent by virtue of Schedule 1 of the Building Act 2004. The Act reads;

> A building consent is not required for the following building work:
>
> (a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 1976:

6.5 On balance, I think that Mr Cody may well be correct. However, I also think that the Owners would be fully justified in applying for a Building Consent for the repair work, so that the Council's building file for this property would clearly

show that the leaks had been repaired in a professional manner and in a manner that had been approved by, and signed off by, the Council.

7. REPAIR COSTS

7.1 The estimated repair costs for targeted repairs have been provided by Mr Lyttle as a part of his Addendum Report. The total amount is $45,500.00 plus GST. Neither of the other experts has criticised these costings. I have looked through the calculations and I consider that these estimates are reasonable and will adopt them for this adjudication. There are, however, some matters that have been raised by the respondents that do need to be considered.

7.2 **Leak 8**. As mentioned in paragraph 5.5 of this Determination I found that this was not an actual leak, and was outside my jurisdiction. Therefore, I will be deducting the repair costs for the work associated with Leak No 8, which amounts to $905.00 plus a proportion of P & G costs, margins, fees and the contingency sum, making a total of $1,943.00.

7.3 **Betterment**. Mr Cornor made submissions on the need to reduce the amount of remedial costs on account of the Owners being the beneficiaries of betterment. Specific submissions were made on the need to adjust the cost of the cavity (in the event that I found that a re-clad was justified) and painting costs, which I will consider below.

7.4 The issue of betterment is often raised in building disputes and WHRS adjudications. The arguments from both sides are often finely balanced, and I believe have been excellently outlined in the judgment of Fisher J in *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99. After covering the authorities, he concluded on page 108:

> I accept the logic of an approach which makes a deduction for betterment only after allowance for any disadvantages associated with the involuntary nature of the plaintiff's investment eg interest on the premature use of capital to replace a wasting asset which would at some stage have required replacement in any event.

7.5 I propose to adopt the logic of Fisher J and apply it, as best as I can, to the situation in this dwelling. However, the remedial costings do not include for repainting the entire house, but only the repaired areas

7.6 The estimated cost of the external painting is about $2,185.00. The house is now ten years old and has not been repainted since it was first built in 1996. A realistic life expectancy for exterior paintwork in this area of Wellington would be about eight years, so that it is well past the time that it should have been repainted. The question is how much of these painting costs is betterment.

7.7 This matter was considered by me in the WHRS adjudications known as "Ponsonby Gardens". I found that to paint an existing previously painted surface in good condition would cost less than painting a new and previously unpainted surface. There would be no sealer coat, and probably one less top coat. I concluded that the Owners were entitled to recover the extra cost of painting on the new plasterwork over and above the cost of repainting after a normal life. I assessed these extra costs as being 55% of the total costs.

7.8 I can see no reason for coming to different conclusions in this adjudication. Therefore, I will allow the Owners to recover 55% of these painting costs. The remaining 45% will be treated as being the betterment gained by the Owners.

$2,185.00 x 45% = $983.25 deduction

7.9 **Summary of Repair Costs.** I have found that the following costs should be accepted as remedial or repair costs for the various leaks that have occurred in this house:

• Total amount claimed (see para 7.1)		$ 45,500.00
• Deductions		
- Leak No 8 (para 7.2)	$ 1,943.00	
- External paint (para 7.8)	983.25	2,929.26
		$ 42,570.74
• Add GST at 12.5%		$ 47,892.09

7.10 **Allocation of Repair Costs**. It is necessary to allocate the repair costs against the various leaks or leak locations. Mr Lyttle has made a realistic allocation as a part of his Leaks List. I say "realistic allocation" because it is not possible to make a finite allocation. Several of the leak locations could have contributed to the same areas of damage. Therefore, it is only possible to make an assessment.

7.11 I have used Mr Lyttle's figures, and adjusted them for the two deductions mentioned above, and then added GST. The allocation is as follows:

Leak areas 1 and 2	13,634.86
Leak areas 3 and 4	5,794.81
Leak areas 5 and 6	16,556.33
Leak area 7	2,897.40
Leak areas 9 and 10	9,008.69
	$ 47,892.09

8. SCANNER INVESTMENTS LTD

8.1 The Owners are claiming that Scanner was the developer of this property, and it owed all subsequent owners of the dwelling a duty to use reasonable skill and care to oversee the building work and to make sure that it complied with the requirements of the Building Act 1991. They say that it has been held that builders and developers cannot avoid that duty by delegation to other contractors or other persons.

8.2 Mr Cleary submitted that *Bowen v Paramount Homes Ltd* [1977] 1 NZLR 394 held that builders/developers had a non-delegable duty of care to subsequent owners of the property, and this has been followed in numerous High Court and WHRS determinations. I accept this submission, and suggest that the situation was clearly established by the Court of Appeal in *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, when Cooke J said, at page 241:

> "There appears to be no authority directly 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."

8.3 As I have already mentioned, Scanner took no part in these proceedings. I am satisfied that the company was properly served in terms of s.56 of the WHRS Act, and that it had every opportunity to present its side of the story. This situation is covered by ss.37 and 38 of the WHRS Act, where it states that my power to determine a claim will not be affected by the failure of a respondent to serve a response under s.28, or the failure of a respondent to provide specific information requested, or the failure to attend the hearing. Under these circumstances, I am permitted to draw any inferences that I may think fit, and determine the claim on the basis of the information available to me.

8.4 I understand that Scanner owned the property on which these three town houses were built, and that it was Scanner that applied for the Building Consent. I am not certain whether Scanner employed a project manager, or employed its own employees to organise and supervise the design and construction work. It is quite possible that Scanner was more than just a developer, and may in fact have been the head contractor or builder. If this were the case then its duty to take care has also been firmly established, as can be seen by reference to two reasonably recent court cases:

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

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

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

> I look first as [the Builder's] position. In this respect the law can be stated as follows:
>
> 1. The builder of a house owes a duty of care in tort to future owners.
>
> 2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.

8.5 Regardless of how it may have organised its affairs, I am satisfied that Scanner was a "hands-on" developer actively involved in organising the building work, which had a duty to ensure that the work on this dwelling complied with the requirements of the Building Code.

8.6 Clause E2 in the Building Code provides that buildings shall be constructed to provide adequate resistance to the penetration by and the accumulation of moisture from the outside. In other words, buildings must be built so that they do not leak. This building leaks, which indicates that the work did not comply with the Code.

8.7 I find that Scanner was negligent in the manner in which it organised, carried out or supervised the building work on this project, and therefore was in breach of the duty of care that it owed to the Owners. Its negligence had led to water penetration and resultant damage to the extent summarised in paragraph 7.7 of this Determination, or a total of $47,892.09.

9. WELLINGTON CITY COUNCIL

9.1 It is claimed by the Owners that the Council owed them a duty of care when carrying out its statutory obligations under the Building Act. They claim that the Council was in breach of this duty by failing to identify inadequate detailing in the application for a Building Consent, and failing to carry out proper inspections during construction which allowed defective work to be carried out.

9.2 It is well established in New Zealand that both those who build houses, and those who inspect the building work, have a duty of care to both the building owners and to subsequent purchasers. This has been established, not only by the cases that I have mentioned when considering Scanner's liability (see paragraph 8.4 above), but also by court cases such as:

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

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

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

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

9.3 It is submitted by Mr Cornor, on behalf of the Council, that the Council's duty of care to the Owners is limited or restricted in the following ways:

- The duty is that of a reasonably prudent building inspector (as stated in *Stieller* - supra);

- The Council's inspectors are not clerks of works (as stated by Hardie Boys J in *Sloper v W H Murray Ltd,* unreported - Dunedin HC, A31/85, 22 Nov 1985);

- The standard of care is the standard applicable at the time of the inspections (as stated by Cooke P in *Askin v Knox* [1989] 1 NZLR 248);

- The Council is not a guarantor, insurer or supervisor (as stated in *Lacey v Davidson*, unreported – Auckland HC, A546/85, 15 May 1986);

- The inspection by Council's building inspectors must be a reasonably careful inspection, albeit not a guarantee (as stated in *Hamlin v Bruce Stirling* [1993] 1 NZLR 374);

- The inspection process by building inspectors is generally a visual one, and they are not expected to undertake a testing programme (as stated in *Otago Cheese Co Ltd v Nick Stoop Builders Ltd*, unreported Dunedin HC, CP180/89, 18 May 1992).

9.4 Mr Cornor then submits that, whilst the above principles apply generally to Council's inspection processes when a final Code Compliance Certificate ("CCC") has been issued, this particular case is different. He says that the Council did not complete the full number of inspections, so that a CCC was not issued in respect of Unit 3. Mr Cleary, for the claimants, does not agree. He says that the Council carried out at least five inspections of this dwelling and the inspectors should have been able to see and detect the defects that existed in the work. He concludes by saying that the Council had already failed to notice the problems and was already in breach of its obligations to take care, and that a final inspection would not have altered the situation, because most of the defects had been covered up by then. Therefore, he says, the fact that the Council may have not got around to issuing the CCC is irrelevant.

9.5 It is a fact that the Council's building file on this property does not include any records that show that final inspections were carried out on either Unit 3 or Unit 5. I was shown the complete record that had been stored on computer files of the Council – 26 pages of printout. Only three of these sheets contained any information that could be described as useful, the rest being generously described as gobble-de-gook. The information shown as records of the field inspections was spartan and, from my experience of inspecting such files, only partially complete. For example, the records show that an interim CCC was issued for Unit 4, but there was no hardcopy record of this Certificate. As a result, I would conclude that the records are incomplete and it would be imprudent to place too much reliance upon them.

9.6 However, I cannot overlook that there is no record of a final CCC having been issued for this dwelling, and that it would be quite inappropriate for me to assume that a CCC had been issued and then mislaid, when there is no evidence of its existence. Therefore, I must conclude that the developer and/or builder had failed to apply for a final inspection, and that the Council had never been approached to carry out its final inspections.

9.7 Counsel for both the Owners and the Council have made very helpful submissions on the important point of the type and thoroughness of Council's inspections. However I am not persuaded to move away from the fundamental question that I need to ask in relation to each particular leak location. The question is whether a prudent building inspector, carrying out the inspections and tests that should have been done by a prudent inspector in 1995-96 up to the pre-line inspection, should have noticed or detected the particular defect. The words of Greig J in *Steiller* should also be borne in mind "the standard of care can depend on the degree and magnitude of the consequences which are likely to ensue."

9.8 **Issue of Building Consent**. The claimants are making a number of allegations about the adequacy of the drawings and specifications submitted by the developers for a Building Consent. I will consider that series of allegations now.

9.9 It is claimed that the Council failed to identify the following points at the time when the building consent was issued:

- No, or inadequate, door sill flashing detail (plan A7A, detail 5);
- No head flashing to doors (plan A7A);
- Insufficient detailing of complex junctions where the decks met the party wall (plan A5A);
- Poor parapet detailing (plan A4A).

9.10 One of the difficulties that I have with these claims is that I am sure that I do not have all the documentation that was submitted for the Building Consent. Mr Lewis told me that there was a full specification that was prepared to accompany the drawings, but this was not produced before me. Furthermore, I was only shown drawings A4A, A5A and A7A – which quite clearly was only a part of the full set of drawings. The Council would have required structural, drainage and plumbing drawings, as well as bracing calculations and the like.

9.11 These buildings were designed to be clad with an exterior insulation finish system ("EIFS"), which is a system normally comprising XEPS expanded closed cell polystyrene, coated with a polymer modified plaster. There were several systems on the market in 1995-96, but each system had a set of technical data sheets that showed how to fix and install the products, and how to finish the EIFS system around openings, penetrations, corners or exposed fair edges. By specifying an EIFS system, and requiring the builders to build in accordance with the manufacturers' data sheets, a designer could legitimately avoid drawing every single detail. It is my view that this has happened in this case, and that the specifications would confirm that situation.

9.12 The sill detail shown on drawing A7A at detail 5, shows a set-down at the edge of the deck, with the Butynol or Traffigard dressed over a fillet and up and under the door sill. This was considered in 1995 to be an adequate detail to prevent moisture getting underneath the sill. For a sill flashing to work effectively it would need to be in the form of a sill tray, with turn-ups at the back and ends. This may have been the usual method with timber joinery, but not with aluminium joinery. I do find that this detail was inadequate at the time that this dwelling was constructed.

9.13 The allegation is that there is no head flashing shown to the doors. However, detail 1 on drawing A7A shows and describes a “powder coated al(uminium) flashing to match window”. This detail not only applies to windows, but also to the doors – refer W13, W33 and W23 for example. Therefore, I will not allow this claim.

9.14 It is claimed that the information shown on drawing A5A is insufficient to show how it was intended to construct the complex junctions between the decks and the party walls. I must presume that the claim refers to the front intersections, as the detail of the junction of deck to party wall is a normal deck-to-wall detail. However, drawing A5A is the 1:50 floor plans and cross sections, and it would not be normal to try and show full detailing on these small-scale plans. I did note that the way in which the front junctions at the upper level had been constructed on site was not the same as shown on the drawings. The builder appears to have installed a small over-capping of polystyrene, and this is the detail that has been criticised by Mr Lyttle. In conclusion, I do not find that the information shown on this drawing is inadequate.

9.15 The final claim is that the parapet detailing shown on drawing A4A is poor. This drawing shows the site layout and building elevations to a scale of 1:100. Once again, this is a small-scale drawing which adequately shows the intended shape of the building. The manner in which the parapets have been drawn is not abnormal or inadequate for this type of drawing.

9.16 I am not persuaded that the Council was negligent in the manner in which it allowed the Building Consent to be issued for this building project. The documentation submitted by the developer/builder was not inadequate in any of the ways alleged by the Owners.

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

9.18 **Leaks 1 and 2** It was Mr Cody’s opinion that it was unlikely that these details would have been completed at the time when the Council’s inspectors carried out their pre-line checks. The other experts disagreed, saying that it was usual

for the external cladding to be substantially complete when the pre-line inspections took place. I prefer the view of the other experts. However, I am not convinced that the inspectors would have been able to detect that this detail was going to eventually leak. I do not find that the Council's inspectors were negligent when they failed to notice that the work had not been properly completed.

9.19 **Leaks 3 and 4** These leaks are very similar to Leaks 1 and 2 in that it is the method in which the EIFS system has been finished at the junction with the front of the decks. My conclusion is the same as for the last item. I do not find that the Council's inspectors were negligent when they failed to notice that the work had not been properly completed.

9.20 **Leaks 5 and 6** One of the reasons for the moisture penetration through these windows was the failure to properly seal the aluminium window-jointing member. The WHRS Assessor temporarily fixed this when he visited the dwelling in late 2004. This failing would not have been able to have been detected by the Council's inspectors, as it would have appeared all right from an external visual inspection. The other cause of leaking around these doors (and windows) was the failure to properly seal underneath the sill member. The experts did not completely agree as to whether the absence of a sill flashing was the main problem, or a problem with how the LAM had been completed under the door sill – and whether it had in fact been taken under the sill. Whichever it is, a reasonably prudent inspector could not have noticed it in 1996, and the detail was quite acceptable at that time. I do not find that the Council's inspectors were negligent when they failed to notice that the work had not been properly completed.

9.21 **Leak 7** This was a defect that should have been noticed by the Council's inspectors, and it was reasonably easy to detect. I do not accept the view offered by Mr Cody that this work was likely to have been incomplete at the time of the pre-line inspection. I think that the evidence shows that it had probably been finished at this stage of the work. I find that the Council was negligent in failing to notice this problem, and failing to require the builders to correct the problem.

9.22 **Leaks 9 and 10** Mr Cody told me that he thought that it was most likely that the LAM would not have been completed at the time of the pre-line inspection.

I do not agree with this conclusion. In my view, it is much more likely that the LAM was applied in a single process so that unnecessary joins were not made in the membrane. The turn-ups at the walls and under the doors must have been completed prior to the fixing of the polystyrene and the aluminium joinery, which indicates to me that the LAM was applied before the polystyrene and joinery were fixed. At the time of the pre-line inspection, the external cladding and the aluminium joinery would be in place, which means that the LAM would have been applied.

9.23 Mr Cody also thinks that the application of LAMs is a specialist field, and that Council's building inspectors would not have the skills to know whether the membrane had be applied correctly or not, save as to obvious defects. I would accept that opinion as a general proposition, and if the defect lay in the method of application (number of coats, thickness, thinning or the like) then it is unreasonable to expect the inspector to pick up on these defects. In this case, however, the defect is in the way that the LAM was finished at the front edge of the decks. It is not that difficult to view the problem, although I am aware that the WHRS Assessor did not pick this problem up during his first inspection. On balance, I am satisfied that the Council's inspector was negligent in failing to notice this problem, and failing to require the builders to correct the problem.

Conclusion

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

Leak area 7	$ 2,897.40
Leak areas 9 and 10	9,008.69
	$ 11,906.09

10. CALLY CONSTRUCTION LTD

10.1 The Owners are claiming that Cally was the main builder of the three townhouses that were built on this property in 1995-96. The existence of a duty of care between builders and subsequent purchasers has been clearly established in New Zealand, as I have already mentioned above.

10.2 It is submitted that the standard of care required of a builder in performing his services is the care reasonably to be expected of skilled and informed members of his trade or profession judged at the time the work was done. I accept that this is a fair generalisation of the required standard.

10.3 As I have already mentioned, Cally took little part in these proceedings. I am satisfied that the company was properly served in terms of s.56 of the WHRS Act, and that it had every opportunity to present its side of the story. As I have already remarked when considering the non-participation by Scanner, the situation is covered by ss.37 and 38 of the WHRS Act, where it states that my power to determine a claim will not be affected by the failure of a respondent to serve a response under s.28, or the failure of a respondent to provide specific information requested, or the failure to attend the hearing. Under these circumstances, I am permitted to draw any inferences that I may think fit, and determine the claim on the basis of the information available to me.

10.4 In his letters to WHRS, Mr Puryer-Ross provided the following information. He said that Cally was employed to do labour-only carpentry on this project, which involved boxing for concrete, all timber framing, ply and flooring, fascias, installing windows and doors, and hardware. He said he was a sub-contractor, but did not say to whom. It is unfortunate that he did not attend the hearing so that he could expand on this information, or answer questions about the persons who were responsible for the supervision and management of the building work.

10.5 The application for the building consent listed Cally as the “builder”. It is not uncommon in the residential construction industry in New Zealand for the main carpentry contractor on site to be engaged on a labour-only basis. This contractor is often the person who calls for Council inspections, arranges for the supply of materials (on the developers account), co-ordinates the other trades (such as the roofer, plumber, electrician) and generally undertakes the on-site tasks of the “builder”.

10.6 Mr Puryer-Ross says:

> “As a subcontractor I was employed to take orders; follow the plans, receiving instruction from the developer, owner and council. I follow orders and I get paid; if not I don’t. . . It was not my job to spec

anything from timber grades to product used, ie plaster for hot, dry, climates, not heavy rain, high winds!"

10.7 With respect, this is not quite correct. A builder, and this can extend to most of the trades working on a building site, is obliged to carry out the building work in accordance with the Building Consent and the requirements of the Building Code. He is responsible for his own work. If he carries out his work in a negligent manner, he must bear the consequences. He cannot hide behind the skirts of a developer or an owner, and should not blindly follow orders. It is no defence to say that he was instructed to carry out work in a negligent manner.

10.8 I find that Cally had a duty to take reasonable care when carrying out building work on this project. I find that Cally was not employed as a project manager and would not be responsible for supervising the work done by other trades. However, Cally was employed to co-ordinate the on-site activities, and this will mean that it would be responsible for ensuring that there were no obvious defects in the building. It is now necessary to review each of the leak locations that have caused damage to the building to ascertain whether Cally was in breach of its duty of care.

10.9 **Leaks 1 and 2** Cally constructed the timber framing which forms the substrate for the EIFS system. The problem with this junction has been exacerbated because it has been constructed in a more complicated manner than indicated on the drawings. However, the leaks have been caused by the detailing selected by the cladding contractor, and the failure to cap the protruding section. I do not see that Cally should be held responsible for these types of defects in the work of the cladding contractors.

10.10 **Leaks 3 and 4** These leaks are very similar to Leaks 1 and 2 in that it is the method in which the EIFS system has been finished at the junction with the front of the decks. My conclusion is the same as for the last item. I do not find that Cally should be held responsible for these defects in the work of the cladding contractors.

10.11 **Leaks 5 and 6** Cally installed the windows and doors. One of the causes of the leaking was the failure of the window supplier to properly seal the junction of the door and window frames at the aluminium jointing member. Cally was entitled to assume that the window supplier had sealed all such joints and

junctions as a part of the window manufacturing process, and the seals are not readily visible. The other cause of leaks around these doors is at the sill, and the inadequate method of protection under the sill members. Cally should have checked that the LAM had been applied under the sills before fixing the windows, and I find that Cally's failure to notice this defect was negligent.

10.12 **Leak 7** This is a defect in the method in which the external cladding system has been installed at the end of the parapet. I do not find that Cally should be held responsible for these defects in the work of the cladding contractors.

10.13 **Leaks 9 and 10** The defect is in the way that the LAM was finished at the front edge of the decks. Cally was responsible for laying the ply decking and for the fixing of the timber fillet along the front edge of these decks. It was not a clever way to finish off these decks, and would make it very difficult for the LAM applicator to produce a weather-tight front edge. Cally was negligent in the way it did this work, as it was bound to allow moisture to track back into the plywood decking and adjacent timber framing.

Conclusion

10.14 I find that Cally was negligent in the manner in which it carried out the building work for which it was responsible for on this project, and therefore was in breach of its duty of care that it owed to the Owners. Its negligence had led to water penetration and resultant damage to the following extent:

Leak areas 5 and 6	16,556.33
Leak areas 9 and 10	9,008.69
	$ 25,565.02

11. CLIVE LEWIS

11.1 The only claims being made against Mr Lewis are being made by the Council. It says that, in the event that the Council is found to have any liability for defective detailing in the Building Consent drawings and specifications, then Mr Lewis must also bear some liability.

11.2 I have already found that the Council was not negligent in the manner in which it allowed the building consent to be issued, or that the documentation was

inadequate in any of the ways alleged by the Owners. Refer to paragraphs 9.9 to 9.16 inclusive. It must follow that the claims against Mr Lewis must fail for the same reasons.

12. CONTRIBUTORY NEGLIGENCE

12.1 Mr Cornor has made submissions on the defence of contributory negligence, in that the Owners' own negligence has directly caused or contributed to all or part of the Owners' own losses. The respondents are saying that the Owners have been negligent in the following ways:

1. Failing to take steps that should have been taken by reasonably prudent purchasers;

2. Failing to maintain or carry out regular checks on the exterior cladding and joinery of the dwelling;

3. Failing to undertake necessary remedial works.

12.2 This defence relies upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1) which states:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that –
>
> (a) This subsection shall not operate to defeat any defence arising under a contract:
>
> (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

12.3 "Fault" is defined in s.2 in this way:

> Fault means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

Failing to act as reasonably prudent purchasers

12.4 It is submitted by Mr Cornor that the Owners, when purchasing this property, were concerned about the workmanship of the garage ceiling. They inserted a condition to allow them to satisfy themselves that the workmanship (of the ceiling) was up to par. This indicates that the Owners were concerned about the workmanship in the dwelling to the extent that they made the purchase conditional. He submits that reasonable purchasers in the position of these Owners would have contacted the Council to find out further information about the dwelling and its construction history. He says that a simply enquiry to the Council would have revealed the absence of a CCC, thus allowing the Owners to make further enquiries and negotiate a reduction in the sale price.

12.5 In the Council's written Response to this claim, it was pleaded that the Owners had contributed to their own losses by failing to obtain a report or other professional assessment of the dwelling prior to purchasing it. In his closing submissions, Mr Cornor conceded that the Owners were under no mandatory duty to obtain a pre-purchase inspection or report on the dwelling. I think that this was a sensible concession, as I have made it known in other WHRS determinations that I do not find that it was essential for prospective purchasers of existing houses to obtain pre-purchase inspection reports in 2001. I have concluded that owners must take the steps that a reasonably prudent purchaser would have been expected to have taken, under all the circumstances.

12.6 In this case, one of the Owners was working in real estate, and had been involved in the housing market for about four years. She told me that she realised the importance of a CCC, but did not have a good reason for not obtaining a LIM from the Council. Essentially, the Owners saw a four-year old house which was presented in a tidy condition, and did not consider that they needed to carry out any further checks (other than check out the garage ceiling) before deciding to purchase. I think that this was imprudent.

12.7 What would have happened if they had obtained a LIM, or checked the Council's building file before committing to an unconditional purchase? It is possible that the Owners may have been decided to not go ahead with the purchase, and thus would have avoided their losses entirely. It is also possible that they could have negotiated a reduction in the sale price on the grounds that there had been no final checks and final clearance given by the Council. Alternatively,

they may have considered it prudent to have engaged a building surveyor to thoroughly inspect the building, which probably would have uncovered some of the problems that they are now faced with. Whichever option they may have chosen, they would have reduced or eliminated their losses.

12.8 I am satisfied that this is a case where the Owners have failed to take all the steps that reasonably prudent purchasers would be expected to take under the circumstances. They should have made some basic enquiries to ensure that the building work was "certified". Therefore, I will allow this claim for a reduction in the damages due to contributory negligence on the part of the Owners, and assess that an amount of about $10,000.00 or 20% of the remedial costs is a reasonable contribution.

Failure to Maintain

12.9 It is submitted by Mr Cornor that the external cladding of the dwelling has not been maintained and this has accelerated the deterioration of the cladding and increased the amount of damage that the dwelling has suffered. He refers me to the BRANZ Appraisal for Insulclad, which he says states that recoating (I think he means repainting) is an important part of any maintenance programme, and needs to be done every 6-8 years.

12.10 The Owners told me that they had washed down the outside of their house every year, but had not carried out any resealing or repainting. It would seem that they have never carried out any preventative maintenance, such as having a tradesman carry out inspections of the roof, parapets or external cladding; or having any cracks repaired in the cladding. When I inspected the dwelling it appeared to me that the previous owners had also never carried out any work to the outside of the building, which was the opinion of Mr Lyttle.

12.11 The evidence suggests that the building had been leaking for some time prior to Mr Lyttle's first report on December 2004, and it was probably leaking at the time that the Owners purchased in March 2000. Therefore, this does not support the argument that the Owners have created the leaks by their failure to repair cracks or repaint the outside of the building. Although it would appear to be a logical assumption that a failure to properly maintain a building would normally lead to deterioration and leaks, the evidence in this case is that the present Owners have not caused the leaks by their own actions, or lack of

action. I find that this particular claim for a contribution from the Owners must fail.

Failure to mitigate

12.12 Mr Cornor submits that the Owners have failed to take any steps to rectify the underlying causes of the leaks after their house was inspected by the WHRS Assessor, and they were advised of his report in December 2004. Furthermore, he says that they have known that the house leaked from November 2003, but have taken no steps to stop the leaks or repair the damage, and now it can be seen that since 2004 the remedial costs have risen from about $15,000 to over $45,000.

12.13 The Owners response to this suggestion is that they had assumed that their claim with WHRS would have been resolved quickly. They also thought that it was probably going to be necessary to leave the house untouched until the respondents had had a chance to inspect. They had not carried out any repairs after receiving the WHRS Assessor's report (in December 2004) for the reasons given by Mr Kennedy, in reply to a question from Mr Cleary;

> **Question** by Counsel: Once you lodged the claim there was some considerable time that elapsed until now – when you lodged the claim how long did you think it was going to take from go to whoa?
>
> **Answer** by Mr Kennedy: We thought that we would have a speedy resolution, given that we watched what was happening with our neighbours in unit 2, and how it seemed that it happened very quickly for them. There was the Council involved and the developer and I suspect the builder. They seemed to get a very speedy resolution. It went to mediation although I am not privy to that as it was confidential, but I just know that they got a resolution, they got the repairs done, a new paint job, and they sold the property. So we saw that happen very quickly from our perspective, so we thought that maybe it would happen like that for us too. Two years later we are here because nobody wanted to talk.

12.14 I think that it is necessary to firstly review the evidence about the increase in the remedial costs between 2004 and 2006. When Mr Lyttle prepared his December 2004 report, he estimated that the repair costs were $15,450.00 plus GST. When he revisited in October 2006, his estimate of the repair costs rose to $45,500.00 plus GST. The initial reaction to these two figures is to assume that the damage has increased over two years by about 200%. However, when

Mr Lyttle was asked to explain the reasons for this increase in repair costs, he told me that there were several reasons;

- He had found that there were more locations in which leaks were detected;

- The cost of repair work had risen generally over this two year period as a result of increases in labour and material prices;

- The 2004 estimates had been prepared by himself, whereas the 2006 estimates had been prepared by a professional quantity surveyor.

12.15 I have had the chance to analyse the figures and a comparison between the two estimates shows that;

- Increases in the cost of labour and materials was shown to have increased by $6,618.00;

- Leaks 1 and 2 increased by $7,015.00, partly because the QS considered that Mr Lyttle's costings were light, and partly because there was found to be a greater area of leaks, but not a greater amount of consequential damage;

- Leaks 3 and 4 increased by $640.00, mainly because the QS considered that Mr Lyttle's costings were light;

- Leak 5 increased by $5,258.00, because the QS considered that Mr Lyttle's costings were light;

- Leak 6, valued at $4,691.00, was not included in the original costings because it was not realised that this door leaked;

- Leak 7 increased by $563.00, mainly because the QS considered that Mr Lyttle's costings were light;

- Leaks 9 and 10, valued at $7,657.00, were not included in the original costings because it was not realised that the front edge of these decks leaked.

12.16 In conclusion, the increase in the estimated costs was because:

- $6,095.00 because the professional quantity surveyor considered that Mr Lyttle's costings did not take into account all of the costs that a remedial builder would consider it prudent to include;

- $6,815.00 because the extent of the work in areas in which leaks had been detected had increased since the 2004 inspection;

- $12,348.00 for new areas of leaking, not noticed during the 2004 inspection;

- $6,618.00 for increases in the cost of labour and materials between 2004 and 2006.

12.17 As can be seen from the above figures, the extent of damage caused by the leaks that were detected in December 2004 has not risen by a large amount, and in the opinion of Mr Lyttle, most of that figure is because he has now realised that his earlier assessment was optimistic. Therefore the strength of this claim for contribution is considerably diminished.

12.18 Mr Cornor has referred me to the WHRS determination in *Hartley v Balemi & Ors* (WHRS claim 1276, 11 April 2006) in which it was found that the owners should contribute between 25% and 50% of the repair costs because of their failure to take any reasonable steps to stop or repair the leaks. I am familiar with that determination as I was the adjudicator for that claim, and do not consider that the circumstances that led to that finding were the same as in the present case. I accept that the Owners were expecting a prompt resolution to their claim, and I am not persuaded that their conduct has been unreasonable under the circumstances. I will not allow this claim for a contribution to be made by the Owners.

12.19 In conclusion, I will allow this claim for a reduction in the damages due to contributory negligence on the part of the Owners, on the grounds that they failed to take all the steps that reasonably prudent purchasers would have been expected to take, and have set the contribution as 20% of the damages suffered by the Owners.

13. CONTRIBUTION BETWEEN RESPONDENTS

13.1 I will now turn to the matter of considering the liability between 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 …

13.2 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.

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

13.4 **Leaks 1 and 2** I have found that only one respondent is liable for these damages, so that Scanner must bear 100% of the damages, after the deduction for contributory negligence. Therefore, the contribution should be:

Total cost of remedial work	$ 13,634.86
Less 20% contribution by Owners	2,726.97
	$ 10,907.89

13.5 **Leaks 3 and 4** As with the previous item, I have found that Scanner must bear 100% of these damages, after the deduction for contributory negligence. Therefore, the contribution will be:

Total cost of remedial work	$ 5,794.81
Less 20% contribution by Owners	1,158.96
	$ 4,635.85

13.6 **Leaks 5 and 6** The responsibility for these leaks must be shared between Scanner and Cally. Scanner must shoulder the liability for the performance of the window manufacturer and the LAM applicator, as well as being responsible for supervision of the entire building process. By comparison, Cally's negligence is minor and I will set the proportions at 3:1. Therefore, the contributions will be:

Total cost of remedial work		$ 16,556.33
Less 20% contribution by Owners		3,311.27
		$ 13,245.06
Scanner Investments Ltd	75%	$ 9,933.80
Cally Construction Ltd	25%	3,311.27
		$ 13,245.06

13.7 **Leak 7** I have found that Scanner and the Council must bear the responsibility for this leak. The developers and/or builders must always take the larger share of responsibility for these sorts of leaks, so that I will set the Council's contribution at 20%. Therefore, the contributions will be:

Total cost of remedial work		$ 2,897.40
Less 20% contribution by Owners		579.48
		$ 2,317.92
Scanner Investments Ltd	80%	$ 1,854.34
Wellington City Council	20%	463.58
		$ 2,317.92

13.8 **Leaks 9 and 10** The main burden or responsibility must fall upon those who organised, supervised and carried out this work, that is Scanner and Cally. Both of these respondents should have realised that this was a bad way to finish off along the front of these decks, and I find that they should make equal contributions. As far as the Council is concerned, I would set its contribution at

20% of the total, or in the ratio of 1:4 with those who actually did the work. Therefore, the contributions will be:

Total cost of remedial work		$ 9,008.69
Less 20% contribution by Owners		1,801.74
		$ 7,206.95
Scanner Investments Ltd	40%	$ 2,882.78
Wellington City Council	20%	1,441.39
Cally Construction Ltd	40%	2,882.78
		$ 7,206.95

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

Scanner Investments Ltd	
Leaks 1 and 2	$ 10,907.89
Leaks 3 and 4	4,635.85
Leaks 5 and 6	9,933.80
Leak 7	1,854.34
Leaks 9 and 10	2,882.78
	$ 30,214.65
Wellington City Council	
Leak 7	$ 463.58
Leaks 9 and 10	1,441.39
	$ 1,904.97
Cally Construction Ltd	
Leaks 5 and 6	$ 3,311.27
Leaks 9 and 10	2,882.78
	$ 6,194.05

14. COSTS

14.1 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.

14.2 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.

15. ORDERS

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

15.2 Scanner Investments Ltd is ordered to pay to the Owners the amount of $38,313.67. Scanner Investments Ltd is entitled to recover a contribution of up to $1,904.97 from the Wellington City Council, and/or a contribution of up to $6,194.05 from Cally Construction Ltd, for any amount that it has paid in excess of $30,214.65 to the Owners.

15.3 Wellington City Council is ordered to pay to the Owners the amount of $9,524.87. Wellington City Council is entitled to recover a contribution of up to $7,619.90 from Scanner Investments Ltd, and/or a contribution of up to $6,194.05 from Cally Construction Ltd, for any amount that it has paid in excess of $1,904.97 to the Owners.

15.4 Cally Construction Ltd is ordered to pay to the Owners the amount of $20,452.01. Cally Construction Ltd is entitled to recover a contribution of up to $14,257.96 from Scanner Investments Ltd, and/or a contribution of up to $1,904.97 from Wellington City Council, for any amount that it has paid in excess of $6,194.05 to the Owners.

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

From Scanner Investments Ltd	$ 30,214.65
From Wellington City Council	1,904.97
From Cally Construction Ltd	6,194.05
	$ 38,313.67

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

Notice

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

Dated this 24th day of January 2007.

A M R DEAN
Adjudicator

792-2832-Determination