CLAIM NO: 3368

UNDER the Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN	**Carole Ann Abraham and Mary Helen Webb**
	Claimants
AND	**Auckland City Council**
	First Respondent
AND	**Peter Raymond Hinton**
	Second Respondent
AND	**Geoffrey Joyce (now struck out)**
	Third Respondent
AND	**Steven Clement Miller**
	Fourth Respondent
AND	**Derek Lloyd Divers**
	Fifth Respondent

Hearing: **21 August 2007**

Appearances: **Ms Macky for the Claimants and First Respondent**
Mr Miller, Fourth Respondent, in person

Determination: **24 October 2007**

DETERMINATION OF ADJUDICATOR

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BACKGROUND

[1] The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the Act") in relation to the dwelling at 1/4 Fitzroy Street, Ponsonby, Auckland. The claim was deemed to be eligible under the Act. The Claimants filed their Notice of Adjudication under s 26 of the Act with the Weathertight Homes Resolution Service ("WHRS") in March 2006.

[2] Initially there were three respondents, but later the Third Respondent was struck out and the Fourth and Fifth Respondents were joined as parties. A conference of the remaining parties was held at the WHRS offices in Auckland on 28 May 2007.

[3] During the lead-up to the hearing I issued seven Procedural Orders to assist in progressing the claim, dealing principally with joinder and removal of parties, but in some there was detailed explanation of the adjudication process including what was expected of the respondents in setting out their particular responses to the claim. The parties were also sent the "Guidance Notes for Parties/Counsel" which fully sets out the WHRS dispute resolution process.

HEARING

[4] I conducted a site inspection of the property on Monday 20 August 2007 in the presence of WHRS Assessor Mr Probett, counsel Ms Macky and the Fifth Respondent Mr Divers. All parties had been invited to attend. The hearing took place the next day, Tuesday 21 August 2007 at the Weathertight Homes Tribunal premises in Auckland City.

[5] It was clarified at the start of the hearing that the First Respondent Auckland City Council had settled the claim brought against it by the Claimants, agreeing to pay $80,429.75 on the basis of taking an assignment of the Claimants' rights against the other respondents, in particular the Second and Fourth Respondents, Messrs Hinton and Miller. In continuing the Claimants' action against these respondents the Council was effectively seeking "to

recover from the Second and Fourth Respondents in particular the Claimants' losses which have been assigned to it, and the entirety of the Claimants' claim less the $80,429.75 paid in settlement".

[6] Therefore both the Claimants and First Respondent were represented at the hearing by counsel Ms Macky, while the Fourth Respondent Mr Miller appeared in person. For reasons set out in paragraphs [39] to [42] below it was not necessary for the Fifth Respondent Mr Divers to attend the hearing.

[7] On the morning of the hearing the WHRS claims advisor received an email from the Second Respondent Mr Hinton indicating that he could not get to Auckland that day as he was "unwell with the flu". He did not formally request an adjournment. After some discussion I decided to proceed with the hearing in his absence on the basis that, while he had not provided a formal response as requested, I knew the thrust of his response to the claim because it was (as I understood the position, having had him present at the afore-mentioned conference of parties) identical to that of his former business associate Fourth Respondent Mr Miller. Mr Miller had at least provided a basic "response" in his letter dated 17 May 2007, and participated in the hearing. In these circumstances I saw no prejudice to Mr Hinton and proceeded in his absence. (See sections 37(a) and 38(a)(b) of the Act)

[8] The witnesses who gave evidence under oath or affirmation at the hearing were the following:

- Carole Ann Abraham, a Claimant;
- Gregory O'Sullivan, the Claimants' expert;
- Steven Clement Miller, the Fourth Respondent;
- Paul Probett, the WHRS Assessor;

[9] The written material making up the documentary evidence upon which my decision is based included: the Prendos report dated 19 November 2004, Mr Probett's WHRS report (completed October 2005), the briefs of evidence of Carole Abraham (with attachments), Gregory O'Sullivan (with attachment),

Richard John Francis Hall (dated 20 August 2007 - with attachment), Paul Probett (dated 16 August 2007) and his addendum (dated 20 August 2007).

[10] Other documents considered were Mr O'Sullivan's "Trade Summary – Remedial Works" (provided for the experts' meeting on 14 August 2007), Mr Probett's "Estimate Summary and Apportionment" dated 15 August 2007, the letter dated 17 May 2007 from the Fourth Respondent Mr Miller, Fifth Respondent Mr Divers' letter dated 30 June 2007 and associated emails, First Respondent Council's initial "Response" dated 25 May 2007, and the "Claimants' and First Respondent's Opening" dated 21 August 2007.

CHRONOLOGY AND PARTIES

[11] I set out below a brief history of the events which have led to this claim.

[12] In "early 1996" the Claimants became interested in purchasing an apartment intended to be built as part of a development in Fitzroy Street, Ponsonby. They signed an Agreement for Sale and Purchase of the property on 1 June 1996, settling the sale and moving in 13 months later on 31 July 1997. In July 1999 they had a problem with water entering the ceiling space which was rectified by Messrs Hinton and Miller. They had no further problems until in early October 2004 they were contacted by a person associated with remediation work being carried out on the neighbouring units 39/39A Brown Street with which they shared a firewall, and as a result they became aware of their dwelling having weathertightness problems.

[13] Over the next month or two they had Prendos Limited ("Prendos") investigate and provide a report, and entered into a contract with Holloway Builders Limited to repair their dwelling. The remediation work was undertaken between April and September 2005. In April 2005 they lodged an application with WHRS; at their request the WHRS Assessor's report was "suspended" until the remediation work was well advanced. His report was completed in October 2005 and the Notice of Adjudication was filed some five months later.

[14] Apparently not all Territorial Authority records are still available but the history of the construction of the dwelling seems to be as follows. Building consent to "erect three townhouses" was lodged on 7 August 1996 (the Architect's drawings being dated May 1996). (It appears from some of the documents that the "three townhouses" are those dwellings now known as 1/4 Fitzroy Street, and 39 and 39A Brown Street.) A "Project Information Memorandum" confirming that the proposed building work could be undertaken dated 28 August 1996 was sent to the builders, and it appears that the building consent was issued towards the end of September 1996. In mid-June 1997 the Council wrote to Mr Hinton advising that a final inspection had been completed, setting out two matters needing attention. On 30 June 1997 an "Advice of Completion of Building Works" was provided to the Council and nine days later a Code Compliance Certificate ("CCC") was issued by the Council. Three months later the Council withdrew that CCC and issued an interim CCC for the Claimants' unit. It seems a CCC was issued on or about 8 March 2001.

[15] The First Respondent Council issued the building consent for the dwelling, carried out the inspections and issued the Code Compliance Certificate. The Second Respondent Mr Hinton and the Fourth Respondent Mr Miller are alleged to be the builder/developers of the property, and the Fifth Respondent Mr Divers was joined as a respondent on the basis that his now liquidated company North Harbour Aluminium (1995) Limited supplied the aluminium joinery (in particular the large road-facing feature window) and that he personally came to the site and took part in its installation. As referred to above the Claimants have settled with the First Respondent Council which has taken an assignment of the claim and is now proceeding in the Claimants' name to recover from the Second and Fourth Respondents.

THE CLAIM

[16] The jurisdictional basis of the claim is that the dwellinghouse at 1/4 Fitzroy Street, Ponsonby is a "leaky building", which is defined in the Act as "a dwellinghouse into which water has penetrated as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used

in its construction or alteration" (s 5). The Claimants rely specifically on the Prendos report and the evidence of its principal Mr O'Sullivan, and also the other evidence, oral and documentary, listed above.

[17] The Claimants are seeking the following amounts:

(a)	Cost of remediation	$ 79,359.00
(b)	Consequential costs	$ 15,599.44
(c)	Interest	$ 13,776.87
(d)	General damages for both claimants	$ 20,000.00
	Total amount being claimed:	$128,735.31

[18] The Claimants seek to recover in tort from the Second and Fourth Respondents as the developer/builders of the property, alleging that they breached their non-delegable duty of care owed to the Claimants.

[19] The claim against the First Respondent Council is also based on the tort of negligence, it being alleged that the Council as the relevant Territorial Authority breached its duty of care to the Claimants in relation to its inspections during construction, and its issuing a CCC .

[20] The First Respondent Council seeks to recover contribution from the Second and Fourth Respondents, pursuant to s 17(1)(c) of the Law Reform Act 1936.

THE DAMAGE TO THE CLAIMANTS' DWELLING AND ITS CAUSES

[21] In this part of the determination I consider the probable cause of the identified leaks, the resulting damage caused by them and the remedial work required. I will not be considering liability nor will I be referring to the detailed requirements of the New Zealand Building Code, although I confirm that the Code's clauses B2 "Durability" and E2 "External Moisture" and the meeting of their objectives is central to this claim.

[22] Prior to the filing of their application to the WHRS in April 2005 the Claimants had sought an "investigative" report with remediation recommendations from Prendos, a company with expertise in these matters. A principal of the company, Mr Gregory O'Sullivan produced a report dated 19 November 2004 and subsequently other material including the "Trade Summary – Remedial Works" and the brief of evidence referred to above. WHRS assigned its assessor Mr Paul Probett to prepare a report on the Claimants' dwelling. He inspected it on 14 April 2005 and notes in the report that its preparation was "suspended" at the request of the Claimants so as to allow for the remedial work (then beginning) to be sufficiently advanced for the full extent of the damage and the actual costs of remediation to be properly assessed.

[23] Therefore the WHRS Assessor's report (dated 3 October 2005) places considerable reliance on information from Prendos, which not only provided the aforementioned November 2004 report but also administered the remediation project. The WHRS Assessor's report includes photographs taken by the assessor and also a large number taken by Prendos personnel during the remediation work.

[24] As a result of his investigations the Assessor concluded there were three broad causes of water entry into the dwelling. They were stated in his report as follows:

(a) "Failure of front rainhead

It is apparent that the dressing of the butyl rubber lining to the internal gutter was not dressed either sufficiently and or permanently enough to stop water tracking around it and entering behind the cladding in the area where the gutter penetrates the front parapet wall.

(b) Failure of cladding to frontage and parapet capping

The cladding at the front has failed at several points where it interfaces with joinery, most notable at the head of the feature window. This has led to damage to the reveals, wall linings and

framing. Additionally there are indications that failure at the change in angle of parapet caps had also contributed to leaks and damage.

(c) Failure of flashings and junctions between apartments at rear of building coupled with inadequate thresholds to balcony joinery

Various photos show flashings have been poorly fitted with insufficient laps and or inadequate attention to junctions between flashing and interfacing building elements."

[25] Mr O'Sullivan's findings and conclusions are set out in considerable detail in paragraphs 23 to 43 of his brief of evidence, and summarised under eight headings in paragraph 49. His paragraph 50 includes a table which lists the aforementioned eight areas and their individual remediation costs. (The table is included in his "Trade Summary – Remedial Works" which he produced for the aforementioned technical conference of experts and which, like all other material being considered in this claim, was circulated to all parties prior to the hearing).

[26] At paragraph 3.2(b) of his brief of evidence dated 16 August 2007 WHRS Assessor Mr Probett states:

> *"In my report on page 13 three causes of damage have been identified. Mr O'Sullivan's summary documents … list eight causes (i-viii). Some of these are felt to be consequential damage rather than specific causes of water entry. However the disparity is more to do with recording methodology than differences of opinion as to how water entered the building. In addition my involvement on site was basically limited to the day of the investigation and it is not unusual for additional causes of damage to be determined during remediation works. Given the limited number of parties at the adjudication I feel it simpler to accept Mr O'Sullivan's cause list. I am comfortable with this approach and feel it will not compromise evidence or result in any unfairness to parties."*

[27] He goes on to record that the damage found is “consistent with what was expected”, that the repair work appeared reasonable and that his “original estimated cost of repairs” and the actual costs incurred were “very close”. In his oral evidence during the hearing Mr Probett confirmed that he agreed with and accepted Mr O’Sullivan’s list of damage and its causes etc.

[28] I am satisfied that Messrs Probett and O’Sullivan are technical experts of wide experience whose evidence in this case is not only consistent but also unchallenged by any respondent, despite the opportunity to do so in writing (as a specific part of the adjudication process) and at the hearing. Accordingly I am satisfied on the balance of probabilities that the defects with this dwelling and the resulting damage which required remediation (and its repair costs) are fairly set out in Mr O’Sullivan’s aforementioned table, which I reproduce below:

(i)	Upper parapet flashings	$17,475.16
(ii)	Boundary parapet flashings	$ 9,662.45
(iii)	Rainwater outlets	$ 7,315.63
(iv)	Window flashings, including the large window and roof light	$20,059.02
(v)	Entrapment at the base or at clamping points, such as boundary joists	$ 6,201.78
(vi)	Failed junctions of balustrade flashings and wall cladding flashings	$11,757.92
(vii)	Failure of control joints	$ 5,850.11
(viii)	The lack of adequate ground clearance at the base of the wall by the meter board	$ 1,036.93
TOTAL		$79,359.00

[29] After careful consideration of the Prendos and WHRS Assessor's reports, the briefs of evidence of Messrs O'Sullivan and Probett, their photographs, the "Trade Summary – Remedial Works" document, Mr Probett's "Estimate Summary", and the experts' oral evidence at the hearing I have come to the conclusion that water was entering the dwelling as a result (in summary) of failure of the front rain head, the failure of cladding to frontage and parapet capping, the failure of flashings and junctions between apartments at the rear of the building coupled with inadequate thresholds to balcony joinery, and lack of adequate ground clearance at the base of the wall by the meter board.

[30] I am also satisfied that as a result of the aforesaid water penetration the dwelling has suffered serious damage as detailed in the Prendos report in particular and well illustrated by the photographs forming part of that report and those of the WHRS Assessor. The dwelling did not comply with the Building Code, in particular clauses B2 Durability and E2 External Moisture, meaning that the original building work did not comply with the mandatory requirements of the Building Act 1991. I accept the evidence of the two experts that the remediation work carried out was necessary and resulted from the damage caused by the leaks, and also that the remediation costs were fair and reasonable.

[31] It should be noted that there was no contrary evidence nor denial of the experts' findings provided by the respondents as to the water penetration, its causes, remediation and its cost. Their positions are set out in the following section.

THE POSITION OF THE FIRST RESPONDENT (AUCKLAND CITY COUNCIL)

[32] In Procedural Order No. 4 (14 May 2007) advising the parties of the "preliminary conference" to be held two weeks later I requested the respondents to provide "a brief response to the claim … identifying what legal, technical and quantum issues (were) agreed or contested". The Council did comply; its "response" dated 25 May 2007 denied liability and indicated it would seek contribution and/or indemnity from the other

respondents if it was found liable. Its denial of liability was on the basis that "its involvement at this property … met the standards of care required of it at the time …".

[33] As referred to above, by the time of the hearing the Council had settled with the Claimants and as part of the settlement they assigned to the Council their "full entitlement to recover damages against Peter Raymond Hinton and/or Steven Clement Miller …". The "Claimants' and First Respondent's Opening" tendered by counsel at the hearing makes it clear that for the purposes of the hearing the Claimants were continuing with their claim against the First Respondent Council as well as Messrs Hinton and Miller. The "Opening"'s paragraph 4 adds that:

> *"The Council seeks to recover a contribution towards the amount it has paid in settlement to the Claimants. The Council also seeks to recover from the Second and Fourth Respondents in particular the Claimants' losses which have been assigned to it, and the entirety of the Claimants' claim less the $80,429.75 paid in settlement."*

[34] Paragraph 30 of the "Opening" requests me "to determine the respective responsibilities of Peter Hinton, Steven Miller and the Council to the Claimants in order to apportion what should properly be borne by the Council of (the $80,429.75 paid in settlement)". It goes on to submit that the "maximum liability the Council should bear should be somewhere in the order of 10% to 15% of the loss, with the developers and builders being concurrently responsible for the balance". Counsel expanded on this point in her oral submissions and cited cases in support.

[35] In this case, especially where there is no formal evidence produced by the Council by way of defence to the Claimants' claim against it, I will base my conclusion when considering the Council's liability on the unchallenged evidence provided in support of the claim.

THE POSITION OF THE SECOND RESPONDENT (PETER RAYMOND HINTON)

[36] Mr Hinton attended the preliminary conference on 28 May 2007 and, together with his former business associate Mr Miller, the Fourth Respondent, did "provide some useful information". However, despite Procedural Order No. 5 and the "Guidance Notes for Counsel/Parties" providing full information on what was required by way of response to a claim from a respondent, he has not provided any written response to the claim and his potential liability to the Claimants. As indicated above I will treat his position as being the same as Mr Miller, with whom he was jointly involved in the building project.

THE POSITION OF THE FOURTH RESPONDENT (STEVEN CLEMENT MILLER)

[37] Mr Miller confirmed at the hearing that his position is as set out in his letter to the Claims Advisor dated 17 May 2007. Relevant parts of that document include:

> *"This house was constructed fully in accordance with the Building Regulations that were current at the 1997 date of construction, and a Code of Compliance Certificate (sic) was issued by the Auckland City Council confirming this fact …"*

[38] He submitted that it was "incorrect while judging this case to attempt to apply the 2002 Building Regulations to a house that was constructed in 1997". He went on to state that:

> *"The developer and owner of this house was Pase Group Limited and my personal role was as one of three builders on site … (A)s builders we were not involved in any exterior cladding or waterproofing work whatsoever. We constructed the foundations and floors, erected the wall and roof framing, and then moved inside the house to work on the interior finishing such as hanging doors etc. All exterior work, and all work of a weatherproofing nature was carried out by other companies and contractors."*

THE POSITION OF THE FIFTH RESPONDENT (DEREK LLOYD DIVERS)

[39] Mr Divers was a director of a now liquidated company which allegedly supplied the aluminium joinery to the dwelling, which included the front road facing feature window. It was alleged that he was onsite and working on the installation of the feature window, which has been identified as contributing to the cause of leaks and damage to the dwelling.

[40] Mr Divers denied that he or his company had any involvement with the dwelling and provided technical evidence in support. Because his involvement was in dispute his earlier application for removal was declined (Procedural Order No.7). However, as the WHRS Assessor was aware of Mr Divers' application (because assessors receive copies of all Procedural Orders), in his brief of evidence dated 16 August 2007 at para 3.2(f) Mr Probett stated that:

> *"It is a requirement for joinery to be identified with a mark to show it complies with NZ Standards and able to confirm that it is designed to withstand specific wind loads. Stickers to this effect are usually fitted to all windows, often on the side of opening sashes……(T)hese often have the name of the manufacturer included in such data."*

[41] At the site inspection on 20 January 2007 the aluminium joinery was closely inspected. A manufacturer's wind zone sticker was found fixed to the top of the left-hand end of the kitchen window frame. That sticker identified the manufacturer of the aluminium joinery as "Nulook", which was not Mr Divers' brand but that of a competitor. Mr Probett carefully examined the sticker and in his "Addendum to Brief of Evidence of Paul Probett" (dated 20 August 2007) he confirmed that "the sticker is aged and starting to delaminate and could not be removed without destroying it". In other words it was a genuine "Nulook" sticker which confirmed Mr Divers' contention that the aluminium joinery was not manufactured by his former company.

[42] On the basis of the manufacturer's sticker found on the joinery I am satisfied that it was not supplied by North Harbour Aluminium (1995) Limited, and

therefore Mr Divers cannot bear any liability to the Claimants and so the claim against him must be dismissed.

LIABILITY OF THE FIRST RESPONDENT (AUCKLAND CITY COUNCIL)

[43] Although it has settled with the Claimants the Council remains a respondent so its liability needs to be considered, and taken into account when deciding the contribution issue.

[44] It is well settled law that a council owes a duty of care to house owners and subsequent owners, in particular regarding the issue of building consents, the carrying out of inspections (if the Council has done the inspections), and the issue of a Code Compliance Certificate. This principle was established by the Court of Appeal in Invercargill City Council v Hamlin [1994] 3 NZLR 513, and confirmed most recently in Dicks v Hobson Swan Construction Ltd & Ors, High Court Auckland, CIV 2004-404-1065, 22 December 2006 (Baragwanath J).

[45] Here counsel for the Claimants confirmed they were claiming against the Auckland City Council "which was the Territorial Authority which issued the building consent for the construction of the house at the property and whose officers carried out inspections of the work during the course of construction culminating in the issue of a Code Compliance Certificate".

[46] Understandably in the circumstances the evidence to sustain the denial of liability made in the aforementioned initial "Response by First Respondent" (dated 25 May 2007) was not forthcoming, but in the interests of completeness I briefly review below relevant established legal principles which underline council responsibility, and apply them to the facts.

[47] The judgment in Stieller v Porirua City Council [1983] NZLR 628 usefully sets the tone:

> *"The standard of care in all cases of negligence is that of the reasonable man (sic). The defendant, and indeed any other council, is not an insurer and is not under any absolute duty*

> *of care. It must act both in the issue of the permit and inspection as a reasonably prudent council would do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensure..."* (emphasis added)

[48] Council inspectors are not expected to identify defects which cannot be picked up by a visual inspection, and indeed they are not clerks of works. Reference may be made to the practice of council officers at the time the dwelling was built but ultimately the courts may conclude that commonsense required something more – in Dicks (supra – para.[116]) Baragwanath J stated that "it was the task of Council to establish and enforce a system that would give effect to the Building Code".

[49] Regarding the issuing of the building consent, in this case the documentation submitted to the Council for the builder/developer was not inadequate for that purpose; in fact the Council sought additional information from the architect (which it presumably obtained) before issuing the building consent so there was no breach of its duty of care in that respect.

[50] Councils have a duty to take reasonable care with their inspections so that they can conclude that there are reasonable grounds for accepting that the provisions of the Building Code have been met. That duty would be breached if there was a failure to carry out adequate inspections and/or a failure to take sufficient care to identify building defects. Did the Council in this case breach its duty of care regarding inspections of the dwelling? To decide it is necessary to consider the causes of water entry identified by the two technical experts Messrs O'Sullivan and Probett.

[51] As quoted in para [26] above the WHRS Assessor Mr Probett accepted the list of eight causes recorded by Mr O'Sullivan and set out in para [28] above. In paras [52] and [53] of his brief of evidence Mr O'Sullivan provided the following conclusion regarding the performance of the Council inspectors:

> *"As for the Council I believe given the nature of the building and the adequacy of construction scaffolding that would have*

been placed, all the upper parapet flashings, boundary flashings and rainwater heads would have been within their clear view and are part of the building envelope and very important to being satisfied on reasonable grounds that E2 – External Moisture has been met. Clearly this did not occur. The plans were very circumspect on the window flashings and the flashings were poorly fitted around windows and the failed junctions and balustrade flashings come within the same parameters. The only issue that I believe was outside the Council's normal inspection and control was the horizontal control joint that they could not have been reasonably expected to note or perceive at the time when this building was built." (emphasis added)

Mr Probett in his oral evidence confirmed that he agreed with the aforementioned conclusions of Mr O'Sullivan.

[52] In other words, of the eight problem areas listed by Mr O'Sullivan he considered that there was only one for which the Council could not bear liability. Accordingly I am satisfied that, with the exception of failing to detect the problems with the horizontal control joints, the Council breached its duty of care to the Claimants as the home owners in that it failed to carry out adequate inspections and/or failed to take sufficient care in those inspections so as to identify the defects which later caused water ingress. Its negligence in carrying out the inspections has led to water penetration and resulting damage, and therefore the Council must be held liable for the cost of repairing the defects in Mr O'Sullivan's table, except for number (vii) ("Failure of control joints"). Subtracting the $5,850.11 cost of remediating that defect means that the remediation costs which can be attributed to the negligence of the Council total $73,508.89. (That is 93% of the total remediation costs)

[53] It follows from this finding that because of the inadequate inspections of the dwelling there was no reasonable ground upon which a building inspector could have been satisfied that the Building Code was complied with in all

respects, and accordingly the Council was also negligent in issuing the Code Compliance Certificate.

LIABILITY OF THE SECOND AND FOURTH RESPONDENTS (PETER RAYMOND HINTON & STEVEN CLEMENT MILLER)

[54] Messrs Hinton and Miller were involved in the development/building work on this dwelling. It is settled law in New Zealand that builders and/or developers have a non-delegable duty of care to build a reasonably sound structure, using good materials and workmanlike practices, in accordance with the Building Code. They also have a duty to supervise the work of sub-trades.

[55] That builders owe this duty of care to owners and subsequent purchasers was confirmed in Dicks (supra). Those who develop and build residential dwellings have a duty to exercise reasonable care to achieve a sound building, both as developer (Mt Albert Borough Council v Johnson [1979] 2 NZLR 234), and as builder (Bowen v Paramount Builders (Hamilton) Ltd [1977] 2 NZLR 394 (CA); Invercargill City Council v Hamlin (supra). In this case, contrary to Mr Miller's assertions in para [37] above, it is clear from the evidence that the dwelling did not comply with the requirements of the "Building Regulations that were current at the 1997 date of construction", namely the Building Code, in particular clauses B2 Durability and E2 External Moisture. The two expert witnesses were in agreement about the failings of the building and that it was a "leaky building" as defined in the Act.

[56] The Claimants seek damages from Messrs Hinton and Miller "as the builder and developer" of the house … on the basis that (they) owe the Claimants a duty of care and that that duty was breached because the house was not constructed with proper care and skill and as such that it breached the Building Code". As referred to above I am treating both respondents' position as being the same: in the words of Mr Miller "the developer and owner of the house was Pase Group Limited" and their "personal role" was "as (two) of three builders onsite" who "constructed the foundations and floors, erected the wall and roof framing, and then moved inside the house to work on the

interior finishing…. All exterior work, and all work of a weatherproofing nature was carried out by other companies and contractors".

[57] It has not been possible to successfully join any of the "other companies and contractors" (including the roofer, cladder/plasterer etc) because the companies have been liquidated/struck off, and/or individuals who may bear personal liability have either not been able to be identified (because the Second and Fourth Respondents no longer hold documentation relating to the project) or there is insufficient evidence about their personal involvement on site to justify their joinder.

[58] Were Messrs Hinton and Miller the "builder/developer" of this dwelling or was it the company Pase Group Limited, as alleged by them? In deciding this fundamental question I start by considering the Council's documents, then Ms Abraham's account of her and Ms Webb's dealings with "the builders", then focus on the documentary evidence about the ownership of the land upon which the dwelling was built.

[59] The Council "Application for Building Consent" dated 6 August 1996 and signed by the architect Jill Armstrong names as "Applicant" "Peter Hinton and Steven Miller". The same document also names them as the "builders". A "Project Information Memorandum" ("PIM") dated 28 August 1996, confirming that the proposed building work could be undertaken, was addressed to the "Applicant" "P Hinton and S Miller". On 18 June 1997 the Council wrote to Mr Hinton care of the architect advising that a final inspection had been completed and asking for two outstanding matters to be dealt with. The formal "Advice of Completion of Building Work" dated 30 June 1997 (being ten months after the issue of the PIM) under the section "Building Consent Information" names the "Owner" as "Pase Group Ltd", and further on in the "Key Personnel Information" section names Pase Group Ltd as "builder". In the final section "Signed by or on behalf of the owner" it is signed by Messrs Miller and Hinton, giving their "Position" as "Owner". The Council file on the project also contains an undated letter from the architect Jill Armstrong to Mr Cartman of the Council which apparently was enclosed with two new sets of prints of one page of the plans (which presumably would

have been required before the building consent was issued on 17 September 1996) in which she invited Mr Cartman to contact for answers to queries Mr Hinton "the builder/developer". So no mention of Pase Group Limited until towards the end of the project.

[60] Secondly, the Claimant Ms Abraham in her brief of evidence tells of her and Ms Webb visiting the building site on Fitzroy Street in early May 1996 where they spoke with "two builders working onsite" who "advised us they owned the land and were building the townhouses on it. This was our first introduction to Peter Hinton and Steven Miller". At the time of this first "meeting" one unit (now 3/4 Fitzroy Street?) had already been built and sold, while next door (now 2/4 Fitzroy Street?) was under construction. After many visits to the site and discussions with Messrs Hinton and Miller the Claimants decided to purchase the third Fitzroy Street unit off the plans, but by this stage Messrs Hinton and Miller had "given the sale to a real estate agent" and so after further discussion over changes to the plan the Claimants signed a Ponsonby Real Estate "Agreement for Sale and Purchase of Real Estate" on 1 June 1996. That document had typed upon it as "Vendor" "P R & T M Hinton" but that was crossed out and replaced by "Pase Group Limited" in handwriting. Ms Abraham makes the point in her brief that "this (was) the first time we were aware of Pase Group". The Agreement for Sale and Purchase is signed as "Vendor" by Messrs Hinton and Miller without reference to the company, or their positions within it.

[61] Attached to Ms Abraham's brief of evidence are copies of two faxes and a letter setting out issues with the building requiring attention, the first fax dated 30 July 1997 being addressed to both Messrs Hinton and Miller, the second fax dated 30 September 1997 to "Peter Hinton – Pase Devpts" (sic), while the letter dated 16 July 1999 is addressed to both gentlemen.

[62] Thirdly, an examination of the relevant documents involving the company Pase Group Limited and those setting out the ownership of the land on which the subject dwelling discloses the following information. The company was registered on 23 August 1995 (until 11 October 2002), with Messrs Hinton and Miller, and Mr Hinton's wife Tresna being directors; these three, together

with G M Joyce were also the shareholders. The registration date means the company was in existence when the Claimants first met Messrs Hinton and Miller, and when building consent was sought in August 1996.

[63] The land's ownership situation and "history" during the 1990's is complex in that a number of titles have issued to reflect the subdivision of the land upon which ultimately five dwellings were built (Units 1, 2 & 3 No.4 Fitzroy Street, and 39 & 39A Brown Street), and the necessary creation of leasehold interests. The witness statement of the Claimant Ms Abraham in its paras [46] to [56] under the heading "Ownership and development of the land/ tracing the titles" lists and describes the various relevant "Certificates of Title" and copies of the "Composite Computer Register" which are attached to her statement. She expands upon the "Development of the land/ building consents etc" in paras [57] to [86] of her statement, some of the contents of which I have already referred to above.

[64] There has been no challenge to her evidence on these matters, and from my perusal of the Land transfer Act documents attached to her statement, and due consideration of the various Council documents and letters listed in para [59] above, I have come to the conclusion that, while Pase Group Limited was registered some months before the 1/4 Fitzroy Street project was formally commenced by the filing of the building consent documents with the Council, its connection with the project at best can be described as "peripheral". It was Messrs Hinton and Miller who were named as "applicant" and "builders" in those documents filed with Council, and there seems to be no reference to the company until near the end of the project. The main thrust of the Council documentation is towards Messrs Hinton and Miller.

[65] It is claimed that the owner of the land was Pase Group Limited. The comprehensive land records, attached to Ms Abraham's statement, set out the ownership history of the land upon which ultimately five dwellings were built, one of which is the subject of this claim. Its Certificate of Title ("CT") is 112C/750 but that was preceded by a number of CT's as the subdivision and "technical" ownership of the total area of land changed over the previous four years from when it was owned by E H Cave Limited.

[66] Focusing on the company, the unchallenged records show that while it took an interest in the land soon after it was incorporated in August 1995, at the time of the sale and construction of 1/4 Fitzroy Street, the subject property, its freehold and leasehold interests were shared with other parties. On 10 July 1996, some five weeks after the Claimants signed the agreement for sale and purchase, CT 106D/648 records the various interests in the land as being held by Pase Group Limited, Mr Miller, Mr and Mrs Hinton, and solicitor Mr Joyce ”as tenants in common in equal shares”, and later that month those interests were transferred to the same parties including the company in various combinations, all of one third, “as tenants in common”. In other words the extent of the company’s interest was one third. Mr Miller and Mr Joyce jointly also held an undivided one third share, as did Mr and Mrs Hinton and Mr Joyce. Subsequent activity involving Pase Group Limited is recorded on the land records, but always in shares with others including Messrs Hinton and Miller.

[67] My conclusion regarding the “ownership” of the subject property is that at the relevant times it was jointly owned by Pase Group Limited, Messrs Hinton and Miller (and Mrs Hinton and Mr Joyce), the company’s share never exceeding one third. The combined share of Mr Miller and Mr Hinton (without his wife’s share) was similar to that held by the company. Pase Group Limited and Messrs Hinton and Miller were *co – owners;* they shared the freehold and leasehold interests in the subject dwelling (with others) in defined proportions. Neither the company nor Messrs Hinton and Miller were “the” owner, rather they were co-owners with their named partners. This means that Messrs Hinton and Miller cannot sustain an argument that it was not them but the company which “owned the house” – they, Pase Group Limited and the other partners were co-owners (with a similar percentage interest), and accordingly Messrs Hinton and Miller can fairly be treated as “owners” (in the sense of having shared ownership with other parties).

[68] The fact that the Claimants signed an agreement to buy the premises from the company is not significant; what is ultimately crucial is that when

settlement was due the purported vendor (Pase Group Limited) was able to transfer ownership, which it did.

[69] I find that the evidence has established on the balance of probabilities that Messrs Hinton and Miller had direct involvement and control of the building process e.g. by way of planning, supervision and directing the building works, and that they were in the business of constructing dwellings for other people for profit (see Body Corporate No. 187820 & McCaul v Auckland City Council & Ors, High Court Auckland, CIV 2004-404-6508, 26 September 2005, (Doogue AJ)), and thus in the circumstances could fairly be described as developers and builders.

[70] Builders not only have a duty of care to owners for their own work, they also have a duty to supervise the work of sub-trades. Mr Miller in his oral evidence indicated that it was Mr Hinton who largely dealt with the sub-trades on the project, including those whose work was negligent. While that may be the case and there is no independent evidence to corroborate Mr Miller's assertions, I am satisfied that their close business relationship and the fact it was clearly their joint project, with both working onsite, means that at law they are both jointly and severally liable for the consequences of the breaches by the sub-trades they engaged.

[71] While they personally may not have carried out all of the work which proved defective and caused water ingress, I am satisfied that as the builders and developers they exercised control over all of the building works, and as builders and developers they owe a non-delegable duty of care to the Claimants as owners. (Mt Albert Borough Council v Johnson (supra) and later High Court authority).

[72] Accordingly there is only one conclusion that can be reached from the totality of the relevant evidence and my findings, namely that the Second and Fourth Respondents were each "builder/developers" who breached the duty of care owed to the Claimants and as such each is liable to the Claimants for the whole of the loss they have suffered as a result of water penetration of the dwelling.

[73] The total remediation costs for which they are accordingly liable is $79,359.00 (as per Mr O'Sullivan's table, referred to in para [28] above).

ADDITIONAL CLAIMS

[74] In addition to the actual remediation costs the Claimants seek (i) "consequential costs" totalling $15,599.44 (as set out in Ms Abraham's brief at para [45], and described in Mr Wright's letter dated 7 July 2007 as "other costs incurred as a result of the need to repair"), (ii) interest for the period from September 2005 to August 2007 at 7.5% ($598.99 per month) x 23 months (totalling $13,776.87) plus interest to the date of the determination, and (iii) general damages in the sum of $10,000.00 for each claimant (total $20,000.00).

CONSEQUENTIAL COSTS

[75] Claimants are entitled to recover costs they reasonably incur as a result of respondents' proven negligence. In this case the First, Second and Fourth Respondents have been held to have breached their respective duties of care to the Claimants and so are liable for reasonable "consequential costs".

[76] In para [45] of Ms Abraham's brief of evidence there are listed the costs relating to the remediation work which are not covered by the actual "remediation costs". With some costs sub-totalled they are as follows:

(i)	House plans	$ 136.00
(ii)	Contractors' and builders' risk insurance policies	$ 447.90
(iii)	Compass building certification	$ 1,283.50
(iv)	Tiles	$ 116.39
(v)	New locks	$ 67.50
(vi)	Landscapers (fixing damaged garden)	$ 361.50

(vii)	Prendos report	$ 2,565.17
(viii)	Prendos destructive testing	$ 835.82
(viiii)	Other Prendos attendances	$ 9,686.77
TOTAL		$15,500.55

[77] It should be noted that the total amount provided in Ms Abraham's brief of evidence was $15,599.44 but by my calculation the correct total is $15,500.55 (as above).

[78] No challenge was raised to these costs and I am satisfied that they were incurred as a consequence of the damage arising from the respondents' negligence. In the circumstances here where the leaking problem was brought to the Claimants' attention by the contractors working next door it was reasonable for the Claimants to obtain professional advice, including a report, from Prendos, which was assisting the neighbours, and also its professional assistance in organising the necessary remediation. This includes the normal supervision of that remedial work.

[79] The need for building certification, house plans and insurance are a foreseeable consequence of the respondents' negligence, as is the cost of some replacement tiles, changing locks and repairing a garden damaged during the remediation project. Accordingly the sum of $15,500.55 is a proper amount to be claimed by the Claimants for "consequential costs" incurred as a result of water penetration of the dwelling.

[80] In accordance with my earlier findings I determine that Messrs Hinton and Miller are each liable for the full amount of $15,500.55, and the First Respondent Council is liable for 93% of that amount, namely $14,415.51. (See para's [52] & [73] above).

INTEREST

[81] In para [33] of her brief Ms Abraham says that:

> *"In order to finance the repair we went into overdraft and extended our personal mortgages. We are still paying interest on the amount borrowed. I went into "overdraft facility" and (Ms Webb) used her revolving credit bank account to pay for the work. We did not raise a specific lump sum, just continued drawing on our individual bank accounts and paid into our joint household account to pay bills through the joint cheque account as required".*

[82] There is no challenge from the respondents to the claim for interest nor its rate or amount.

[83] Clause 15 of the Schedule to the 2002 Act states:

> *"(1) … in any adjudication for the recovery of any money, the adjudicator may, if he or she thinks fit, order the inclusion, in the sum for which a determination is given, of interest, at such rate, not exceeding the 90 day bill rate plus 2%, as the adjudicator thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment".*

[84] The Claimants seek interest at the rate of 7.5%; this does not exceed the "90 day bill rate plus 2%" and is reasonable. The Claimants are entitled to borrow money to carry out remediation, and by doing so as soon as possible after the problem was identified they have mitigated their loss, as they are obliged to do, and are entitled to be reimbursed the interest cost of the borrowings required to remediate the dwelling.

[85] Because of the lack of detail in the claim for interest, and because the "settlement agreement" entered into between the Claimants and the First

Respondent required the settlement sum to be paid over within two weeks of that agreement (which presumably was entered into a few days before the hearing) I am uncomfortable about awarding any more interest than the amount specified in para. [5] of the "Claimants' and First Respondent's Opening". This sum is $13,776.87, and I find that is a proper sum to be claimed by the Claimants.

[86] In accordance with my earlier findings I determine that Messrs Hinton and Miller are each liable for the full amount of $13,776.87, and the First Respondent Council is liable for 93% of that amount, namely $12,812.49. (See paras [52] and [73]).

GENERAL DAMAGES

[87] The Claimants seek general damages (which are available for pain and suffering, distress and loss of enjoyment) in the sum of $10,000.00 for each of them. The Weathertight Homes Resolution Services (Remedies) Amendment Act 2007, which came into force on 29 August 2007, confirms that adjudicators can award general damages in these claims.

[88] The grounds for making such an award (as set out in Ms Abraham's brief of evidence) include that having a leaky dwelling frustrated and prevented the Claimants' plans to sell the property and pursue their personal interests, that because of the discovery of the serious leaking problem they had no option but to undertake the repairing of the dwelling "which obviously cost time, money and emotional stress", that they had the "disruption and dislocation" which is a natural consequence of building work being undertaken when the property owners remain onsite, which meant they were subjected to "living with noise, dust, lack of privacy and in cramped conditions due to furniture repositioning and so on". If I understood the brief correctly Ms Webb had to stay elsewhere for part of the time the house was under repair, while Ms Abraham remained in occupation despite the privations.

[89] In addition to having a "greatly restrict(ed)" social life the Claimants' also had the worry of being unable to secure the property properly. This concern was

made worse by the fact that one of the neighbouring properties was broken into during the course of its remediation.

[90] Another consequence of the fact that the dwelling was a "leaky building" was that the Claimants had difficulty selling it as intended, and as a result they took professional advice and formed a LAQC which took over ownership of the property (in the name "Carmarco Limited"). The setting up of the company, obtaining a valuation and having to raise more finance to facilitate the sale from them to the new company added to the stress that the Claimants had and were experiencing.

[91] I have no doubt that the Claimants have suffered mental stress, anxiety, disturbance and general inconvenience as a direct result of the leaks in their dwelling, and that those consequences were a reasonably foreseeable consequence of the First, Second and Fourth Respondents' breach of their duty of care owed to the Claimants. I am satisfied that they should receive an award of general damages - the issue remaining is the amount.

[92] In another WHRS determination I quoted the words of Adjudicator Green in the Smith determination (WHRS Claim No. 277) where, after referring to a number of New Zealand High Court and Court of Appeal decisions he stated that his detailed examination of those authorities disclosed "that the approach of the courts has generally been to award a modest amount for distress damages to compensate distress and anxiety brought about by the breach, and not the anxiety brought about by the litigation itself".

[93] I understand that general damages have been awarded in 17 previous WHRS claims, the amounts ranging between $2,000.00 (Claim No. 277 Smith) to $18,000.00 in WHRS Claim No. 27 Gray ("Ponsonby Gardens"). My review of the range of awards as at April 2006 indicated that out of 11 claims 8 were in the $2,000.00 to $6,000.00 range (for each party), and that all awards, including the aforementioned $18,000.00 awarded to Mr Gray, were very much lower than the amounts sought by claimants.

[94] In this case there is no doubting the stress, anxiety and inconvenience that the Claimants have suffered. However two significant features of their

unfortunate experience were firstly, that they apparently suffered no health problems and, secondly, that the whole episode was relatively short, compared with most WHRS claims. In this case the Claimants had no reason to suspect that their dwelling was experiencing water ingress problems (so no concerns or worries) until October 2004 when tradesmen working on an adjoining property alerted them to the problem with the shared firewall. By the next April, six months later, their repairs were underway, and were completed by September 2005. In other words the time taken from becoming aware of the problem until it was repaired was about 12 months, while the actual time taken to repair the dwelling, with its serious upheaval, was six months.

[95] Weighing up the situation of the Claimants in this case in comparison with the factual bases of the WHRS claims where significant awards of general damages were made leads me to the conclusion that the Claimants' undeniable suffering and distress was at the very lowest end of the scale, and in fairness this must be reflected in the award. In all the circumstances I consider that a fair award of general damages for these Claimants is $4,000.00 each (or a total of $8,000.00).

[96] In accordance with my earlier findings I determine that Messrs Hinton and Miller are each liable for the full amount of $8,000.00, and the First Respondent Council is liable for 93% of that amount, namely $7,440.00. (See paras [52] and [73].

SUMMARY OF PARTIES' LIABILITY FOR CLAIMANTS' LOSSES

[97] To summarise the situation I find the First Respondent Council liable to the Claimants for damages in the total sum of $108,176.89, made up as follows:

(a)	Remediation (para.[52])	$ 73,508.89
(b)	Consequential losses (para.[80])	$ 14,415.51
(c)	Interest (para.86])	$ 12,812.49
(d)	General damages (para.[96])	$ 7,440.00

	TOTAL	$108,176.89

[98] I find the Second Respondent Peter Raymond Hinton liable to the Claimants for damages in the total sum of $116,636.42, made up as follows:

(a)	Remediation (para.[73])	$ 79,359.00
(b)	Consequential losses (para.[80])	$ 15,500.55
(c)	Interest (para.86])	$ 13,776.87
(d)	General damages (para.[96])	$ 8,000.00
	TOTAL	$116,636.42

[99] I find the Fourth Respondent Steven Clement Miller liable to the Claimants for damages in the total sum of $116,636.42, made up as follows:

(a)	Remediation (para.[73])	$ 79,359.00
(b)	Consequential losses (para.[80])	$ 15,500.55
(c)	Interest (para.86])	$ 13,776.87
(d)	General damages (para.[96])	$ 8,000.00
	TOTAL	$116,636.42

CONTRIBUTION BETWEEN RESPONDENTS

[100] At law persons found liable for negligence are known as “tortfeasors”. A tortfeasor is entitled to recover a contribution from other tortfeasors, as set out 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 …”*

[101] The First Respondent is a "concurrent tortfeasors" with the Second Respondent on one hand, and the Fourth Respondent on the other, and the Second Respondent and Fourth Respondents are each "joint tortfeasors".

[102] The approach to be taken in assessing a claim for contribution is provided in s 17(2) of the Law Reform Act. In essence it says 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 which depends on the particular circumstances giving rise to the claim.

[103] In this case there are three liable respondents, namely, the First Respondent Council, the Second Respondent Mr Hinton and the Fourth Respondent Mr Miller. What is an appropriate level of contribution as between these tortfeasors?

[104] Ms Macky, counsel for the Claimants and the First Respondent Council, both in her "Claimants' and First Respondent's Opening" and orally at the conclusion of the evidence, made submissions on the point. After reviewing several relevant Court and WHRS decisions she argued that Council's maximum liability in this case should be in the range of 10 – 15% of the loss, with the builder/developers bearing the balance.

[105] The leading case on contribution as between a council and a builder is the Court of Appeal decision in Mt Albert Borough Council v Johnson [1979] 2 NZLR 234. In that case (which concerned defective foundations rather than a "leaky building") the Court apportioned responsibility for the damages at 80% to the builder and 20% to the Council. This was on the basis that the main responsibility lay with the builder as the person responsible for construction in accordance with the Building Code, while the Council inspector's lesser role was one of supervision. In other words the builder was entitled to a 20% contribution from the Council, while the Council was entitled to an 80% contribution from the builder.

[106] One of the decisions I was referred to by counsel was Body Corporate 160361 & Jackson & Ors v Auckland City Council & Ors, High Court Auckland, CIV-2003-404-006306, 25 June 2007, Harrison J. Interestingly, while the Judge in that formal proof contribution judgment did refer to "the normal apportionments of liability" being against builders "in the range of 75-85%" and "25-15% against the local authority", he accepted as "appropriate" an 80% / 20% contribution ratio in that case. In the Dicks decision (supra) the Judge set the Council's contribution at 20%, although it may be noted that in the recent Waitakere District Court decision of Standen v Waitakere City Council & Ors (CIV-2657/04, June 2007) the Judge found the Council's contribution in a leaky dwelling case to be 60%. However comparing the factual situations in the cases cited to me with the factual finding in this claim, and applying the various relevant judicial dicta I conclude that in this matter the fair division of liability between the respondents as between the First Respondent on the one hand, and the Second and Fourth Respondents jointly on the other hand is 80/20. Accordingly I fix the Council's contribution at 20%, the Second Respondent's at 40% and the Fourth Respondent's at 40% in respect of the same loss for which each has been found liable. The Second and Fourth Respondents are entitled to a contribution from each other for 50% of the same loss for which each has been found liable.

[107] While each of the First, Second and Fourth Respondents is liable for the Claimants' losses caused by water ingress and associated damage (except in relation to the horizontal control joints) in the sum of $108,176.89, each is entitled to a contribution toward that amount from the other tortfeasors according to the relevant responsibilities of the parties for that damage I have determined above. Therefore I find that the respondents contributions between themselves are as follows:

First Respondent	(20%)	$ 21,635.38
Second Respondent	(40%)	$ 43,270.76
Fourth Respondent	(40%)	$ 43,270.76
TOTAL	(100%)	$108,176.90

[108] While each of the Second and Fourth Respondents is liable for the Claimants' losses caused by water ingress and associated damage in relation to the horizontal control joints in the sum of $8,459.53 ($116,636.42 minus $108,176.89 – see para's [97] – [99]), each is entitled to a contribution toward that amount from the other according to the relevant responsibilities of each for the damage I have determined above. Therefore I find that the contribution between the Second and Fourth Respondents in relation to the horizontal control joints is as follows:

Second Respondent	(50%)	$4,229.76
Fourth Respondent	(50%)	$4,229.76
TOTAL	(100%)	$8,459.52

[109] Accordingly if each respondent meets its obligations under this determination it will result in the following payments being made by the respondents to the Claimants:

First Respondent:

Horizontal control joints	$Nil	
All other damage	$21,635.38	
Sub-total	$21,635.38	$ 21,635.38

Second Respondent:

Horizontal control joints	$ 4,229.76	
All other damage	$43,270.76	
Sub-total	$47,500.52	$ 47,500.52

Fourth Respondent:

Horizontal control joints	$ 4,229.76	
All other damage	$43,270.76	
Sub-total	$47,500.52	$ 47,500.52
TOTAL		$116,636.42

[110] Accordingly I determine that the First Respondent Council is entitled to a contribution in the sum of $86,541.52 from the Second and Fourth Respondents jointly and severally towards the sum of $108,176.89 (see para's [97] – [99] above) that the Claimants would otherwise be entitled to obtain from it pursuant to this determination.

[111] The Second Respondent Mr Hinton is entitled to a contribution towards the sum of $116,636.42 (see para's [97] – [99] above) that the Claimants would otherwise be entitled to obtain from him pursuant to this determination as follows:

From the First Respondent Council	$ 21,635.38
From the Fourth Respondent Mr Miller	$ 47,500.52

[112] The Fourth Respondent Mr Miller is entitled to a contribution towards the sum of $116,636.42 (see para's [97] – [99] above) that the Claimants would otherwise be entitled to obtain from him pursuant to this determination as follows:

From the First Respondent Council	$ 21,635.38
From the Second Respondent Mr Hinton	$ 47,500.52

COSTS

[113] No application for costs has been made by any party so no consideration of section 43(1) of the Act is required, and no order made. The parties will bear their own costs.

ORDERS

I make the following orders:

(a) The claim against the Fifth Respondent Derek Lloyd Divers is dismissed (s 42(1))

(b) The First Respondent Auckland City Council is liable to pay the Claimants the sum of $108,176.89 (s 42(1))

(c) The Second Respondent Peter Raymond Hinton and the Fourth Respondent Steven Clement Miller are jointly and severally liable to pay the Claimants the sum of $116,636.42 (s 42(1))

(d) In the event that the First Respondent Auckland City Council pays the Claimants the sum of $108,176.89 it is entitled to a contribution of $86,541.52 from the Second and Fourth Respondents jointly and severally. (s 29(2)(a))

(e) In the event that the Second Respondent Peter Raymond Hinton pays the Claimants the sum of $116,636.42 he is entitled to a contribution of $21,635.38 from the First Respondent and $47,500.52 from the Fourth Respondent

(s 29(2)(a)

(f) In the event that the Fourth Respondent Steven Clement Miller pays the Claimants the sum of $116,636.42 he is entitled to a contribution of $21,635.38 from the First Respondent and $47,500.52 from the Second Respondent

(s 29(2)(a))

(g) As clarification of the above orders, if all respondents meet their obligations set out in these orders it will result in the following payments to the Claimants:

From the First Respondent Auckland City Council	$ 21,635.38
From the Second Respondent Peter Raymond Hinton	$ 47,500.52

From the Fourth Respondent Steven Clement Miller	$ 47,500.52
TOTAL PAYABLE TO THE CLAIMANTS	$116,636.42

DATED the 24th day of October 2007

P D SKINNER
Adjudicator

STATEMENT OF CONSEQUENCES

IMPORTANT

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

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