CLAIM NO. 4309

UNDER the Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN	**The Tenants in Common of 19 Victoria Avenue** (for full names see sheet attached at end of this Determination) Claimants
AND	**EASTON CONSULTANTS LTD** First Respondent
AND	No second respondent, Commercial Building Services Ltd having been removed
AND	No third respondent, Auckland City Council having been removed
AND	**MATTHEW DOUGLAS EASTON** Fourth Respondent
AND	No fifth respondent, Bruce Tizard having been removed
AND	**REILY ROOFING LTD** Sixth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 23rd November 2007)

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1. BACKGROUND

1.2 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS02 Act"). The claim was deemed to be an eligible claim under the WHRS02 Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS02 Act on 9 June 2006.

1.3 Chief Adjudicator Skinner was initially assigned the role of adjudicator to act for this claim, but it was reassigned to me in March 2007. I have been required to issue five 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 Shortly before the Hearing was due to start, I was advised that the third respondent, the Auckland City Council ("the Council"), and the fifth respondent had come to a settlement with the claimants. The claimants asked that these two respondents be removed from the adjudication. In a telephone conference with the parties on 5 October 2007, I indicated that I would consider these removal applications at the beginning of the Hearing, so that the other respondents could decide whether they wished to oppose the applications.

1.5 The Hearing started at 10 am on 10 October 2007. The claimants were the only party that attended the Hearing. I proceeded in accordance with the agenda that I had given in my last Procedural Order. Firstly, I considered the removal applications, and then considered the limitation defence that had been raised by the sixth respondent. I then listened to the submissions and evidence of the claimants, followed by the evidence from the WHRS Assessor.

1.6 I will now proceed to make my Determination on the basis of the submissions, witness statements, and documents presented as a part of the claims, responses and replies.

2. THE PARTIES

2.1 The Claimants in this case are the owners of the ten apartments in the building known as Ridgeview Apartments, 19 Victoria Avenue, Remuera, Auckland. I will refer to them as the "Owners". The building is a five level apartment block built on a sloping landscaped site on the north side of Remuera Road. It was built in 1971-72, and was re-roofed in 1996. The ten owners each have a tenth share in the property, and are acting as tenants in common.

2.2 The first respondent is Easton Consultants Ltd, who organised the re-roofing work that was done in 1996. The fourth respondent is Mr M D Easton, who I understand is the sole director of Easton Consultants Ltd, and it is alleged that Mr Easton was the person who was responsible for the design, planning, organisation and supervision of the re-roofing work. Neither the first nor fourth

respondents were represented at the Hearing, although I am satisfied that they have both been served with all the documents relating to this adjudication.

2.3 The second respondent was Commercial Building Services Ltd, called "CBSL", which was the company that contracted with the Owners to carry out the re-roofing work. The Owners asked that CBSL be removed, or struck out, from this adjudication, as they were satisfied that it was a shell company with no assets. They saw no practical value in pursuing a claim against an impecunious party. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that CBSL is no longer a party in this adjudication.

2.4 The third respondent was the Auckland City Council ("the Council"), which is the territorial authority responsible for the administration of the Building Act in the area. The Council reviewed the application for a building consent, issued the consent, and carried out the inspections during construction prior to issuing the Code Compliance Certificate. As mentioned above, the Owners asked that the Council be removed, or struck out, from this adjudication, as they had entered into a settlement with the Council. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that the Council is no longer a party in this adjudication.

2.5 The fifth respondent was Mr Tizard, who I am told was an employee of CBSL. It was alleged that Mr Tizard had a hands-on role in the organisation and supervision of much of the re-roofing work. As mentioned above, the Owners asked that Mr Tizard be removed, or struck out, from this adjudication, as they had entered into a settlement with Mr Tizard. As I received no objections to this application, I advised the parties at the Hearing that I would be allowing it, so that Mr Tizard is no longer a party in this adjudication.

2.6 The sixth respondent is Reily Roofing Ltd (called "Reily Roofing"), who it is alleged carried out the roofing work as a part of the re-roofing operation in 1996. Mr Hales of Smith & Partners filed a Response on behalf of Reily Roofing, and had asked that this Response be considered at the Hearing. Mr Hales did not attend the Hearing, and there was no representative of Reily Roofing at the Hearing.

3. THE CLAIMS

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

Temporary repairs to roof	$ 6,914.17
Insurance excess	250.00
TV installations	850.00
Re-Roof NZ costs	26,449.74
Repairing leaks in 2003-04, Martin Plumbing	473.97
Interior repairs, Bricon Asbestos Removal	1,649.06
Interior repairs, Remuera Property Services	4,038.75
Total amount claimed	$40,625.69

3.2 This represented a reduction from the amount claimed in the Notice of Adjudication, as a result of obtaining actual costs for all of the work. The Owners are also claiming interest on all amounts paid from February 2006 until the date of payment.

3.3 The owners will be restricted in their recovery from the remaining respondents, as they have already received a total of $20,000 from the Council and Mr Tizard. Therefore, any amounts that I may award against the remaining respondents will have to be reduced to reflect this payment of $20,000.

4. LIMITATION DEFENCE

4.1 Reily Roofing has raised as an affirmative defence to the claims being made against it, that the claims are out of time. It says that the defects and leaks were discovered by the Owners in 1997 and 1998, which was two years after the roof was reconstructed. The Owners claims were lodged with WHRS on 16 January 2006, so that the claims were lodged outside the six year limit set down by the Limitation Act.

4.2 The Owners have responded to this defence by saying that, firstly, their claims were filed in December 2003 and, secondly, the extent of the leaks was not fully appreciated until 2002-03. Each of these points needs to be carefully considered.

4.3 I am aware that I indicated at the hearing that, based upon my initial reading of the submissions and evidence, it was likely that I would not be allowing this limitation defence for the reason that the Owners did not appear to have appreciated that the leaks were serious until 2002 or even 2003. However, my final decision could not be made until after I had heard and considered all of the arguments and evidence that was available. Now that I have had time to consider all of the evidence, my views have changed slightly.

4.4 For the purpose of the Limitation Act 1950, the making of an application under s.9(1) of the WHRS02 Act is deemed to be the filing of proceedings in the Court. In this case I have been advised by the Case Manager that seven of the owners filed applications with WHRS on 24 December 2003. The WHRS Evaluation panel decided that many of these claims were ineligible on the grounds that there was no damage to the individual apartments. Although the individual owners also claimed for $1/10^{th}$ of the damage suffered by the common areas, these claims were also deemed to be outside the jurisdiction of the WHRS02 Act. Therefore, all claims were deemed to be ineligible.

4.5 In September 2005, Adjudicator Carden held that under the Unit Titles Act 1972, only a Body Corporate could make a claim for damage to common property. As a result of that decision, the Owners joined together to make a single claim as tenants in common, and it was this claim that was filed with WHRS on 16 January 2006. The Owners are saying that most of them first made their claims in December 2003, which were exactly the same claims as were filed in January 2006, except that the claimants were individuals rather than a group. They submit that it was only a change of policy by WHRS that caused the need for the new joint claim.

4.6 I must say that I have considerable sympathy for their submissions; but I think that I can only consider claims that have been accepted by the Evaluation panel. In this case, the earlier claims were not considered to be valid claims, so that the date that they were filed is not relevant to this claim. There is only one date that I can accept as being relevant, and that is the date that the accepted claim was filed with WHRS. In this case that date is 16 January 2006.

4.7 I would not accept the submission that this situation was caused by a change in policy by WHRS. The claims that were lodged by the individual owners were deemed to be ineligible as far as the claims for damage to the common

property was concerned. Adjudicator Carden did not make new law in September 2005, because he simply interpreted the existing law. The Owners could easily have made their own joint claim as soon as they had obtained the agreement from all owners.

4.8 The Owners' cause of action arises, in contract, when the work was being done, which in this case was in 1996. The Council issued the Code Compliance Certificate in June 1996, and this is the date that I would normally adopt as being the starting date for a limitation defence for claims in contract. This was nearly ten years before the Owners filed proceedings, so that they are well outside the six year limit set by the Limitation Act. However, the Owners did not have a contract with Reily Roofing so that they are bringing their claims in tort for negligence.

4.9 When does the cause of action arise in claims for negligence in building defect cases? This question is best answered by quoting from the Privy Council decision in ***Invercargill City Council v Hamlin*** [1996] 1 NZLR 513:

> "The cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert."

4.10 In this particular case the Owners had continuing discussions with Mr Easton and Mr Tizard through 1997 into 1998. Frustrated that these discussions were not leading anywhere, they called in an expert, a Mr Rod Kestle, in May 1998 and he produced a report in September 1998. Mr Kestle identified some of the problem areas and recommended that an independent report be obtained from BRANZ or a BRANZ accredited building consultant or inspector, to establish the extent of problems with the roof. Mr Kestle also recommended that the Owners should seek legal advice before proceeding any further.

4.11 I have no knowledge as to whether the Owners sought any legal advice, or whether they obtained a report from BRANZ, but there is no evidence that they did either. They appear to have continued to employ plumbers from time to time to attend to various leaks or problems that arose with the roof, but not to have taken any steps to address the fundamental problems with the roof.

4.12 The Owners say that they did not fully appreciate that the leaks were serious until 2003, and it was only after they had received the report from the WHRS

Assessor that they realised the extent of the leaks. However, I need to consider not only when the Owners say that they knew about the leaks, but also when they should reasonably have known about them.

4.13 They certainly knew abut leaks in the roof as early as May 1998, when they employed Mr Kestle to look into their problems. I appreciate that leaks were not a dominant feature of their concerns when they consulted Mr Kestle, as they had a number of complaints about the extent of the new Butynol, damage to the new roofing sheets, the replacement of some gutters and downpipes, and the finishing around the skylights. However, in November 1998 they were told by Mr Kestle that they should both seek legal advice and obtain a full report on the roof from a BRANZ approved building consultant.

4.14 I have carefully considered the WHRS Assessor's report, and the evidence that he gave at the hearing. I am satisfied that many of his observations and conclusions would have been made and reached in 1998, if he had been asked to carry out a thorough inspection at that time. The problems that were causing the leaks, and the damage that would probably be caused by these leaks, cannot have changed materially between 1998 and 2005. Therefore, if the Owners had consulted an experienced building consultant in 1998 to inspect the roof, I have little doubt that he or she would have told them that they should carry out repair work of a similar nature and extent as recommended by the WHRS Assessor.

4.15 It is my conclusion that a reasonable homeowner would have taken Mr Kestle's advice and called in an expert building consultant in late 1998. Therefore, the Owners would have known, by at least early 1999, that the roof needed some substantial repairs and rework to prevent the leaks that were happening, and were likely to happen in the near future. This means that their cause of action against the respondents accrued in early 1999, at the latest.

4.16 This means that the Owners lodged their claims with WHRS outside the six year limit placed by the Limitation Act, and the claims against Reily Roofing must fail for that reason.

4.17 Neither Easton Consultants Ltd nor Mr Easton has filed formal responses to the adjudication claims, but Mr Easton has filed several submissions in this adjudication in support of his applications for removal and other interlocutory

matters. At the hearing I told the parties that it was my intention to take these submissions into account as if they had been filed as responses to the adjudication claims, so that the parties could reply to these submissions if they wished to do so.

4.18 In his submission for the removal of Easton Consultants Ltd, dated 6 December 2006, Mr Easton said that his company's "..limited involvement with the repairs to [this roof] was outside the Limitation Act 1950 which imposes a 6 year limitation from the date of reasonable discoverability." Furthermore, in his submissions on 5 June 2007, Mr Easton says that the owners knew of the alleged leaks yet chose to live with them for approximately 8 years, and has referred me to Grant v Australian Knitting [1936] AC 86 and page 19 of my own decision in WHRS Claim 1917.

4.19 I think that these submissions make it reasonably clear that Mr Easton is mounting a limitation defence along the same lines as that articulated by Mr Hales on behalf of Reily Roofing. For the same reasons as I have given above, I find that the claims against both Easton Consultants Ltd and Mr Easton must fail because the claims were lodged out of time.

5. COSTS

5.1 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:

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

5.2 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.

6. ORDERS

6.1 For the reasons set out in this Determination, I order that all of the claims by the Owners in this adjudication will fail and are dismissed.

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

NOTICE

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

Dated this 23rd day of November 2007.

A M R DEAN
Adjudicator

792-4309-Determination

List of the Tenants in Common at 19 Victoria Avenue, Remuera, Auckland

JOHN STEVENSON HOWIE and **PATRICIA DAWN HOWIE**; and

WILLIAM NORMAN RAINGER and **JAMES WILLIAM LYALL WISEMAN** as trustees of the Rainger Family Trust; and **WILLIAM NORMAN RAINGER** and **ANTHONY WILLIAM BRETT RAINGER** and **JAMES WILLIAM LYALL WISEMAN**; and

CLIVE RUSSELL WALKER, SHIRLEY ANNE WALKER and **MICHAEL JOHN FOLEY** as trustees of the Walker Family Trust; and

PHILIP JOSEPH BARKER; and

JAMES WILLIAM LYALL WISEMAN and **ROSEMARIE ANNE VAUGHAN WISEMAN**; and

MICHAEL CARMODY WALLS, **MARGARET MARY WALLS** and **RICHARD SPENCER CLARKE** as trustees of the Walls Family Trust; and

SUZANNE MARION SCOTT; and

JEAN McLEAN WALLACE; and

RICHARD MILNER-WHITE; and

TREVANION TRUSTEES LTD