CLAIM NO: 2511

UNDER the Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **WALTER HUGH KETTLEWELL and RAYMOND ARTHUR McLAREN as trustees for the DS DAY TRUST**

Claimants

AND **ROBERT ANDREW CRIGHTON and VERA CRIGHTON**

First Respondents

AND **WAITAKERE CITY COUNCIL**

Second Respondent

AND **ROB NEARY**

Third Respondent

AND **KEVIN LAWTON**

Fourth Respondent

AND **KE LAWTON LIMITED**

Fifth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 15 September 2006)

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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 17A Humphrey Kemp Avenue, Henderson, Auckland. The claim was deemed to be eligible under the Act. The Claimants filed a Notice of Adjudication under s 26 of the Act with the Weathertight Homes Resolution Services ("WHRS") in July 2005.

[2] A preliminary conference was held at the WHRS offices in Auckland on 15 August 2005. Initially there were three Respondents, and later the Fourth and Fifth Respondents were added as parties.

[3] During the lead-up to the hearing I have issued eleven Procedural Orders and three Memoranda to assist in the preparation for the hearing and to monitor the progress of the proceedings. On 23 February 2006 the Claimants reached a settlement of their claim with the Second, Fourth, and Fifth Respondents (Waitakere City Council, Kevin Lawton and his company KE Lawton Limited). In their document "Written Clarification of the Claimants' Claim" (dated 20 March 2006) the Claimants advised that the amount paid to them in terms of the settlement was $37,250.00, and that they sought the sum of $48,950.00 from the First Respondents, Mr & Mrs Crighton ("the Crightons"). The Claimants did not pursue a claim against the Third Respondent Mr Neary. So the remaining parties involved in the hearing were the Claimants and the First Respondents, the Crightons. (The Second, Fourth and Fifth Respondents were not removed as parties because the First Respondents were seeking contribution from them if they were found liable to the Claimants.)

HEARING

[4] I conducted a site inspection on 10 May 2005 and the hearing commenced later that morning, concluding on 12 May 2005. It took place in the hearing room at the WHRS offices in Auckland City.

[5] The Claimants were represented by Mr Stainton and the First Respondents by Mr Rice. None of the other parties took part in the proceedings except some as witnesses for the Claimants.

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

- Mark Harvey (Exhibit 4), called by the Claimants;
- Robert Neary (Exhibits 5A and B), called by the Claimants;
- Raewyn Day (Exhibit 6), a Claimant;
- Kevin Lawton (Exhibit 8), called by the Claimants;
- D'Auverngne (Sid) Day (Exhibit 9), the other Claimant;
- Nick Dibley (Exhibit 10), called by the Claimants;
- William Hursthouse (Exhibits 1 and 11), the WHRS Assessor;
- Robert Crighton (Exhibit 13), a First Respondent;
- Vera Crighton (Exhibit 14), the other First Respondent.

[7] Other documents formally produced as exhibits included: the WHRS Assessor Mr Hursthouse's "Summary/Addendum" received 17 February 2006 (Exhibit 2), four pages of elevations showing areas to be repaired (Exhibit 3), four large house plans prepared by Contemporary Design & Build Ltd (Exhibit 7), an Insulclad Decking Detail Data Sheet (Exhibit 12A) and a Dunlop Membranes "Substrate Specification for Butynol" sheet (Exhibit 12B).

[8] Material forming part of the totality of the evidence upon which my decision was based included: Mr Dibley's "Deck and Cladding Addendum Report" dated 2 November 2005, witness statement of Gilbert Pritchard, Contemporary Design & Build Ltd "Residential Specification", the "Written Clarification of the Claimants' Claim" referred to above, the formal

"Responses" filed by all parties, memoranda and submissions filed by counsel.

[9] At the hearing I obtained the consent of the parties to a reasonable extension to the timing of the completion of this determination, pursuant to s 40(1)(b) of the Act.

CHRONOLOGY & PARTIES

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

[11] The Crightons purchased the land at 17A Humphrey Kemp Avenue in the early 1990s, later demolishing the old house on the land with a view to building a new home and developing a large garden. They entered into a contract with Contemporary Design & Build Ltd ("Contemporary") to design and build the house and obtain all necessary consents. The building consent was granted on 4 October 1994 and construction began soon after. In August 1995 Contemporary went into liquidation; the house was "nearly complete" so the Crightons moved in and approached the Master Builders Association with whom they had taken out a building guarantee. Other builders arranged by the Master Builders Association completed the interior work and carried out work on the deck. Master Builders declined to carry out further work including the tiling of the deck so the Crightons found and engaged Mr Neary, the Third Respondent, to undertake the tiling. The Crightons lived at the property from 1995 to 2000, deciding to sell it because they wanted a bigger garden. Being advised by their real estate agent that a code compliance certificate was required the Crightons arranged a final inspection by the Council on 20 January 2000, receiving their code compliance certificate on 27 January 2000. On 5 March 2000 the property was sold to the Claimants at auction, they taking possession on 1 September 2000. About three years later the Claimants first became aware of problems, which led to some contact with Mr Crighton and their engaging a builder to carry out repairs on the dining room deck and internal floor near it. In addition work and inspections were carried out by other tradespeople, and application was made to WHRS in 2004.

[12] The Claimants purchased the dwelling from the Crightons, the First Respondents. The Second Respondent, Waitakere City Council, issued the building consent, carried out the inspections and issued the code compliance certificate. The Third Respondent Mr Neary carried out the tiling work for the Crightons after Contemporary went into liquidation and after they moved into the house. Kevin Lawton, the Fourth Respondent, was the principal of the Fifth Respondent KE Lawton Ltd which did most of the carpentry work on the dwelling under contract to Contemporary. As referred to above the Claimants settled with the Second, Fourth and Fifth Respondents, and are pursuing their claim against the First Respondents, but not the Third Respondent.

BURDEN OF PROOF

[13] WHRS proceedings tend to be less formal than litigation but nevertheless it needs to be confirmed that they are "civil" proceedings in which claimants must prove their claims to the civil standard of the "balance of probabilities" – what is more probable than not? The relevant legal principles, tortious and/or contractual, are applied to the preferred evidence.

CLAIM

[14] The jurisdictional basis of the claim is that the dwellinghouse at 17A Humphrey Kemp Avenue, Henderson 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 on the report of the WHRS Assessor, their witness Mr Dibley's report and the oral and documentary evidence listed above.

[15] The claim against the First Respondents is in the tort of negligence. It is alleged that they "took over the organising and supervision of the different subcontractors engaged by them to complete the dwelling and the landscape of the property. In so doing they acted as the owner/builder/head contractor for the balance of the work" remaining after Contemporary ceased trading

and left the site. It is settled law that those who build/develop properties owe a non-delegable duty of care to subsequent purchasers, in this case the Claimants.

[16] The claim against the Third Respondent was not pursued, and as referred to above, the claims against the Second, Fourth and Fifth Respondents have been settled.

[17] The First Respondents deny any liability to the Claimants but if found liable seek contribution from the Second, Third, Fourth and Fifth Respondents pursuant to s 17(1)(c) of the Law Reform Act 1936. They also seek costs.

LIABILITY OF THE FIRST RESPONDENTS

[18] This claim, only proceeding against the First Respondents, is based on the contested allegation that the Crightons' actions following the failure of Contemporary made them at law the head contractors/builders of the dwelling, rather than merely being the owners or employers of the tradepersons they engaged to complete the dwelling. Therefore I propose to decide whether or not the First Respondents have liability before, if then necessary, moving on to consider the evidence of the damage to the dwelling and its causes.

[19] Counsel have cited to me a number of cases and WHRS determinations in support of their position. They include:

- Mt Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA);
- Mowlem v Young High Court, 20.09.1994, Robertson J, Tauranga, AP35/93;
- Willis v Castelein [1993] 3 NZLR 103;
- Body Corporate No. 187820 v Auckland City Council & Ors High Court, 26.09.2005, Doogue AJ, Auckland CIV-2004-404-6508;
- Riddell v Porteous [1999] 1 NZLR 1 (CA).

- Morton v Douglas Homes Ltd [1984] 2 NZLR 548;
- Carter v Auckland City Council & Ors High Court, 14.10.2004, Christiansen AJ, Auckland CIV-2004-404-2192;
- Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394, 395 (CA);
- McKinlay Hendry Ltd & Kings Wharf Holdings Ltd (in liq.) v Tonkin & Taylor Ltd CA, 09.12.2005, Glazebrook J, Robertson J, Hansen J CA81/04;
- Gardiner v Howley High Court, 17.05.1994, Temm J, Auckland, HC117/92;
- Chase v de Groot [1994] 1 NZLR 613;
- Nikora v Nightingale & Ors (WHRS Claim No. 2601, 18.11.2005);
- Theobald v Coulter & Ors (WHRS Claim No. 300, 10.06.2005);
- McQuade v Young & Ors (WHRS Claim No. 119, 20.04.2004);
- Tonks v Stone & Ors (WHRS Claim No. 363, 14.07.2005).

[20] It is not disputed that the Crightons entered into a "turnkey"-type contract with Contemporary. Contemporary organised and supervised the project and the Crightons made the agreed progress payments. In fact because of an agreement made early on in the life of the project when Contemporary sought more money for the job the Crightons agreed to pay progress payments in advance, meaning that they had paid all money owed to Contemporary when the company departed the site leaving the deck, the driveway and some of the interior not completed.

[21] Mr Harvey, a former shareholder and director of Contemporary, gave evidence for the Claimants. In his witness statement (Exhibit 4) he stated that the Crightons asked for some items to be removed from the contract; those he said he was "certain about" included the roof, landscaping, and

"decks beyond construction". At para 11 he stated that the company's quote "included a provisional sum for deck surfacing, including waterproofing, labour and supply. These sums are always itemised in a quote and were removed when the Crightons elected to complete the decks and steps beyond construction. No decision was made about the surface material and waterproofing during the course of the contract …". During cross-examination Mr Harvey could recall the facts of some matters put to him but not others. He was positive that the waterproofing and tiling was removed from the contract but could not recall if the Crightons had provided him with their choice of tiles at a meeting with the company. He did confirm that the building work was "largely complete" when the company left the site.

[22] The tiler Mr Neary's response to the claim is set out in two letters from him, one received in early November 2005 (Exhibit 5A) and the second dated 02/03/2006 (Exhibit 5A). In the first letter he stated that he "expressed my concerns about (the effect of having to raise the deck level to allow proper fall) as it may present problems of inadequate waterproofing in the future. Mr & Mrs Crighton assured me that the waterproofing was adequate and to carry on with the job". In both letters he states that he did not possess expertise about waterproofing and claimed that he carried out the tiling work "under the instruction of Mr & Mrs Crighton" and that "(he) was relying on Mr & Mrs Crighton's knowledge of any waterproofing applied".

[23] Under cross-examination by Mr Rice Mr Neary changed his evidence. He acknowledged that there was never any discussion over waterproofing with the Crightons and although the level of the deck was "unusually high" he assumed that it would be "fine", and indicated that conclusion to the Crightons. He agreed that it would be "fair to say to a layman (like the Crightons) that because there was no waterproofing membrane it was likely to leak". He assumed that the timber was tanalised and so it would be fine. He stated that he assumed that the Crightons would have already been advised and precautions taken (over waterproofing). The basis for his comment in the 2 March 2006 letter that he was relying on the Crightons for supervision was based on the fact that there was "no one else there to

authorise me to do the work – to me they would tell me what they wanted, I would tell them what I would do and the cost and then they would decide. I assumed they would have the knowledge of waterproofing that I don't". He accepted that he laid the tiles after the cladding had been applied and that, as a result, many of the tiles were higher than the bottom of the cladding. He was not aware that there was required to be a gap between the bottom of the cladding and the tiles to stop "wicking up". Mr Neary acknowledged that he had worked as a tiler for approximately 13 years, starting with his father who was a tiler, and that he had done "hundreds of jobs". If I understood his evidence correctly he acknowledged that when he laid tiles over wooden decks they were "usually covered with butynol".

[24] The Claimant Mrs Day in her witness statement set out the history of the purchase of the property by her and her husband at auction, their pre and post-purchase dealings with the Crightons, their discovery of problems with the dwelling and the actions they took including arranging repairs. Mr Day's evidence was short and dealt with his discovery of the rotting problem and their remediation steps. (It should be noted that the WHRS Assessor's evidence was that he recommended to the Claimants that the remediation work being undertaken should be halted because he had concerns about aspects of it. His advice was taken)

[25] Mr Crighton's witness statement was elaborated upon by him in his oral evidence and under cross-examination by Mr Stainton. He confirmed the nature of the contract with Contemporary and that he and his wife had no experience of building or related issues. When Contemporary went into liquidation the house was "virtually complete except for the external tiling of the deck and the driveway and the fixing up of the plaster coving on the lounge ceiling". They had a Master Builders Association guarantee so contacted the Association which did engage a builder to finish the internal plastering work and also added a row of bearers and studs under the deck and fitted new ply over it (because they were concerned that the deck "felt a bit spongy"). The Crightons were not formally advised of Contemporary's liquidation but once they became aware of the situation (namely that

Contemporary would no longer be completing the project) they moved in to the house and “picked up the cudgels”. Firstly they arranged the removal of rubbish and had metal laid on the drive (so they could have vehicular access from the road), and then went looking for a tiler. They obtained Mr Neary’s name and he was contacted.

[26] Mr & Mrs Crighton were adamant about several matters including that the full contract price which they paid Contemporary included waterproofing and tiling the decks (they had selected the tiles to be laid before Contemporary went into liquidation), landscaping was never part of the building contract, that they knew nothing about waterproofing and tiling and that they approached Mr Neary because he was recommended by a relative in the building trade and therefore they concluded that he would be competent.

[27] Under cross-examination Mr Crighton explained that they did not consider appointing a person to supervise the completion of the decks because it was “normal practice for (him) to contact a tradesman and rely on his knowledge and ability…..You rely on his ability to do the job”. This was clearly his and his wife’s expectation of Mr Neary; that he as an experienced tiler who, when shown the tanalised ply decks that required completion, would know what to do, raise with them any problems that he saw, and complete the job in a tradesmans-like and competent manner. Their denial of any discussion with Mr Neary about problems with the deck is largely upheld by Mr Neary in his evidence under cross-examination. In addition Mr Crighton in his witness statement and under cross-examination confirmed that had there been any warning about problems with the waterproofing of the decks he would have “instructed Mr Neary in no uncertain terms to take whatever precautions were necessary to make sure the decks were waterproof”. In support he made the point that they had an optional extra waterproofing coat added to the exterior cladding of the house before it was painted because the dwelling was to be their “dream home” and “no expense was spared in the quality of its design and construction”.

[28] I found Mr & Mrs Crighton to be compelling witnesses who gave honest and credible evidence. Mr Neary significantly altered the thrust of his written

responses under cross-examination and in so doing largely supported the Crightons' evidence on several crucial points. Where the Crightons' evidence differed from that of Mr Harvey I prefer their evidence; these events took place over a decade ago and he was involved with dozens of projects. He did not produce any written documentation that supported his "recollection" about the detail of the contract entered into with the Crightons. Overall I found his evidence unhelpful.

[29] I am satisfied on the balance of probabilities that completion of the decks (waterproofing and tiling) was part of the Crightons' contract with Contemporary and that they did not ever ask for it to be removed from the contract. I am also satisfied that they had selected tiles at the company's invitation before the company's financial position necessitated its departure from the site and that if this unfortunate event had not occurred then, as contracted, Contemporary would have completed the decks, finished the small amount of interior work outstanding and laid the concrete driveway. I am in no doubt that Mr Neary did not bring to the Crightons' attention any "problems" about the work he was about to undertake to complete the deck and that the Crightons not only did not indicate to him that he should proceed despite his misgivings, but that they were entitled to expect him to carry out the work in a competent and tradesmans-like fashion. Given my finding of facts above the question now is: did the actions of the Crightons in engaging Mr Neary to complete the deck constitute their "taking over" as the builder/developer/head contractor, or were they "mere owners or employers" arranging for and paying a tiler to complete work that should have been undertaken by a now defunct building company?

RELEVANT LEGAL PRINCIPLES

[30] The law is clear; those who build/develop properties owe a non-delegable duty of care to subsequent purchasers, and that duty arises where a person assumes legal responsibility by giving directions in relation to the construction of a dwelling at an operational level and/or having direct involvement in matters of construction of the dwelling which give rise to damage and/or loss. Not only does it involve a duty to take care to build a

reasonably sound structure, using good materials and workman like practices in accordance with the Building Code, but in addition the builder/developer as "head contractor" has a duty to supervise the work of sub-trades. The leading cases are Mt Albert Borough Council v Johnson (supra) and Morton v Douglas Homes Ltd (supra).

[31] Counsel for the Claimants sets out his arguments in his "Submissions of Counsel for the Claimants" dated 10 May 2006. In submitting that the Crightons "took over the organising and supervision of the different subcontractors engaged by them to complete the dwelling and the landscape of the property" he cites the WHRS determinations in Theobald and McQuade (supra). In Theobald the Respondents who had "built" the dwelling had not only arranged for the building consent and identified themselves as being the "builders" on the application form (which is required by law, regardless of whether the owners are "building" the house or having it built for them) but they had also subcontracted most of the work to different tradespeople, and the carpentry and concrete work was all done on a "labour only" basis. They were responsible for supplying the materials, and coordinating and managing the construction process. In other words a classic example of owners choosing not to enter into a "turnkey"-type contract but rather employing subcontractors and generally managing the project. With respect this determination does not assist because in the present case we are looking at owners whose "turnkey"-type contract was effectively ended by company liquidation when the project was (in the words of Mr Harvey) "largely complete".

[32] In McQuade the Claimants purchased one of five units, construction of which started in late 1991 and finished with the construction of Unit 5 in the years 1997 - 1999. The Respondent Young owned the land upon which Unit 5 was to be constructed then sold Unit 5 to her family trust from which the McQuades purchased it. The evidence established that not only was Mrs Young the owner when the majority of the construction work was carried out, but also that she was in control of the building including after the transfer of the property to the trust; the evidence was that she "organised everything

to do with the development from having revised drawings prepared, contacting the local authority and organising all parts of the contract and the subcontractors. In effect Mrs Young was the main contractor". Again in this case the "builder/developer" managed the whole project.

[33] Counsel for the Claimants outlined the detail of the tasks undertaken by the Crightons, a list which counsel for the Crightons described as "over-blown", and goes on to cite Gardiner v Howley (supra) in support of his basic contention that the Crightons "selecting, controlling and supervising the final construction work including that of Mr Neary …" indicated that they had become the "head contractor". The Gardiner case was another where, in the words of Temm J, the original owners built themselves a house "by engaging staff on a labour only basis with some contractors for particular kinds of work". The District Court Judge who dealt with the original claim found that the original owners were "in effect head contractors" and this was upheld by Temm J on appeal. Another example of an owner using labour only subcontractors being held to be the "head contractor".

[34] Counsel goes on to assert that the Crightons "did not get advice or employ an experienced tradesperson to supervise the work to completion", especially regarding the waterproofing, and lists their negligence as the failure to supervise the work of the tradesmen hired by them, the failure to organise professional supervision of those tradesmen and the failure to "take professional advice given (the Crightons) lack of understanding of Building Code requirements". Several High Court decisions and a WHRS determination were cited in support. With respect, the legal principle confirmed by the cited cases is "settled law" but does not help me to decide whether or not the Crightons became the "head contractors" in the way argued by counsel. If I find that they did assume that responsibility then they had the various legal obligations set out immediately above, but the question is did they have that responsibility?

[35] The opposing position argued by counsel for the Crightons, put simply, is that they engaged a professional builder to build the dwelling, the builder engaged subcontractors to do the work but went into liquidation before the

building was finished, the Crightons engaged Mr Neary to tile the decks and did not undertake any building work themselves. They did not dismiss Contemporary – it went into liquidation – and when it did so the project was virtually finished so they were able to move into the dwelling. They acted responsibly by engaging tradesmen to do the outstanding work and did not try to do it themselves. He submits that these facts all point away from a duty of care and that they did not become the "head contractors" who would owe a duty of care to subsequent purchasers. He relies on Riddell v Porteous (supra) (where an owner contracted with a builder to construct a deck on a labour only basis and the deck leaked the owner was found not to be the "head contractor") and submitted that the facts in this case fit squarely with the High Court decision in Mowlem v Young (supra). In that case, an appeal from a District Court decision, the Respondent Young, a chartered accountant with some experience as a developer, built a home for himself. Included in the work was a large retaining wall which, some years later after the property was sold, had problems which necessitated costly repairs. The purchasers sued Mr Young. The issue as identified by the High Court Judge was "whether Mr Young as the effective builder or constructor of the walls … had a duty of care to persons who subsequently became owners of the property". The evidence was that Mr Young engaged contractors to do the work; the Judge concluded that "this was nothing more than a professional man building a house and getting appropriate workmen to come in and do the physical jobs which needed to be done … Mr Young needed walls. Mr Young arranged for people to do it. To now say that makes him a contractor or developer, is in my judgement to miss the import of a distinction which the Court of Appeal was drawing in Mt Albert Borough Council".

[36] I have read the relevant evidence, and carefully considered the legal principles set out in the cited cases, and the submissions of counsel. I have come to the view that on the facts in this case the Crightons could not be described as the builder/developer/head contractor. Their role was determined by necessity – they had a turnkey-type contract with Contemporary pursuant to which they expected to receive the complete project for which they had bargained and for which they had met all

payments. Instead their builder went into liquidation with the dwelling habitable but not completely finished; they "made the best of a bad job", took occupation and made arrangements to complete the outstanding work. In this they were no different from any person (in this case) knowing a deck needed to be completed and finding a tiler to do the work.

[37] I accept that they knew nothing about waterproofing or butynol; they were aware that the decks needed to be completed by tiling, but the fact that an essential part of that process was waterproofing before the laying of tiles was not only unknown to them but was a matter that they could fairly rely upon their tiler to inform them.

[38] It may well have been different legally if for example the dwelling was only half-built when Contemporary moved off site, and presumably a number of trades would still have been undertaking work on the project. When the Crightons found themselves with a dwelling complete except for some very minor interior work, incomplete decks and a driveway then they set about remedying the situation, firstly, by invoking the Master Builders Association guarantee, and when they found that the guarantee did not cover "external work" (although they were able to persuade Master Builders to do some carpentry work on the deck) they located and employed contractors to do the remaining work at their own cost.

[39] Mr Young, the home builder in Mowlem v Young (surpra) built his house and the wall that led to the claim against him. The judgment does not make it clear whether his house was built by a turnkey-type contract or whether he arranged the trades and supervised the project. The facts are focused on the "relatively major retaining wall": Mr Young is referred to "as the effective builder or constructor of the walls" but ultimately the learned High Court Judge, after stating that he "needed walls" so "arranged for people to do it" did not accept that made Mr Young a contractor or developer. As submitted this judgment confirms for me that in this particular claim the actions of the Crightons did not make them builder/developer/head contractor. They do not owe a duty of care to the Claimants as subsequent purchasers. They were not negligent – they employed a tiling contractor whose name had been

given to them and whom they reasonably expected to be competent and able to carry out the task of completing the decks in a workman-like manner. They relied totally on his skill and experience, which was reasonable in the circumstances, and so did not have a duty to take other advice before engaging him, or have his work supervised. As lay people they were entitled to rely on the expertise of their tradesmen.

[40] I am also satisfied that they knew nothing about the Building Code nor the fact that they were expected to apply to the local council for a code compliance certificate when all work was completed. That would have been the task of Contemporary had they completed the contract, and I accept the Crightons' evidence that they were not told of the need to get a code compliance certificate until the issue was raised by their real estate agent about the time the property was going on the market. It appears from Council records that no work was required to be done as a result of the final inspections in January 2000 before the code compliance certificate was issued several days later.

[41] I also accept that just as an owner having a dwelling built pursuant to a turnkey-type contract for his/her own use does not owe a duty of care to subsequent purchasers, so too an owner owes no duty of care for inadequacies in lesser projects or jobs carried out by tradespeople on or around a dwelling.

[42] There will sometimes be a contractual liability but in this particular case the property was sold at auction and therefore the standard warranty (clause 7.1) in the "Particulars and Conditions of Sale" does not assist the Claimants. It must be said that the house and grounds are very attractive and one can understand the Claimants not choosing to get a building report nor attempting to negotiate additional warranties, but ultimately the transaction came down to "buyer beware" and unfortunately they have paid the price.

[43] As I have concluded that the Crightons have no duty of care to the Claimants it follows that the claim against them must fail. Therefore I do not need to

consider the evidence relating to the damage and its causes that were the basis of this claim against the Crightons. (See order below)

COSTS

[44] In the "Response of First Respondents to Written Clarification of Claimants' Claim", filed in late April 2006, counsel for the Crightons seeks costs.

[45] Section 43 of the Act deals with costs.

> *"(1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by –*
>
> *(a) bad faith on the part of that party; or*
>
> *(b) allegations or objections by that party that are without substantial merit.*
>
> *(2) If the adjudicator does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses."*

[46] In brief summary counsel submits that there should be an award in favour of the First Respondents because the allegations against them were "without substantial merit and should not have been pursued beyond the settlement with the Second, Fourth and Fifth Defendants". He goes onto say that it is "incomprehensible that the Claimants would withdraw their claim against (Mr Neary) who performed the defective work, yet continue their claim against the Crightons who did not". He submits there is bad faith. He points out that the fact costs would be sought had been brought to the Claimants' attention, and concludes by referring to the unnecessary costs and distress which the claim has caused the First Respondents. He seeks an order "that

the Claimants indemnify the Crightons for the legal costs incurred post-settlement in preparing for and attending the adjudication hearing".

[47] Subsection (1) allows an award for costs if costs and expenses were incurred unnecessarily by "bad faith" or allegations that are "without substantial merit". Is there evidence of either?

[48] I cannot accept that "the claim lacked any evidential foundation" as alleged. As happens with many WHRS claims, subsequent purchasers like the Claimants here often cannot find out all relevant facts important to their claim until the claim is well underway, and sometimes not until a hearing where evidence in witness statements can be tested by questioning. In this case the Claimants were clearly relying on the evidence provided in Mr Harvey's witness statement (obtained by Mr Lawton's lawyer) and Mr Neary's written responses. Had Mr Harvey's evidence been preferred over the Crightons and/or Mr Neary not changed his position under cross-examination then the Claimants' would have been in a strong position and the Crightons in trouble.

[49] There was an "evidential foundation" but it was ultimately not sustained. The basis of the claim against the Crightons was neither reckless nor malicious. I do not see any significance for the claim against the Crightons in the settlement with the Second, Fourth and Fifth Respondents. The claim was based on the argument that they took over as the builder/head contractor, with particular reference to the work of Mr Neary. The circumstances around his employment were not apparent until during the hearing. In addition the Crightons could have been found liable even when, for whatever reasons, the claim against Mr Neary was not pursued.

[50] I also do not consider that any significance should be placed on the fact that a party, here the Claimants, has been "warned" that a costs claim will be made against it in certain circumstances. "Costs" is a real issue in general litigation and it is usually appropriate for parties to confirm that, if successful, they will seek costs. However in the WHRS jurisdiction, with Parliament clarifying in the "Purpose" section (s3) that the "procedures" are to be "speedy, flexible, and cost-effective", and including a costs section which

permits costs only where there is “bad faith” or lack of “substantial merit”, there seems a presumption against costs, so such warnings are largely meaningless and unhelpful unless there is clear evidence of bad faith etc.

[51] I am not satisfied that the grounds in s 43(1) are made out and accordingly dismiss the application for costs against the Claimants. This means the parties will meet their own costs. (See order below).

CONCLUSION AND ORDERS

[52] For the reasons set out above in this determination I dismiss the claim against the First Respondents and their claim for costs against the Claimants and make the following formal orders:

(1) The claim by Walter Hugh Kettlewell and Raymond Arthur McLaren as trustees of the DS Day Trust against the First Respondents Robert Andrew Crighton and Vera Crighton is hereby dismissed.

(s 36(1)(i))

(2) The claim for costs by the First Respondents Robert Andrew Crighton and Vera Crighton against the Claimants is hereby dismissed.

(s 43)

DATED the 15th day of September 2006

P D SKINNER
Chief Adjudicator