Claim No: 2109

Under	the Weathertight Homes Resolution Services Act 2002
In the matter	of an adjudication claim
Between	**Andre De Wet** and **Annette Cornelia De Wet** Claimants
And	**North Shore City Council** First respondent
And	**Grant Hearle Williams** Second respondent
And	**Jason Thomas Williams** Third respondent
And	**Grant Hearle Williams** and **Jason Thomas Williams** and **Desmond Sarjant Williams** as trustees of **Aladdin Trust** Fourth respondents
And	**Anthony G Smits** trading as **The Home Design Co** Fifth respondent
And	**No Sixth Respondent to this claim** Sixth respondent
And	**Philip Murphy** Seventh respondent
And	**Plaster Systems Limited** Eighth Respondent

(Continued over)

Determination
2 October 2006

(Continued)

And **Eric Lakay**
Ninth Respondent

And **Gino Bianca**
Tenth Respondent

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2. Summary

2.1. The claim is for sums totalling $264,915.00 for repairs to damage from leaks to the dwelling at 18A Manu Place, Albany.

2.2. The builder of the dwellinghouse, the third respondent, Jason Thomas Williams, is liable to the claimants for negligent breach of his duty of care to them as subsequent purchasers of the dwelling and specifically his failure to build the dwelling to meet the performance requirements of the Building Code under the Building Act 1991; and he is liable to them in the sum of $264,915.00.

2.3. The fourth respondents, Grant Hearle Williams, Jason Thomas Williams and Desmond Sarjant Williams**,** as owners of the property and developers of the dwellinghouse for the purpose of sale who employed the builder and other contractors are liable to the claimants for their negligent breach of the duty of care owed by them to the claimants in respect of their development of the site in the sum of $264,915.00.

2.4. The fifth respondent, Anthony G Smits, as designer of the dwelling is liable to the claimants for negligent aspects of the design under a duty of care owed by him to them in sums totalling $121,927.50, the adjudicator having drawn adverse inferences against him for his failure to attend conferences and participate in the adjudication.

2.5. The tenth respondent, Gino Bianca, who was the plasterer on site has a liability to the claimants in respect of negligent discharge of his duties of care so far as first, plastering issues affecting installation of the joinery are concerned; and secondly, his failure to deal with the way in which the builder had completed the parapets so as to prevent water entry and damage and is liable to the claimants in sums totalling $170,752.50.

2.6. The eighth respondent, Plaster Systems Limited, is negligent in its discharge of duties of care in that its representative advised the plasterer, Mr Bianca, the eighth respondent, concerning application of the Duraplast system and aspects concerning one part of the construction and is liable to the claimants for that negligence in the sum of $72,743.00.

2.7. The territorial authority, the North Shore City Council, the first respondent, has been negligent in its discharge of its duties of care primarily in relation to inspection and in its consequent completion of a Code Compliance Certificate in relation to parapet top issues, cladding to deck issues and glass penetration of balustrade issues and is liable to the claimants in the sum of $234,652.50.

2.8. The ninth respondent, Eric Lakay, has completed a pre-purchase inspection and report on behalf of the claimants which is deceptive and misleading and he is liable to them under the Fair Trading Act 1986 for sums totalling $264,915.00 insofar as his reports attract liability to him personally under the Fair Trading Act 1986.

2.9. The respondents other than the ninth respondent are entitled to contributions from other respondents in varying proportions and, insofar as one respondent may pay more to the claimants than its share of liability is as stipulated it or he is entitled to recover from other respondents a contribution to that liability up to the stated percentages.

2.10. No order for costs is made.

3. Adjudication Claim

3.1. The claimants are owners of 18A Manu Place, Albany, and gave Notice of Adjudication dated 10 October 2005 under the Weathertight Homes Resolution Services Act 2002 (**the WHRS Act**) naming certain of the above respondents. There were amended Notices of Adjudication including one dated 13 April 2006 which was further amended at the hearing and then another Amended Notice of Adjudication dated 15 May 2006 at the conclusion of the first day of the hearing.

3.2. By then there had been further respondents joined pursuant to s33 of the WHRS Act. The claim in the final amended claim was for $312,664.00 against all respondents except the eighth respondent, Plaster Systems Limited, where the claim was $101,675.00 amended yet again on 17 May 2006 to total $120,492.00.

3.3. I was assigned as the adjudicator to this claim along with claim 1505 which relates to unit B, 18 Manu Place, Albany. For convenience, and because many of the respondents were the same and the issues affected both claims, they were dealt with simultaneously both at preliminary conferences I held and at the final conference/hearing which commenced on 15 May 2006.

3.4. That hearing on 15 May 2006 was attended by:

3.4.1. Mr G Lewis, counsel for the claimants, accompanied by Mr & Mrs De Wet;

3.4.2. Ms S Thodey and Ms A Fistonich, counsel for the first respondent (**the Council**), accompanied by Messrs Gunson and Flay, Council officers;

3.4.3. Mr J T Williams, the third respondent (**J T Williams**);

3.4.4. Mr D Williams and Mr J T Williams as trustees of the fourth respondent (**Aladdin Trust**);

3.4.5. Mr S Piggin, counsel for the seventh respondent (**P Murphy**) (and representing another respondent to claim 1505);

3.4.6. Mr R Knol, the business manager, and Mr D Hesketh, the area manager, of the eighth respondent (**Plaster Systems**);

3.4.7. Mr G Bianca (**G Bianca**), the tenth respondent.

3.5. Also at the hearing was Mr Francis John Murphy (**F J Murphy**), respondent to claim 1505.

3.6. Also at the hearing was the WHRS assessor, Mr W Hursthouse.

3.7. Evidence at the hearing was called:

3.7.1. for the claimants from Mr Andre De Wet, Mrs Annette De Wet, Mr Matthew Earley, Mr William Roger Cartwright and Mr John Grant Ewen. The claimants also relied on the report from the WHRS assessor, Mr Hursthouse, who was examined by all parties (and

there was evidence given in support of claim 1505 by Mr Atkins which I take into account in the present claim only to the extent that it is relevant);

3.7.2. for the first respondent, the Council, from Morris Ballantine Jones and Alec James Roxburgh;

3.7.3. for the third respondent, Mr J T Williams, from Jason Williams;

3.7.4. for the seventh respondent, from Philip Murphy, Phillip Wayne Grigg and Jason Thomas Williams (the third respondent) (who had, of course, given evidence on his own behalf). Also to the extent that it was relevant to this claim, evidence was given by Francis John Murphy, a respondent to claim 1505;

3.7.5. for the eighth respondent, Plaster Systems, from Robert William Knol;

3.7.6. for the tenth respondent, Mr G Bianca.

3.8. The hearing continued on 16 May 2006 and Mr J T Williams was not present from then on; and 17 May 2006, then resumed on 19 May 2006 (and Mr Desmond Sarjant Williams was not present then, neither was Mr Hesketh of Plaster Systems).

3.9. I requested that there be a technical meeting of experts on technical questions chaired by the WHRS assessor, Mr Hursthouse, and that occurred on 15 May 2006 in which there participated Mr Hursthouse, Mr Earley, Mr Roxburgh, Mr Ewen, and Mr Grigg. The purpose was to explore areas where those persons were in agreement or those areas where they were in disagreement. Mr Hursthouse reported back to the conference/hearing later

that day that it had been agreed as follows (although there was some departure from this in the evidence that ensued):

3.9.1. That targeted repairs were not appropriate and both units needed to be fully reclad. (In fact in respect of unit B – claim 1505 – the unit had been fully demolished and rebuilt).

3.9.2. The waterproofing to the block wall of unit B had failed. It was agreed the Council would not have inspected this issue and that none of those experts expected the Council would have inspected.

3.9.3. The caps to the parapets had failed and there was inadequate waterproofing protection to the parapets. One way to achieve waterproofing was a metal capping which had not been installed in accordance with the consent drawings. The capping should have been continuous. The parapets had failed because of inadequate waterproofing. This was a workmanship rather than a design issue.

3.9.4. With respect to the internal guttering there were cap flashings missing and they lacked a suitable overflow which could have been contributing factors.

3.9.5. Where the cladding was in contact with the ground this could cause wicking damage and damage from wicking had been observed although this was significantly less than damage caused by other defects.

3.9.6. With respect to the balustrades:

3.9.6.1 the glass barriers penetrated into the balustrades and this was the most significant defect;

3.9.6.2 the tops of the balustrades lacked waterproofing and no 18B had a flat top. This was the second most significant defect.

3.9.7. With respect to the decks:

3.9.7.1 the cladding was in contact with the deck tiles;

3.9.7.2 there was no significant difference between the floor level and the deck level.

3.9.8. With respect to window installation:

3.9.8.1 this failed because the sealant failed (and this was challenged by G Bianca – he had not participated in the expert conference);

3.9.8.2 the 1994 installation detail from Plaster Systems should have been used (and this was challenged later by Mr Hesketh on behalf of Plaster Systems, he not having been a party to that conference).

3.9.9. As to the importance and weighting of issues, the two most significant causes were the parapets issues and the window installation issues mentioned.

3.10. The parties agreed to accept those findings except for:

3.10.1. Mr Knol on behalf of Plaster Systems indicated there had been no water testing of joinery weatherproof issues and Mr Hesketh for Plaster Systems questioned the suggestion the 1994 Plaster System installation details should have been followed (and I refer to this later). Mr Hursthouse indicated that the Council pre-line inspection was 17 March 2005 and, in his view, there had been insufficient time to bring in the 2005 detail.

3.10.2. Mr G Bianca challenged the statement concerning failure of the sealant.

4. The Dwelling

4.1. The two units at 18 Manu Place, Albany, were built between 1994 and 1996. The building consent for the two units was issued on 30 November 1994. At the time the fourth respondents were not the owners of the property, it having been transferred to them on 27 July 1995. I was not given evidence about ownership before that date but it seems uncontentious that the fourth respondents, perhaps in their capacity as trustees of the Aladdin Trust but in any event in their name, were the owners of, or had appropriate equitable interests in the property during the time of construction. Both units were built by the third respondent, J T Williams, at the same time using drawings and specifications created by the fifth respondent, Anthony G Smits, trading as The Home Design Co.

4.2. The design of both was substantially the same although there were upper floor interior layout differences and also unit B was higher on site than unit A. Exterior cladding was a system named Duraplast provided by Plaster Systems (the eighth respondent) and this was applied as to unit A by the tenth respondent, G Bianca, and as to unit B by the sixth and seventh respondents, F J Murphy and P Murphy.

4.3. The application for building consent was made to the territorial authority, the first respondent, the North Shore City Council, and building consent number BG5328 was given on 30 November 1994. There were various inspections during construction by officers of the Council and Field Memoranda and Producer Statements issued. The Code Compliance Certificate for both units was issued by the Council on 29 April 1996.

4.4. The title to unit A shows that it was transferred to J & M J Atchison in September 1995 and by then to L S Aitken and D H Te Wheoro in September 2000.

4.5. The claimants, Mr & Mrs De Wet, agreed, by agreement dated 21 April 2003, to purchase the property from L S Aitken and D H Te Wheoro for $346,000.00 with settlement on 12 June 2003. It was a condition of that agreement that they be satisfied with a report on "structural integrity of the building" by "a qualified Builder".

4.6. A pre-purchase report was prepared for the claimants by the ninth respondent, Eric Lakay, and the agreement for purchase by the claimants became unconditional.

4.7. The claimants moved in on 12 June 2003 and within a short time Mr De Wet considered it necessary to apply sealant to certain of the cracks. Later that year the shelf in the bedroom collapsed and the wall was dripping wet. After further inquiries they contacted Mr Lakay in September 2003 asking him to carry out a test for dampness and he completed a further report dated 19 September 2003 referring to water moisture readings that he had taken and found and concluded that certain parts of the dwelling had a moisture content in excess of 18% which would not comply with appropriate standards.

4.8. In January 2004 the claimants initiated a claim under the WHRS Act. The assessor, Mr Hursthouse, attended the dwelling in June and July 2004 and completed a report dated 31 July 2004 (along with a report of the same date in respect of unit B).

4.9. Mr & Mrs De Wet have continued to have leaking problems in their dwelling since then during the winters of 2004 and 2005 and have themselves

applied sealant and installed metal capping and taken other steps to prevent leaking where they could.

4.10. The assessor, Mr Hursthouse, in his July 2004 report assessed the repairs that he considered were necessary for damage caused and to prevent future damage and obtained a Quantity Surveyor's estimate for the cost of this from Hauraki Marketing Limited at $123,775.65 plus GST. The claimants have themselves commissioned independent costing from CoveKinloch and Rider Hunt Terotech at $195,400.00. Adding documentation costs, project management fees, GST and building consent fees, the total repair costs claimed by them is $259,134.00.

5. The Claim

5.1. The claim by the claimants is for sums totalling $312,664.00 made up as follows:

Metal capping and sealant purchased and applied early 2005	$981.00
Painting of house by Shiny Painters (claimed now to be wasted effort and cost)	1,500.00
CoveKinloch account 30/6/05 (excluding aspects relating to mediation)	6,735.00
Cost of repairs – Rider Hunt Terotech	195,400.00
Documentation costs	10,000.00
Project management fees	16,000.00
GST on last three items	27,675.00
Building consent fees (inc GST)	10,059.00
Removal and storage costs for vacating the dwelling and storage of household furniture and effects for six weeks	1,614.00
Cost of alternative accommodation – six weeks at $450.00	2,700.00
Compensation for distress, anxiety and inconvenience - $20,000.00 each	40,000.00
Total	$312,664.00

5.2. That sum is claimed in full against all respondents except the eighth respondent, Plaster Systems Limited, where the claim is for $120,492.00 which is made up as follows:

Metal capping and sealant purchased and applied early 2005	$981.00
Painting of house by Shiny Painters (claimed now to be wasted effort and cost)	1,500.00
CoveKinloch account 30/6/05 (excluding aspects relating to mediation)	6,735.00
Cost of repairs to south-west elevation only (to include a proportion of project management documentation costs and building consent fees (referred to in para 5.1 above) – amended without objection on 17 May 2006)	66,962.00
Removal and storage costs for vacating the dwelling and storage of household furniture and effects for six weeks	1,614.00
Cost of alternative accommodation – six weeks at $450.00	2,700.00
Compensation for distress, anxiety and inconvenience - $20,000.00 each	40,000.00
Total	$120,492.00

5.3. The claim included schedules of the six major defects alleged and the amounts claimed by the claimants against each of the first, third, fifth and seventh respondents for each of the six defects alleged. There is in that process significant duplication because it is claimed that each of those respondents has an individual liability for some or all of the six items.

5.4. Largely the quantum of claims is not contested by the respondents but the Council specifically raised these issues:

5.4.1. That there should be disallowed the following items on the grounds that these were costs that would have been incurred for maintenance in any event:

Cost of repainting exterior of house	8,500.00
Cost of repainting interior of house	4,810.00
Cost associated with new carpet	704.00
Total	$14,014.00

5.4.2. The CoveKinloch Consultants account of 30/6/05, $6,735.00, are costs in preparation for the adjudication.

Maintenance Costs

5.5. Certainly a dwelling needs regular maintenance. This dwelling has been now constructed for some 11 years and in the normal course would have required painting at the cost of the owners. It is unclear from the Hauraki Marketing Limited quantity surveying assessment whether exterior painting is included in the sum of $37,232.00 for recladding but the Rider Hunt Terotech analysis does appear to include $9,200.00 for external painting. Likewise there appears no express allowance for interior renovation in the Hauraki Marketing analysis, although the WHRS assessor's report refers to relining, plastering and painting and replacing carpet; and the Rider Hunt Terotech analysis appears to include $5,600.00 for internal linings.

5.6. My view is that, if the claimants have the remedial work proposed done, they will end up with a house that is freshly repainted to the exterior with the fresh repainting to the interior and new carpeting and that can be regarded as betterment. Accordingly I allow the Council's proposed deduction of **$14,014.00**.

5.7. The claimants have claimed, and it is conceded by the Council (and no other respondent objects) that the cost of painting the exterior incurred with Shiny Painters, $1,500.00, should be reimbursed and that is included in the amounts claimed.

Consultants' Costs

5.8. The CoveKinloch account of 30 June 2005 for $6,735.00 (net after allowance for costs associated with the mediation) is stated to be for reviewing the report and QS costs and preparation and attendance at the mediation. Although the CoveKinloch letter of 29 March 2006 breaks down "from historical data" the amount for investigating and reporting as against preparation and mediation attendance, there is nothing to suggest that the investigation and reporting is anything other than preparation for the presentation of the claimants' case in this matter which includes the adjudication.

5.9. My view is that costs for that consultation are costs in relation to the adjudication and should be dealt with, and are in fact dealt with below, under s43 of the WHRS Act.

General Damages

5.10. The Council expressly acknowledges that it accepts that it may be appropriate to award the claimants a sum for general damages. Its submissions address principles and make specific reference to the claims for general damages in claim 1505. The submissions for the sixth and seventh respondents address the claim for damages in claim 1505 and appear to accept that the claimants in this claim may be entitled to an award. None of the other respondents have expressly addressed this.

5.11. The submissions from the Council include reference to a significant number of cases on the subject of general damages and acknowledge that:

> "… there has been an increase in the level of general damages awards over the last 5 – 10 years".

Those submissions do include, however, that:

> "… academic writers comment that awards are generally on the low side and as [Law of Torts in New Zealand, 4th edition – Todd] has said, awards of $20,000.00 - $25,000.00 must therefore be seen at the top end of the scale"

referring to that text.

5.12. The Council also submits on the basis of the authorities that when an award of general damages is made it must be made in respect of the individual respondents based on the measure of the effect that events have caused to that particular claimant by that particular respondent and not an award which is the subject of concurrent tortfeasorship rules.

5.13. The basis for the claim is that the claimants had recently come from South Africa with two young children aged 12 and 11 years looking for a change of lifestyle and a better work/life balance. After arrival in Auckland in June 2002 they looked for a home in the vicinity of Northcross Intermediate and in the Rangitoto College zone. They were attracted to the subject dwelling but Mr De Wet said he was not used to a cladding system and made inquiries concerning this especially seeking the building report from Mr Lakay to which I have referred. It was after they moved into the dwelling in June 2003 that they noticed the cracks and then the leaking and damage became apparent. They made the inquiries I have spoken of and initiated this claim. Mr De Wet spoke of being concerned about financial pressures especially that they had lost money on their immigration from South Africa and the collapse of the rand. He said they were very stretched financially and that he has lost a lot of sleep worrying about this. He said that the family decided they could not take family holidays because of the cost of repair and had to cut back on birthday presents and dining out. He was offered, and undertook, two sessions of counselling in November 2004 because of the stress. He said that he and Mrs De Wet separated in June 2006 and that he has:

> "… no doubt that the pressures associated with owning a leaky home contributed to the separation."

5.14. For her part Mrs De Wet said that she too has lost a lot of sleep worrying about the problem and had constant problems with sinuses and a gastrointestinal problem which her doctor advised were stress related. She said too that the leaky home was one of the main reasons for her separation and that Mr De Wet:

> "… was absolutely devastated and the problem with the house consumed him completely. He became a different person."

5.15. The authorities were extensively considered in *Chase v De Groot* [1994] 1 NZLR 613 and *Attorney-General v Niania* [1994] 3 NZLR 106. In *Waitakere City Council v Sean Smith* (District Court; CIV 2004-090-1757; 28/1/05; Judge McElrea) it was affirmed that the purpose and intent of the WHRS Act enhances the power to award general damages and in *Maureen Young and Porirua City Council v Dennis and Jane McQuad & Ors* (District Court; CIV 2003-392-2004; Judge Barber) the Court followed that principle and increased the amount awarded by the Weathertight Homes adjudicator.

5.16. In addition to the authorities cited by the Council there are also the decisions of adjudicators in adjudications under the WHRS Act. These have ranged between $2,000.00 and $18,000.00. I have come to the conclusion that the appropriate amount to be awarded to the claimants for general damages is the sum of **$13,000.00** between them. I do not think that the stress from the financial consequences of their move from South Africa or the poor exchange rate they experienced should be visited upon the respondents. I do think, however, that they expected to establish a new life for themselves in New Zealand and the consequences of the distressing situation they have found themselves in has perhaps been exacerbated by the frustration of that objective. Because they are separated, because Mr De Wet remains in the subject dwelling and because even Mrs De Wet seems to acknowledge that Mr De Wet has suffered greater, I am of the view that the sum should be

paid unequally with an award of **$7,000.00** to Mr De Wet and **$6,000.00** to Mrs De Wet.

5.17. I will consider individual respondents' liability to those damages as I deal with each respondent.

6. Causation of Leaks and Damage

6.1. The claim refers to six defects causing water entry and damage and requiring repair at the costs mentioned above, namely:

6.1.1. cladding taken below ground and floor to external ground levels inadequate;

6.1.2. inadequate waterproofing detail to parapet tops to front gable and side elevations;

6.1.3. inadequate sill and jamb flashings to aluminium window and door joinery;

6.1.4. failure of flashings at either end of central internal gutter;

6.1.5. cladding taken hard down onto paved decks;

6.1.6. glass penetrating flat tops of balustrades on front decks.

6.2. It is claimed that each of the North Shore City Council, the builder, Mr Jason Williams, the designer, Mr Anthony G Smits, have a liability for the damage caused by each of those defects and that the plasterer has a liability for the damage caused by items 1 (cladding below ground level), 3 (inadequate flashings) and 5 (cladding to paved decks).

Parapet Tops and Detail

6.3. The technical meeting of experts referred to at paragraph 3.9 above identified the parapets issues and the window installation issues as the most significant causes of water entry and damage, that is items 2 and 3 in paragraph 6.1 above.

6.4. Mr Earley's evidence was that the parapets are at the side, north-east and south-west elevations and had been constructed flat with the fibre cement backer nailed directly to the timber and plastered over. To the front and rear elevations there were a pair of raking parapet gables constructed and on the front south-east elevation the raking parapet had a metal capping which terminated behind the plaster instead of more appropriately over the top. Moisture has been penetrating the side parapet tops through nail fixing penetrations made worse by the flat surface. Moisture was, Mr Earley said, also penetrating the raking junction between the cladding and the parapet capping.

6.5. The WHRS assessor said in his report that the March 1995 Duraplast specifications of Plaster Systems Limited showed two alternatives, one of which was on the consented plans, namely a metal capping, but that three different systems had been used and only one of these was in accordance with manufacturer's details. He said that the four sloping parapets at the rear were clad with four metal cappings which were working but the sloping parapets at the front were almost completely covered with metal flashings which turned down over the Hardiflex in front of the plaster coating allowing water to soak into the plaster coating and into the Hardibacker.

6.6. Mr Grigg, called as a witness for the plasterer Mr Philip Murphy, largely confirmed Mr Earley's evidence as to the construction. He referred at some length to design issues. The drawings provided for H1 framing "clad in

Hardibacker & plaster prefinished steel capping to flashtop". The specification called for the roofing contractor to:

> "… adequately and neatly secure all ridgings, cappings and overflashings wherever needed to make and keep **roof** watertight" (emphasis added)

and in respect of the plumber that the inclusion of flashings meant that these should:

> "… be of the quality expected of work customarily done by plumbers"

(and that does not of itself in my opinion impose flashing obligations on the plumber).

As to flashings, the Plumber section also provided:

> "Wherever possible use flashings that are readily available, purpose-made by the roof cladding manufacturer to suit the roofing material and profile selected. Otherwise provide flashings as recommended but not supplied by cladding manufacturer and adequately secure. Flash wherever needed to making and keeping roof watertight …"

6.7. Mr Grigg said that the drawings made it clear that there was to be a metal cap flashing to be installed and that, "following normal trade practice", flashing would be undertaken by the roofer, plumber or main builder after the plasterers had finished.

6.8. As with Mr Earley, Mr Grigg referred to the designer having used the first of the March 1995 Duraplast detail sheets with rigid metal flashing. In respect of the builder he said this had been done "to some extent". As to the gable flashings at the rear, the builder installed full metal flashings. On the front of the house the metal flashings extended half way across the gable parapets; and on the side parapets the builder has substituted butynol underneath the Hardibacker on the parapet tops, an express departure from the specification.

6.9. Mr Roxburgh of the Council gave evidence which primarily addressed Council's inspection obligations and did not appear to disagree with the design and construction issues mentioned by other witnesses except that he expressed the view that water ingress at the level in question will also have been contributed to by the failure of gutter linings and waterproofing details (item 4 in the defects list) and he said that it was:

> "… highly likely that water ingressed significantly in and around the gutters through lack of maintenance."

6.10. These respective views were canvassed at the technical meeting mentioned and, as I have said at paragraph 3.9.3 above, it was agreed by those present that the caps to the parapets had failed and there was inadequate waterproofing protection to the parapets. A metal capping had not been installed in accordance with the consent drawings and any capping should have been continuous. It had been agreed that the parapets had failed because of inadequate waterproofing. It was also agreed that this was a workmanship rather than a design issue.

6.11. The builder, Mr Jason Williams, in a written statement dated 23 April 2006 which he affirmed at the hearing said in relation to the front gable flashings that these were installed by the roofing contractor, John Watts (not a respondent to this claim), who he said was "solely responsible for this procedure and paid in full by the Aladdin Trust [the fourth respondents] for material and labour". As to the side elevations, he said they were waterproofed and inspected by the plasterer, Mr Bianca, but essentially does not deny the evidence referred to as to leaks causation or damage.

6.12. Likewise the responses and evidence from Plaster Systems Limited and Mr Bianca, while denying liability for reasons I shall mention, did not offer any alternative opinion on water entry or damage.

6.13. Accordingly I find that there were leaks in respect of parapet tops which arose from faulty construction methods. I shall deal with the respective liabilities of the parties below.

6.14. As to the cost of that remedial work, this was put by Mr Earley and not effectively disputed by other parties as follows:

Repair Detail and Location	**Repair Cost**
Reclad side elevations and rebuild internal gutters parapets:	
South-west elevation	48,145.00
North-east elevation	48,855.00
Parapets	14,700.00
Total (excluding GST)	$111,700.00
Total (including GST)	**$125,662.50**

Joinery Flashings

6.15. This was the second issue identified at the technical conference as one of the most significant causes of water entry and damage.

6.16. A measure of agreement was reached between the technical experts at their meeting and, as I have said at paragraph 3.9.8:

6.16.1. the window installation failed because the sealant failed (although this was challenged by Mr Bianca);

6.16.2. the 1994 installation detail from Plaster Systems should have been used (and again this was challenged by Mr Hesketh).

6.17. Different considerations apply in respect of 18A Manu Place where the plasterer was the tenth respondent, Mr Bianca, from those that apply in

respect of 18B where the plasterers were the sixth and seventh respondents, Francis and Philip Murphy.

6.18. The window installation and associated Duraplast system application required to follow the appropriate Duraplast specifications and manuals and required to comply with good trade practice.

6.19. The Duraplast system details provided for fixed face installation of windows or recessed and there were two versions of those system details discussed, one dated July 1994 and the other March 1995.

6.20. Mr Earley produced an "As Built" detail which at first referred to 18A but which he then corrected as referring to 18B (that is, as implicated in the plastering work of Messrs Murphy).

6.21. Mr Earley had said in his evidence that the cladding to window joinery construction for unit 18A was a departure from the manufacturer's installation requirements and had failed. He said that the construction followed neither option in the Duraplast details (face fixed or recessed) but more closely resembled the face fixed detail. However that evidence was given in relation to his "As Built" sketch which in fact referred to 18B.

6.22. Mr Roxburgh for the Council said that the more relevant Duraplast details were those of March 1995 and that:

> "… the plasterer has made a closer attempt to follow these than the 1994 details but still failed to execute the detail correctly."

It is quite unclear from that whether he was referring to unit 18A or unit 18B.

6.23. Mr Grigg, the witness for the Murphys, was unable to inspect 18B where they were implicated because it had by then (16 June 2005) been removed but he did inspect the site at no 18A Manu Place. He assumed that the

detail for 18A was the same as shown in photographs in the WHRS assessor's report for unit B (claim 1505). He said that the fitted window joinery was closer to the 1994 Duraplast recessed window option rather than the face fixed option. The recessed window option had two alternative UPVC flashing options in the March 1995 detail, an "L" shape and a "Z" shape.

6.24. With reference to the As Built detail from Mr Earley for no 18B, Mr Grigg said that this would produce a far better waterproofing option than the then current Duraplast specification. The As Built detail showed the "L" flashing across the top of the polystyrene screed guide which Mr Grigg said would direct moisture away from the Hardibacker board to the outside face of the cladding system where the Duraplast plaster mixture is located. By contrast, the July 1994 Duraplast system detail showed the "L" flashing as being **behind** the Hardibacker in respect of recessed window, but in respect of the fixed face joinery did not show a flange at all but merely the outside of the joinery being separated from the Hardibacker by sealant. In respect of 18B, Mr Grigg said that the As Built detail was faithful to the Plaster System's Duraplast specification.

6.25. In reply Mr Earley said that in his opinion it was:

> "… clear from the positioning of the window that the intention was for a face fixed option for windows [and they] have been incorrectly placed to achieve a face fixed installation and it is apparent that the plasterer has adapted the plaster installation to suit. As the installation is different than that specified by the plaster manufacturer and the windows have subsequently failed, responsibility for the defect should be attributed to the plasterer as opposed to Plaster Systems (unless the construction was confirmed on site by a plaster systems representative, as recently alleged by the Builder)."

6.26. Mr Grigg also said that another point of water egress "**can** occur" (emphasis added) on the mitre corners of the windows but he had been unable to ascertain whether there were any inbuilt drainholes for the windows and gave speculative evidence about the possibility of mitre joints splitting.

6.27. The assessor in his original report had referred to the July 1994 faced fixed joinery Duraplast detail (with the joinery outside the Hardibacker and sealed with sealant) and photographs of 18A that he had taken which showed the window embedded in the plaster and concluded that:

> "By embedding the joinery, surface water is diverted into the lightweight plaster soaking sideways and reaching the framing."

In his supplementary report the assessor had seen the recessed window detail and concluded that:

> "The flashings installed to the side and sill … so closely resemble a Plaster System installation detail which was current at the time that in [his] opinion the installers can be said to have followed it faithfully."

However, those comments appear to relate to claim 1505 concerning 18B Manu Place.

6.28. During an adjournment certain investigative work was done and photographs taken in respect of unit 18A and the photographs were produced without objection. They showed that the window installation detail at unit 18A was different from that at unit 18B and different from the photographs taken in respect of unit 18B to which the assessor had referred and the As Built diagram for unit 18B by Mr Earley. Unit 18B had, of course, by then been demolished. Unit A and the photographs showed that there was not the same flange detail in the window installations as had been used in respect of unit 18B.

6.29. There was some evidence and discussion about the time for application of the March 1995 Plaster Systems Duraplast system detail. Mr Grigg had been unable to find it amongst his firm's library resources. Plaster Systems were unable to give clear evidence as to when the detail was distributed or would have been available to the respective plasterers at 18 Manu Place. The approval from BRANZ to the 1995 Duraplast detail is dated May 1995

but I do not think that is significant. The detail was available earlier than that and I was told that the relevant flanges would have been available earlier too.

6.30. In my view if the 1994 detail had been deficient to such an extent that this justified correction in the 1995 detail it was incumbent on Plaster Systems to make sure that its contractors and applicators were well aware of the changes and had their attention specifically drawn to the changes that had occurred. In this case a Plaster Systems representative, Mr Bakker, attended the site from time to time and, if the necessity to change the flange detail from the 1994 detail had been an issue then it was for him, in my view, to make this quite clear to the respective plasterers. There was no evidence that he did so. In fact Mr Bianca's evidence was to the contrary, namely that he worked on the basis of advice from Mr Bakker who was the on-site training manager and technical adviser and his job on site:

> "… was to ensure that the standard of work that we carried out was up to Plaster Systems Ltd standards. If there were any problems with the work that we done [sic] it was the responsibility of the builder to approach us, so that we may fix the problem within the guarantee period, the builder did not approach us and Plaster Systems Ltd approved the standard work without question."

My view is that in those circumstances it was quite in order for the plasterers in each case to follow the July 1994 detail.

6.31. At the expert technical meeting mentioned it was agreed between those participating, as I have said at paragraph 3.9 above, that the 1994 installation detail should have been used and, as I have said, I accept that.

6.32. It was also agreed that the window installation failed because the sealant failed. Mr Bianca was not a party to that meeting and is not bound by that agreement and indeed he challenged that. He did not, however, produce any evidence to support his challenge and indeed his response to the claim

and complete presentation was directed more to the issue of any supervision and guidance he had from Mr Bakker than from technical explanation disputes.

6.33. Mr Grigg said in evidence (and his evidence at the time was addressed to both units because Mr Philip Murphy was then a respondent in respect of unit 18A) that the Hardibacker solid plaster system required that windows be sealed with:

> "… a good quality polyurethane sealant such as Sikaflex II FC".

He said that a polyurethane sealant works if there are only two surfaces to be sealed but is not usually adequate for three surfaces where there is required to be a bond breaker. I was referred to the Sikaflex construction detail which read:

> "If the joint has a solid, formed base it is essential to apply a bondbreaker tape to this surface in order to prevent back adhesion. This will then allow the sealant unrestrained movement throughout the depth of the joint."

Mr Grigg, in reference to unit 18B, said that the photographs showed the three surfaces to be waterproofed and therefore the need for a bond breaker. I am taking it that the same applied in respect of unit 18A. Mr Grigg said that it appeared that the sealant in a photograph to unit 18B looked similar to the requirement of the detail in the Duraplast system 1994 detail but that detail does not show a bond breaker and should have done to comply with the Sikaflex requirements.

6.34. Having considered all these issues I have come to these conclusions. First, different considerations apply to unit 18A from those to unit 18B. In respect of both units the applicable Duraplast system was the 1994 detail. That detail in respect of the recessed window required an L flashing and in respect of face fixed joinery required the joinery to abut the Harditex or the polystyrene screed but with an adequate sealant. The construction of both

units was unclear as to whether there were recessed or face fixed joinery used and the plasterers in each case had to adapt the application of the Duraplast system to cope with the specific As Built detail. In respect of unit 18B, the plasterers have used an L shaped flange which has been as effective, if not more so, than the Duraplast system drawings in having drawn the water away from and over the Hardibacker surface. In respect of unit 18A there has been no such flange used for the joinery. Where a bond breaker was required in respect of three surfaces this has not been provided as required by the Sikaflex specification.

6.35. I do not find there has been evidence of other causation of leaks in respect of the joinery, particularly as to the suggestion of the mitred corners being defective or having been driven out of shape. Although there was some evidence of that possibility, in my view that evidence is not sufficiently compelling and I have the view of the technical experts, not disputed by evidence from Mr Bianca, that the primary cause of leaks in this area was sealant failure. Accordingly my view is that the cause of damage in respect of this aspect of the work was in respect of unit 18A the absence of any adequate flange, the absence of a bond breaker where required and inadequate application of sealant. In respect of unit 18B the cause of leaks was the absence of a bond breaker where required and inadequate application of sealant, although this was relieved to a degree by the use of an operative flange.

6.36. As to the cost of remedial work from this cause, Mr Earley has given evidence that this amounts to $48,145.00 plus GST, ie $54,163.13, being the amount referred to in paragraph 6.14 above.

Cladding to Ground

6.37. Having regard to the technical expert discussion on primary causes of leaking and damage and to the schedule of repair costs outlined by Mr

Earley in respect of each category of claimed damage, this is a relatively minor matter. The amounts he attributes to the total cost of repairs where cladding to the ground may be an issue, a total of $106,400.00, comprises:

South-west elevation	48,145.00
North-east elevation	48,855.00
Nib wall	9,400.00
Total	$106,400.00

6.38. It will be seen that the only new item there is the nib wall, $9,400.00, although his evidence is that the cladding has contributed to damage to the other aspects of the dwelling.

6.39. The assessor referred to the causes of water entering the dwellinghouse as including:

> "… buried cladding, outside finished levels high relative to the inside floor level".

His report referred to the required break between the bottom of the sheet for Duraplast and the finished ground level.

6.40. Mr Earley spoke of the cladding having been taken down to the ground level at the front (south-east) elevation and the side (north-east and south-west) elevations. He referred to the wicking of moisture having occurred and the moisture meter readings taken by the assessor. He also referred to further moisture testing carried out in March 2006 where readings of 25% were found in the south-west and north-east elevations. He referred to the Acceptable Solution under the Building Code no E2/AS1 requiring a floor to ground separation of 150mm to paved ground and 225mm to unpaved. He also referred, as did the assessor, to Performance Clause E2.3.3 of the Building Code.

6.41. Mr Roxburgh confirmed that cladding in contact with the concrete around the house is contrary to the requirements of NZS3604:1990 – Light Timber Framed Buildings. He opined that:

> "[t]he problem of plaster in contact with the ground was not considered to be of high risk **at the time**. There are a lot of houses that were built without such a break between the plaster and the ground." (emphasis added)

Mr Earley disagreed with this given the specific reference to it in clause E2.3.3 of the Building Code. Mr Grigg referred to the requirement of the James Hardie December 1994 Technical Detail for Hardibacker sheets for a 50mm overhang below the bottom plate and the concrete floor. He also referred to the need for Hardibacker to be covered with plaster and concluded that:

> "… the builder sets the base level of the Hardibacker sheets and the plasterers would have plastered up to that edge."

6.42. Mr Jones for the Council said that it would only be areas not under cover which would have been considered at risk. He said there was a channel around those parts of the houses where the issue of inadequate ground clearance arose which the builder "would have retrofitted".

6.43. There seems to be unanimity (and there was no evidence from other parties to the contrary) that there was inadequate ground clearance between the ground and the cladding surface and, in my view, that has been a contributing factor to the entry of water and damage, although a relatively minor one by comparison to other issues raised.

6.44. The amount claimed is, as I have said, $106,400.00 but that represents a significant overlap with amounts claimed for other causes. The extra amount ($9,400.00) inclusive of GST is **$10,575.00**.

Failure of Flashings at Central Internal Gutter

6.45. There is decayed wall framing below the gutter ends. The assessor has described that, of the three full length internal gutters, the two outside gutters each have one 65mm outlet properly installed, but the single outlet should have been fitted with a comfortable safety margin in terms of coping with volume to comply with clause E1 4.2.1 Table 5 of the Building Code but there was no overflow fitted to either side. He said that the design and execution of the gutter have allowed water to enter soaking the wall.

6.46. Mr Earley described that the central parapet to the gutter ends has been inadequately flashed and linked in with the raking parapets of the gables with the effect that the raking parapets are channelling water toward to the vulnerable junction. He said moisture is then entering the wall framing below with decay as highlighted by the assessor's report.

6.47. Mr Roxburgh disagreed that the construction was not in accordance with the plans because he could find no reference on the plans or in the specifications to flashings at the end of this internal gutter. He said the gutters were adequately flashed with a butyl rubber flashing that has subsequently failed and his opinion was that this was a major cause of water ingress and one that contributed greatly to the need to demolish. That was an opinion expressed at the time of his brief of evidence but was, I take it, superseded by the discussion of technical experts referred to at paragraph 3.9 where it had been agreed by persons including Mr Roxburgh that the two most significant causes were the parapets issues and the window installation issues mentioned earlier.

6.48. Mr Grigg did not give evidence expressly relating to this issue except to the extent that it was part of the flashings-to-parapets issue mentioned earlier.

6.49. This matter was discussed by the technical experts where they agreed that the internal guttering lacked cap flashings and a suitable overflow and these could have been contributing factors.

6.50. Having considered the evidence carefully I have formed the conclusion that entry of water at this point was a factor and has contributed to the damage caused in the relevant areas. This has been poorly designed to cope with the water flow and has not been manufactured to deal with the adequate disposal of stormwater to an internal guttering such as this.

6.51. The amounts of repair costs have been itemised by Mr Earley as follows:

South-east elevation	27,300.00
North-west elevation	16,000.00
Rear deck	1,500.00
Total (excluding GST)	$44,800.00
Total (including GST)	**$50,400.00**

These items are **additional** to the repair costs to those elevations referred to earlier. They are for recladding the front and rear elevations, separating and reinstating the rear deck.

Cladding Hard to Paved Decks/Glass Penetration Flat Tops of Balustrades

6.52. I have considered these two matters together although they were discussed separately in the evidence. This is first because that proportion of the repair costs attributed by Mr Earley is the same for each, that is that he has said that those repair costs are occasioned by one or other or both of those causes. The second is that they do relate to the same general area of the dwellinghouse.

6.53. The amount Mr Earley has attributed from repair costs to remedial work in respect of this issue for rebuilding the deck balustrades, replacing the deck joists, decking membrane, tiling etc and recladding the front elevation totals $56,800.00 made up of:

South-east elevation (same repairs as internal gutter flashing)	27,300.00
Front decks	23,500.00
Master bedroom internal repairs	6,000.00
Total (excluding GST)	$56,800.00
Total further items including GST ($23,500.00 + $6,000.00)	**$33,187.50**

6.54. Again the technical experts agreed that the cladding was in contact with the deck tiles. There was no evidence to the contrary and that is common ground.

6.55. As to the glass barriers penetration into the balustrades, it was agreed that this was the most significant defect in this area and that the tops of the balustrades lacked waterproofing (and in the case of unit 18B had a flat top).

6.56. The assessor's report refers to this item as a situation where the cladding has come down onto the two cantilevered decks at the front of the house but there has been no capillary break between the cladding and the deck tiles and that is quite apparent from the photograph. He refers also to the outer barrier to each of those decks as a combination of glass and plastered wooden framing where the glass has been recessed into the top of the plastered walls and again this is shown in the photographs. There is advanced decay with high water meter readings.

6.57. Mr Earley has also referred to this defect and its non-compliance with Performance Clause E2.3.3 of the Building Code and by reference to the 1994 Duraplast Technical Details.

6.58. Greater damage is caused by gravity induced moisture than moisture from wicking and the evidence confirmed that.

6.59. Mr Earley in his evidence described the glass penetration into the top of the balustrade walls and its being held in place by a rubber gasket. This allowed moisture to run down the face of the glass and enter at the glass-to-plaster junction through gaps in the gaskets, penetration of the timber and damage. He said there were no specific details in the 1994 Duraplast details as to construction of balustrades in these circumstances but pointed to the requirements of Performance Clause E2.3.2 of the Building Code:

> "Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements."

He referred to the same clause in relation to the cladding to the paved surface.

6.60. Although Mr Roxburgh said there was no guidance at the time regarding installation and weatherproofing of penetrations and that the plastered balustrades sloped away from the glass at a greater slope than shown in the Plaster Systems March 1995 detail sheet, he did not comment further on whether this was a cause of penetration of water.

6.61. Mr Grigg's evidence addressed responsibility issues but did not expressly address the glass penetration issue. He referred to a trough drain installed at the junction of the external wall and the deck which indicated consideration by someone of the issue of drainage from the deck.

6.62. In my view there has been water penetration in this area caused mainly by the design and construction of the glass penetrations to the balustrades but also to a degree by the wicking effect of the cladding being hard to the deck.

7. Causation: Pre-Purchase Inspection; Contributory Negligence Issues

7.1. This issue has been raised by the Council but is relevant to the claims against all respondents and I deal with it now.

7.2. It is argued that the intermediate inspection of the dwellinghouse by the ninth respondent, Mr Lakay, "**may** snap the chain of causation" (emphasis added). It is also argued that that report "**may** support a finding of contributory negligence against [Mr & Mrs De Wet]" (emphasis added).

7.3. The Council argued that the evidence established that Mr & Mrs De Wet placed "utmost importance" on the pre-purchase report from Mr Lakay. Certainly Mr De Wet said that the report was very important in giving them reassurance in their purchase.

7.4. The agreement for sale and purchase by Mr & Mrs De Wet dated 21 April 2003 had special condition 15.0:

> "This agreement is conditional on the purchaser being satisfied with a report on structural integrity of the Building to be obtained from a qualified Builder. Should the Purchaser in good faith be dissatisfied with any matter contained in the report the Purchaser may terminate this agreement by notice in writing to the vendor or the vendor's solicitor …"

7.5. Mr Lakay had been named by the real estate agent as a person "very thorough with his inspections" and Mr De Wet had checked the website for Mr Lakay's company. He said he booked Mr Lakay in to do the inspection and pre-purchase report. He made his enquiries of the Council and said that he "took comfort from the fact that the local authority was involved in the building process and monitored the construction of the house", although he

did concede that he did not know what section 43 of the Building Act 1991 referred to. Mrs De Wet picked up Mr Lakay's report from his office. Mr & Mrs De Wet read the report and were happy to undertake maintenance work. They were pleased with the report and decided to proceed with the purchase. Mrs De Wet did not comment on the impact of the report at all.

7.6. I think it relevant that when they discovered leaks Mr & Mrs De Wet chose to refer the matter back to Mr Lakay for a further report which he gave on 19 September 2003. I mention below the significance of the findings of that report and the absence of those findings from the initial report in the context of Mr Lakay's liability. For present purposes it is noteworthy that Mr & Mrs De Wet had sufficient confidence in Mr Lakay and his first report to consult with him again when they found leaks.

7.7. In support of submissions counsel for the Council has referred to a number of authorities. In *Bowen & Anor v Paramount Builders (Hamilton) Ltd & Anor* [1977] 1 NZLR 394 the plaintiffs/appellants had purchased the flats built in 1968 after only cursory inspection. The flats had been built by the first respondent under contract with the second respondent. In the High Court it had been found that questions of the adequacy of the foundation were known and the plaintiffs' claim failed because the plaintiffs could have acquired the knowledge of the foundation issues. In the Court of Appeal Richmond P referred to his own judgment in *Jull v Wilson & Horton* [1968] NZLR 88 (which was also referred to me by counsel) in which he had said that a person who creates a dangerous situation:

> "… cannot shelter behind the reasonable expectation of intermediate inspection unless the expectation was strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm."

In *Bowen* Richmond P said there were:

> "… two ways in which the question of intermediate examination may be relevant. The first relates to the question whether a plaintiff is in sufficient proximity to the negligent act of the defendant to bring him within the ambit of the defendant's duty of care.
> …
> The second way … is in relation to causation."

7.8. I was also referred to *Peters v Muir* [1996] DCR 205 where the purchaser of the property was found to have been negligent in the purchase such as to reduce the liability by one-third. That case was one where the defects were sufficiently numerous and obvious to put a reasonable person upon enquiry. I was referred to *Cinderella Holdings Ltd v Housing Corporation of New Zealand* [1998] DCR 406 but that was a case of the purchaser suing the vendor for breach of warranties in the agreement and misleading or deceptive conduct. The Court did decide that the plaintiff was negligent in failing to take steps which a reasonably prudent purchaser of a valuable building could have been expected to have taken and that had the building been inspected by competent persons the presence of the PCB contaminated light fittings to which the case referred would have been found justifying a reduction for contributory negligence at 80%. That is a very high percentage. I do not find that case very helpful insofar as it related to an office building.

7.9. In reliance on those authorities the Council has argued that the chain of causation has been "snapped" in this case or the facts may justify a finding of contributory negligence.

7.10. In reply counsel for the claimants has drawn my attention to *Waitakere City Council v Smith* (Waitakere District Court; CIV 2004-090-1757; Judge F W M McElrea; 28/1/05) where the territorial authority had appealed against a finding by the adjudicator in an adjudication under the WHRS Act that the claimants had been negligent in relation to a pre-purchase inspection and had reduced their claim by 20% accordingly. Not only was the territorial authority's appeal not allowed by way of increase to that percentage but the

Court also found that, had the respondent, Mr Smith, appealed against the finding, the contributory negligence 20% reduction would have been disallowed. His Honour said that there was no basis for increasing the percentage:

> "… both because, on the adjudicator's findings there is no basis for finding fault with Mr Smith [the respondent] personally, and because [His Honour did] not think that the negligence of [the certifier] can be imputed to the respondent…"

7.11. In *Morton v Douglas Homes Ltd* [1984] 2 NZLR 549 a plea of contributory negligence against purchasers was rejected by the Court. In that case it was held that, against the known background that a new building required a building permit and the local authority's building inspector checked that foundations were constructed in accordance with by-laws, the purchaser was not at fault in failing to obtain professional advice about foundations.

7.12. The position here is that Mr & Mrs De Wet came to New Zealand intending to re-establish their lives here. They were not used to the type of construction that they found at 18A Manu Place and Mr De Wet noticed some fine cracks in the cladding which "didn't look bad" to him. The inside of the house was perfectly dry so he did not think there would be a problem. He intended to get a pre-purchase inspection report which he thought would highlight "anything serious". They signed the agreement for purchase which contained the condition mentioned above. They obtained a pre-purchase inspection report, the author of which was the ninth respondent. In reliance on that they went ahead with the purchase.

7.13. I do not think on the evidence that there was anything significant to alert them to do any more than they did. Perhaps today more might be done but judging by standards at the time they purchased in April 2003 the obtaining of a pre-purchase inspection report of the kind they did was an appropriate course to follow. There was nothing in the report that alerted them to matters of concern (and I shall refer to the adequacy of the report below).

They proceeded therefore to make the agreement unconditional and I do not think it was negligent of them to take that step given that there was nothing in the report to raise concerns.

7.14. It may be that, had there been matters of concern raised, the question as to the steps they might have taken would arise but that is only speculative. I do not find that the obtaining of a report which on its face gave no cause for concern and indeed allayed any concerns there may have been was the cause of the claimants' losses.

7.15. Likewise I do not think that it can be said that they were negligent insofar as on the one hand they **did** obtain a report and on the other there was nothing in that report to arouse concern or prompt further enquiry.

7.16. I have come to the conclusion that the report did not "snap" the causation link. I have come to the conclusion too that there should be no reduction for any contributory negligence as claimed.

7.17. I turn now to the individual respondents and claimed liability.

8. **Liability: Jason Thomas Williams – Builder – Third Respondent**

8.1. It is claimed that, on the authority of *Chase v De Groot* mentioned above, the builder owes a duty of care to future owners to take reasonable care to build the house in accordance with the building consent and the relevant Building Code and Bylaws; and on the authority of *Bowen v Paramount Buildings (Hamilton) Ltd* [1971] 1 NZLR 394 that a builder is liable to subsequent homeowners for reasonably foreseeable damage caused by his work. It was submitted that the builder has ultimate responsibility for construction of the dwelling even if work was done by other contractors or subcontractors and reliance was placed on the Weathertight Homes decisions in claims 1917 (*Hay v Dodds*) and 2601 (*Nikora & Ors v*

Whakatane District Council & Ors) and also *Cashfield House Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452.

8.2. The evidence to support that claim comes from Mr Earley who said in respect of each of the six aspects of defect that, in his view, Mr J T Williams had failed in his responsibilities. He said the same in respect of plastering by Mr Philip Murphy and objection was taken on Mr Murphy's behalf on the grounds that that was the ultimate question for the adjudication to decide. I think that objection also extends to Mr J T Williams although he did not personally raise it. It is not for a witness to decide whether a party has failed a responsibility but rather for the adjudication to decide that. I therefore limit my acceptance of the evidence from Mr Earley in this regard to it being evidence from him that, in his view, Mr J T Williams had an obligation as builder in each particular aspect.

8.3. In his response, which he affirmed in evidence, Mr Williams said that he was 25 years of age at the time and was employed by the Aladdin Trust to construct the house. The trustees of the Aladdin Trust are, of course, the fourth respondents and include Mr Williams. He said that he was fully qualified but had limited experience in site management and control of subcontractors and was employed on a labour-only contract with his brother, Grant Williams. Grant Williams did not participate in the hearing or indeed in the claim at all. Mr Jason Williams said at the hearing that he was essentially the project manager. Mr Jason Williams said he:

> "… put full trust in the contractors who were employed by Aladdin Trust to do a quality job in their areas of expertise ie Roofers, plumbers, butynol, electricians, plasterers etc; and relied on their professional skills."

However no contracts were produced. The contract between Jason Williams and the trustees of the Aladdin Trust was oral and nothing in writing but apparently contractors were paid direct by Aladdin Trust.

8.4. Mr Jason Williams said that the house was built in accordance with the Building Code and that:

> "… the market dictated the quality of materials used, the quality and practicality of the materials were compromised in favor of aesthetics. Building codes were relaxed …"

In Mr Williams' opinion the Council should hold full legal responsibility for inspections, advice given, rechecks and issue of Code Compliance.

8.5. He said that Mr Bianca had done a "substandard job of the plastering". He referred to there being no control joints and other issues concerning the plastering.

8.6. Mr Williams expressed the view that Plaster Systems Limited:

> "… sold an inferior product with limited information for the plasterers."

8.7. His response referred to the passage of time since construction and that there had been no complaint to him in that time. It referred also to there having been "much neglect".

8.8. Mr Jason Williams did not attend the hearing beyond the first day and did not hear or question further evidence that was given.

8.9. The requirement of s7(1) Building Act 1991 applicable at the time was:

> "(1) All building work shall comply with the building code to the extent required by [the Building Act], whether or not a building consent is required in respect of that work."

8.10. The scheme of the Act was to provide a performance based code. This is contained in the Building Regulations 1992. Clause E2.2 had as its Functional Requirement:

> "Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside."

Clause E2.3.2 as to Performance read:

> "Roofs and exterior walls shall prevent the penetration of water that cause undue dampness or damage to building elements."

8.11. Those requirements and the authority of the cases referred to above have led me to conclude that Mr Jason Williams was the builder in all respects of this dwellinghouse and he had the obligation to achieve those performance standards. He owed a duty of care to future owners, including the claimants, to take reasonable care and he had a liability to subsequent owners for reasonably foreseeable damage caused by his work.

8.12. As to other contractors on site, I have formed this view. They may have been paid direct by the trustees of the Aladdin Trust but there is otherwise not sufficient evidence of the independence of their contractual relationship to negate the ultimate responsibility that Mr Jason Williams had for the construction of the dwelling. He was one of the trustees. Although he may have been a labour-only builder (and there was no real evidence about that from him) his close involvement in the whole project was such as to place on him the legal responsibility to achieve compliance with the performance requirements of the Building Code. I do not accept his statement that the house was built in accordance with that Code. The performance standard was simply not achieved. Although the "market" may have compromised quality as he says, that does not absolve him from the responsibility to achieve the performance requirements of the code.

8.13. He may have claims against other parties for contribution to his liability but that is another issue and I deal with it below.

8.14. I find that the builder, Mr Jason Thomas Williams, is liable to the claimants as builder, not only in respect of work that he did but in respect of work done by other trades.

8.15. In addition, I now consider the six individual defects referred to above.

Parapet Tops

8.16. The assessor's view was that the sloping parapets had failed. The underlying metal flashing did not cover the full width of the parapet. Nail penetrations into the flat surface of parapet tops had allowed water to enter. The flat surface of parapet tops did not allow effective dispersal of rainwater. The waterproof membrane had been penetrated by fixing.

8.17. Mr Williams does not deny any of that but simply says that flashings were installed by a roofing contractor named John Watts. No-one has sought to have him added as a respondent in this case. Mr Jason Williams must take responsibility for any work done by Mr Watts even if he were paid direct by the Trust.

Sill and Jamb Flashings

8.18. I have described this in detail above. Mr Williams' response is that as the builder he installed the joinery and head flashings but it was for the plasterers to install jamb and sill flashings. While that may be so, it is still my view that as head builder and project manager Mr Jason Williams had the responsibility to ensure that that was done properly. Mr Bianca said that during the whole of the work he only spoke with the builder during lunch breaks and that is simply not good enough supervision of the plasterer by the builder responsible for the project. Mr Bianca has also referred to a Mr Bakker being on site from Plaster Systems Limited but again that does not mean that Mr Jason Williams as principal builder could simply ignore what was being done. In particular in relation to the windows there seems to have

been an issue arise that the windows were not clearly recessed or clearly flat faced and therefore the compromise arrangement had to be made of the kind mentioned above. Mr Williams acknowledges he installed the joinery and he must take responsibility for that directly.

Gutter Flashings

8.19. Mr Williams does not appear in his response to have dealt with these expressly but the causes of leaks there that I have described are clearly matters which were, or should have been, under his control as building developer and he has a liability for those.

Cladding to Paved Decks and Glass Penetration of Balustrades

8.20. Mr Williams' response is that ground levels were acceptable to the Council at the time and the Council passed the deck inspection. He does acknowledge cutting concrete and placing channels beside the house. The application of the cladding by him was directly in breach of the requirement for clearance and he must carry responsibility for that.

8.21. As to the glass barriers he refers to Winstone Glass Limited as the contractor which installed the glass barriers and he also refers to the stainless steel handrails being installed by Design Stainless NZ Limited. In neither case has any application been made to join those parties as respondents but in any event again the liability for their work lies with the overall builder, Mr Jason Williams.

Conclusion

8.22. In respect of all six defects to which this claim refers I find Mr Jason Thomas Williams to be liable to the claimants for the cost of repair and remediation work totalling **$195,400.00 plus GST**.

8.23. I also find him liable for the other losses claimed as set out above subject to the allowances and deductions I have made but with the addition of the general damages amounts I have provided for. The end result is:

Total of claims (para 5.1)		312,664.00
Less deduction items in paras 5.3 and 5.5	14,014.00	
Less CoveKinloch account 30/6/05	6,735.00	
Less claimed general damages	40,000.00	
Plus general damages Mr De Wet (para 5.15)		7,000.00
Plus general damages Mrs De Wet (para 5.15)		6,000.00
Balance due	**264,915.00**	
	$325,664.00	$325,664.00

8.24. I accordingly **ORDER** that Jason Thomas Williams pay the sum of **$264,915.00** to **Andre De Wet** and **Annette Cornelia De Wet** (with the adjustment between them then for general damages).

9. Liability: Aladdin Trust Trustees – Owners - Fourth Respondents

9.1. The fourth respondents were owners of the property during construction although not at the time construction commenced. The application for building consent was made by Mr Grant Williams in November 1994 and construction commenced in December 1994.

9.2. It is claimed by the claimants that the fourth respondents were together the developers of the houses and that, on the authority of *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 and *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, they owed a non-delegable duty of care to subsequent purchasers including the claimants in the same way as a builder. It is claimed that their liability is not limited by the fact that they were trustees of a Trust. Council's submissions also are that the trustees undertook the

development and that as developer they had a non-delegable responsibility for the performance of their contractor, Mr Jason Williams.

9.3. Mr Grant Williams did not attend the hearing but his response stated that he had no involvement in the construction and was working full-time as a coffee salesman. His family home was used as security to fund the project and he raises the question of lack of maintenance. In his response affirmed at the hearing Mr Jason Williams said that he was employed by the Trust to construct the house; that he was employed on a labour-only contract with his brother, Grant Williams; that Grant took care of the finances and paperwork while he ran the site; and that Grant Williams had little else to do with the house. He said that Mr Desmond Williams, who is father to Jason Williams and Grant Williams, had no financial involvement nor did he invest nor gain any monetary return. He was purely a trustee of the Trust on solicitor's advice.

9.4. Mr Desmond Williams did attend the hearing for part of the time but did not actively participate other than to affirm his written response of 8 February 2006 that stated that his whole involvement was in an advisory capacity which was never required; a third party signatory; and with no involvement in any part of the planning, building or execution of the work. He never invested monies in the Trust nor received monies from the Trust.

9.5. I am of the view that the fact that the fourth respondents were trustees of a Trust does not exonerate them from, or limit, any liability they may have in respect of the dwelling. The fact that they were trustees of a Trust is not noted on the title nor on any of the other documents. No party has in any way agreed in any contractual document that their liability should be in any way limited to the assets of the Trust. As is stated in *Brookers, Equity and Trusts in New Zealand* (2003) at para 5.2.4:

> "The question of the liability of trustees to third parties has arisen with the corresponding rise in family and trading trusts in recent times. **A Trust is**

> **not an independent entity with a separate legal personality in the way that a limited liability company is**. The Trust is constituted by the rights and obligations in relation to the Trust property attaching to the trustees in a personal capacity. Liabilities to third parties who are not beneficiaries can be incurred by the trustee because of the nature of the property the trustee holds." (emphasis added)

9.6. Both cases relied on by the claimants are relevant although *Morton* was as much a question of the liability of directors/employees as that of the "developer". In *Mt Albert Borough Council v Johnson* the owner of the site was Sydney Construction Limited. The development work of the block was carried out by a partnership working solely for Sydney Construction Limited and at a contract price. Sydney Construction sought, in the Court of Appeal, to rely on the independence of those contractors to exclude any liability on the part of Sydney Construction. The Court pointed to the evidence that led it to the conclusion that it was:

> "… not a case of a landowner engaging a firm of builders and leaving everything to them." (p240 l32)

Sydney Construction had described itself in the application for building permit as builder as well as owner. It had obtained the building permit and Mr Huljich of that company was constantly involved in discussions with the partners of the building partnership about details of the work.

The Court also discussed the liability of an employer for negligence of an independent contractor. It said (p240 l47):

> "In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes to the landscape. It is not a case of a landowner having a house built for his own occupation initially … There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor."

9.7. In this case the partnership owning the subject land included two persons who were engaged as builders, Mr Grant Williams and Mr Jason Williams. Mr Grant Williams was the applicant for building consent. Mr Jason Williams did work on the site but Mr Grant Williams was involved in payment to the Council and the like. Although Mr Desmond Williams may have had relatively little involvement, nevertheless he becomes a party because of his involvement as one of the owners of the property and one of the partners in the Trust which has developed the dwellings. Accordingly according to the principles enunciated above I find that each of the three fourth respondents, Mr Grant Williams, Mr Jason Williams and Mr Desmond Williams, have a liability to the claimants in their capacity as developers of the block and in addition to the liability that Mr Jason Williams has as I have found above in his capacity as builder.

9.8. The amounts claimed against them are the same as are claimed against Mr Jason Williams referred to above.

9.9. I accordingly **ORDER** that each of the fourth respondents, **Grant Hearle Williams, Jason Thomas Williams** and **Desmond Sarjant Williams**, pay the sum of **$264,915.00** to **Mr Andre De Wet and Ms Annette Cornelia De Wet** to be paid to them (with the adjustment between them then for general damages).

10. **Liability: Grant Williams – Second Respondent**

10.1. Mr Grant Williams was named individually as a separate respondent. He has taken no steps in the adjudication. No mention of a claim was made against him in the closing submissions for the claimants other than as one of the fourth respondents; and none of the submissions for other respondents refer to a cross-claim against him other than as one of the fourth respondents. It may be that he has a further liability insofar as it appears he was so closely involved with Mr Jason Williams in the construction of the

dwelling as to amount in law to a partner with him. I do not need to decide that. There was certainly a significant overlap in roles between the two persons, Grant Williams and Jason Williams, as owners of the property, as applicant (in the case of Mr Grant Williams) for building consent, in the payment of accounts and employment of contractors and the like.

11. **Liability: Anthony G Smits – Fifth Respondent**

11.1. Mr Smits also has taken no steps in the adjudication claim, other than a letter dated 8 May 2006 from his solicitors stating that he would not be taking any steps in the proceeding as his "personal and financial circumstances prevent him from doing so" and confirming that he was aware that the matter would proceed in his absence and the adjudication would be "entitled to draw adverse inferences from his failure to respond".

11.2. Under s37 of the WHRS Act my powers as adjudicator to determine this claim are not affected by the failure of any respondent, including Mr Smits, to serve a response, make a submission, provide information, **comply with a call for a conference**, or do any other thing that I as adjudicator **request or direct**.

11.3. Under s38 of the WHRS Act I have the power if a respondent, including Mr Smits, fails to do any of the things mentioned in s37 to draw any inferences from that failure that I think fit and to determine the claim on the basis of information available.

11.4. In Procedural Order No 3 dated 25 January 2006 I requested the respondents, including Mr Smits, to file their formal responses by 26 April 2006. Mr Smits did not do so. I requested him to lodge any statements of evidence, expert reports and submissions by that date and, although he has no obligation to do so, he failed to do so. I told him that the hearing would

commence on 15 May 2006 at 10.00am but he did not attend that hearing nor the telephone conference I convened on 24 January 2006.

11.5. In the schedule supplied by Mr Earley it is said that Mr Smits has a liability for all six categories of defect and for the total repair costs of $195,400.00 plus GST. In his evidence Mr Earley refers to the lack of detail in the design in respect of those six categories of defect.

11.6. There is no evidence to refute those statements and there are design aspects alluded to by other witnesses.

11.7. I draw the inferences adversely to Mr Smits in relation to the claims made against him that I am entitled to do and I find that, on the evidence that has been supplied to me, there is evidence that he has been negligent in his design work in respect of this dwelling causing the claimants that loss.

11.8. There is apparently evidence that he was adjudged bankrupt on 28 May 1992 and discharged on 28 May 2005. His bankruptcy in 1992 did not release him from debts other than those which were provable. His indebtedness to the claimants arose since he was adjudged bankrupt and he continues to have a liability for them.

11.9. Because of the agreement of the technical experts that capping and inadequate waterproofing to the parapets was a workmanship rather than a design issue (see para 3.9.3) Mr Smits has no liability for that cause of damage to the south-west elevation, the north-east elevation or the parapets. Furthermore I find there are no design issues in the cladding extending to the ground or the joinery issues and Mr Smits has no liability in respect of damage caused from those issues. That leaves remaining the three other issues where I find there is design factor (particularly in the context of the failure of the internal gutter flashings, the cladding hard down

to paved decks and glass penetrations of balustrades). The repair costs for those and associated damages as claimed are as follows:

Metal capping and sealant purchased and applied early 2005	$981.00
Painting of house by Shiny Painters (claimed now to be wasted effort and cost)	1,500.00
Cost of repairs referred to:	
- South-east elevation repairs	27,300.00
- North-west elevation repairs	16,000.00
- Rear deck repairs	1,500.00
- Front deck repairs	23,500.00
- GST on last 4 items	8,537.50
Documentation costs	10,000.00
Project management fees	16,000.00
GST on last two items	3,250.00
Building consent fees (inc GST)	10,059.00
Removal and storage costs for vacating the dwelling and storage of household furniture and effects for six weeks	1,614.00
Cost of alternative accommodation – six weeks at $450.00	2,700.00
Compensation for distress, anxiety and inconvenience – Mr De Wet (para 5.16)	7,000.00
Compensation for distress, anxiety and inconvenience – Mrs De Wet (para 5.16)	6,000.00
Total	$135,941.50
Less deduction items (paras 5.4 and 5.6)	14,014.00
Balance	**$121,927.50**

11.10. I accordingly **ORDER** that the fifth respondent, **Anthony G Smits**, pay the sum of **$121,927.50** to **Mr Andre De Wet and Ms Annette Cornelia De Wet** (with the adjustment between them then for general damages).

12. **Liability: P Murphy - Seventh Respondent**

12.1. It became quite clear during the hearing that Mr Philip Murphy was not involved in plastering at 18A Manu Place and he has no liability to the claimants.

13. **Liability: G Bianca – Tenth Respondent**

13.1. It is claimed that Mr Bianca is liable for the same amounts as is claimed against Mr Jason Williams and the submissions refer to the duty of care claimed to be owed to subsequent owners with reliance on a Procedural Order No 4 in claim 465 *Simpson Family Trust v Wellington City Council & Ors* and *Construction Law in New Zealand,* T Kennedy-Grant, p533.

13.2. The claim for liability against Mr Bianca is supported by the Council in the context of its claim that, if it has a liability to the claimants, there should be apportionment between respondents. It too has relied on *Simpson Family Trust v Wellington City Council* (claim 465).

13.3. Mr Bianca did not make submissions on this point but I have been assisted by submissions on behalf of Mr Francis Murphy and Mr Philip Murphy advanced by counsel and I express my appreciation to counsel for that assistance. Messrs Murphy are not, as it turns out, involved in unit 18A but they were at the commencement of the hearing and the principles advanced by counsel also affect the claim against Mr Bianca.

13.4. The question of whether a subcontractor in a position such as Mr Bianca's is addressed at length by adjudicator Mr John Green in the *Simpson Family Trust v Wellington City Council* case. He has taken time, despite that being an interlocutory application for strike out of a respondent, to consider the principles and legal issues at length and I have read his Procedural Order No 4 dated 26 April 2006 carefully. In that Procedural Order he analyses the issues affecting the question of whether a subcontractor owes a duty of care

to the owner **of a dwellinghouse**. He does so by examining the case law in relation to builders and developers, Local Authorities and Building Certifiers, building professionals and subcontractors. He makes an analysis of, and comparison with, established case law and he considers issues of proximity, policy considerations and the fairness and reasonableness of imposing a duty of care.

13.5. I emphasise that that Procedural Order is in the context of the particular facts of that case and in the context of that order applying to an interlocutory application by a respondent (subcontractor) to be struck out and I apply his reasoning with those considerations in mind.

13.6. I adopt his statement of principles and I agree with the general conclusions he has reached.

13.7. In his comprehensive and helpful submissions for Messrs Murphy, Mr Stephen Piggin has started with *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 and the Procedural Order No 4 of adjudicator Mr Green mentioned in *Simpson Family Trust v Wellington City Council*.

13.8. He first submitted that the Procedural Order in *Simpson Family Trust* in its general terms went well beyond the narrow issue of potential liability that the fifth respondent in claim 465 was claimed to have, that respondent being there the supplier of window and door hardware to the builder; and that the finding of such a wide-ranging duty is against the gradual approach noted by the Court of Appeal in *Rolls-Royce*. I certainly accept that, as I have indicated above, the statements of general principle by the adjudicator in claim 465 must be read within the limited confines of the application with which, and the case with which, he was dealing. That is not to say that the statements of general principle are **wrong** and, as I have said, I agree with those statements.

13.9. The submissions of counsel for the Murphys concentrate on issues raised by *Rolls-Royce* in the context they are interpreted in *Simpson Family Trust*.

13.10. The judgment in *Rolls-Royce* considers the test to be applied where claims are made of duty of care. This is expressed in paragraph 58 as follows:

> "The ultimate question when deciding whether a duty of care should be recognised in New Zealand is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed."

13.11. The judgment then goes on to consider the two broad fields of inquiry, the first being the degree of proximity or relationship and the second the other wider policy considerations. As to proximity, the judgment says that this is "more than a simple question of foreseeability [and] involves consideration of the degree of analogy with cases in which duties are already established" (para 59) (and it is the statement in the judgment that the Courts should only move gradually into new areas of liability that is relied on by Mr Piggin in his submissions).

13.12. The Court said that the proximity inquiry:

> "… can be seen as reflecting a balance of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from undue restrictions on its freedom of action and from an undue burden of legal responsibility." (para 60)

13.13. One consideration is the extent to which the plaintiff is vulnerable and, in an appropriate case, a consideration of whether a defendant with special skills has power over a vulnerable plaintiff (para 61). Relevant to this issue is the question of whether there are or could realistically have been other remedies and, if so, this may point to an ability for a plaintiff to protect itself and to there being adequate deterrents for a defendant (para 62).

13.14. Also to be taken into account can be the nature of the loss and reference is made to the Courts' being less willing to impose a duty of care in cases of

economic loss than where there is physical damage to property or, in jurisdictions other than New Zealand, physical injury (para 63).

13.15. The statutory and contractual background may also be relevant in defining the relationship which might also raise wider policy issues (para 64).

13.16. In the Court's discussion of the case law reference is made at paragraph 71 to the fact that:

> "[l]iability to subsequent owners of domestic dwellings for defects in such dwellings has … long been a feature of New Zealand case law"

and the reference to *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, although involving the liability of a Council, is said to have assumed that the liability of the builder would have been no less extensive. There is discussion about the apparent contrast between commercial construction cases and domestic buildings but the Court at para 74 said that:

> "… any distinction must have a more complex foundation than a mere distinction between commercial and domestic …"

13.17. The conclusion is reached at paragraph 90, after extensive discussion of overseas cases, that:

> "[i]t is therefore difficult … to escape the conclusion that something more is needed for there to be a liability than merely being a nominated skilled contractor."

13.18. In discussing assumption of responsibility the Court at para 100 did note:

> "… that assumption of responsibility for the task cannot be sufficient in itself, at least insofar as the negligent construction cases are concerned."

It referred to the outcome in *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791 (which the Court noted had been widely approved) and the outcome there that the subcontractor had not assumed responsibility to the plaintiffs in its supply of glass according to

contractual specifications but had only assumed responsibility to the direct contracting party.

13.19. One of the policy considerations (indeed the "main policy factor") was expressed as the need for commercial certainty (para 118). The "main factor" pointing towards a duty in *Rolls-Royce* was said to be foreseeability which "largely derives from the contractual structure".

13.20. The facts in *Rolls-Royce* were that the respondent, Carter Holt Harvey Limited (**Carter Holt**) had contracted with the predecessor of Genesis Power Limited (**Genesis**) to procure the design, manufacture, construction, purchase and installation of a co-generation plant and that predecessor (**ECNZ**) contracted with Rolls Royce New Zealand Limited (**Rolls-Royce**) to design, construct and commission the plant. It was claimed by Carter Holt that the plant was defective and its claims included one against Rolls-Royce in negligence, there being an alleged breach of duty to perform contractual obligations. The judgment concerned an application to strike out that part of the claim which had been declined by the Master and the High Court Judge on review. Those judgments were reversed in the Court of Appeal which struck out the claim in negligence (with one exception). The Court should not interfere, it was held, in risk allocations negotiated and paid for by the parties, particularly in commercial contracts. The parties had chosen clearly to define their obligations by detailed contracts and there was no duty of care, it was held, owed by Rolls-Royce to Carter Holt except to the extent that the duty rested on alleged negligent statements (which was the exception allowed).

13.21. As adjudicator Mr John Green said in *Simpson Family Trust* at para 152, and as I have mentioned above, a significant factor was the commercial sophistication of the parties and the complex contractual arrangements between them.

13.22. The judgment of Potter J in *Body Corporate No 114424 v Glossop Chan Partnership Architect Limited* (HC Auckland; Potter J; 22/9/97; CP 612/93) also involved parties of commercial sophistication. Although the apartments in question were for residence purposes the subcontract with Carter Holt Harvey Aluminium Limited (**Carter Holt Harvey**) had been for design fabrication and installation of aluminium framed windows and doors and was with the head contractor, Wilkins & Davies Construction Company Limited (**Wilkins and Davies**). The plaintiffs were subsequent purchasers of the apartments.

13.23. In *Body Corporate No 114424* Potter J distinguished what she described as "the only instance where a subsequent purchaser has been held to have a cause of action against a subcontractor" namely *Winnipeg Condominium Corporation No 36 v Bird Construction Co* (1995) 121 DLR(4th) 193 (SC) on the ground that that case involved claims concerning a "dangerously defective structure or part of a structure" while *Body Corporate No 114424* was a case "only of failure to provide weatherproofness". Her Honour did, however, in considering the two issues of degree of proximity and policy considerations, refer again to the requirement from *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282 for consideration of the facts in each case against the authorities and principles. She too made reference to the contractual terms of the subcontract as part of the policy consideration and the care that should be taken not to impose on a subcontractor an obligation of which it had no knowledge.

Is there a Duty of Care in this Case?

13.24. The first critical fact is that in this case there was not a subcontract as such. The evidence is that there was a very casual contracting arrangement between the then owners, the fourth respondents, and Mr Jason Williams, the third respondent, for construction of the two units. Mr Bianca was

introduced to the work by Mr Bakker, the technical consultant for Plaster Systems Limited, and Mr Bianca's evidence, which was unchallenged, was that Mr Bakker had already priced the job with "the builder" (who I take to be Mr Jason Williams) and had:

> "… completed the pre-work inspection and pre-work paperwork. The work was priced at $12,000.00NZD. Mr [Bakker] had the materials already arranged and had them delivered to the site so that the job was ready to commence. Once the site was prepared and ready for work to begin, [Mr Bakker introduced Mr Bianca] to the builder of the project at the start, Mr Jason Williams. … Mr [Bakker] took the responsorblity [sic] for the site because it was his priced site."

Apparently payment was made direct to Mr Bianca by the Aladdin Trust (the fourth respondents). Accordingly therefore the strict question of whether Mr Bianca owed a duty of care **as subcontractor** does not arise.

13.25. The critical question is whether, in the role that he did have, Mr Bianca can in law be said to have owed a duty of care to subsequent purchasers of unit 18A including the claimants. My view is that he did. Because he was a direct contractor to the then owners, the fourth respondents, he was in no different position from the principal builder, Mr Jason Williams. It would be quite wrong to impose an obligation on the principal contractor in tort but not to impose one on another contractor simply because that contractor had a narrower focus and responsibility for only one area of the dwelling. Of course the question of whether that second contractor, in this case Mr Bianca, the plasterer, has discharged that duty must be limited to the responsibilities that he had but that is a different question. In my view as plastering contractor Mr Bianca did have a duty of care to subsequent purchasers for his work just as Mr Jason Williams, the principal builder, had his. Mr John Green as adjudicator in *Simpson Family Trust* made the same point at para 172 where he said there was no reason to distinguish in principle between a subcontractor and a builder provided other factors are present.

13.26. In *Simpson Family Trust* in the context of proximity the adjudicator, Mr Green, said at para 162 that:

> "It has been common knowledge in New Zealand, at least since the early 1990's, that water penetration of a dwellinghouse leads to decay in timber and degradation of other materials to the extent that those materials will require repair and/or replacement to restore the dwellinghouse to an acceptable standard for safe and healthy habitation."

He said it was "almost trite" to say there was a clear and close nexus between the negligent acts of various contractors who have caused or contributed in some way to the creation of the defect and the degree of harm and loss to the owner and inevitable damage to the fabric and structure of the dwellinghouse; and that one of the strongest factors towards a finding of proximity is foreseeability. In that case he found that in manufacturing (and to a limited extent installing) the windows, doors and roof glazing units to the dwellinghouse in question if the subcontractor failed to use reasonable care and compliance with appropriate standards there would be loss to the claimant. Economic loss is foreseeable because there would be major financial investment which would not be realised given the minimum requirement of 50 years for duration and structural soundness under the Building Code.

13.27. He emphasised the artificiality of imposing a different duty on building contractors from that on other persons contributing to the construction because of the process in residential building that has developed, particularly in the last 30 years, that:

> "… almost every singular aspect of the design, construction and inspection of any dwelling is undertaken by specialists (persons possessed specialist knowledge and skills) who often operate unsupervised and independently of the person(s) managing and co-ordinating the building works, for sound logistical and financial reasons … The builder *per se* has in the main become a mere project manager and co-ordinator of specialist contractors, including in many cases carpentry contractors and sub-specialists in that field. The concept of a builder being a person who constructs a dwelling with his or her own hands, skill and knowledge from concept to completion

> is therefore something that has, in this age of specialisation, largely been relegated to the history books." (paras 167 and 168)

13.28. He concluded at para 169 that:

> "[i]n the building industry in New Zealand there is little distinction to be drawn therefore between the responsibility assumed by the multi-skilled 'builder' of old (by virtue of possession of specialist skills and knowledge) and any of the plethora of present day specialist contractors."

13.29. I do not read in any of that any suggestion that the principal contractor is relieved of liability by virtue of the specialist responsibilities of other contractors on site whether these be subcontractors or not. That builder still has the overall responsibility for the total project and the duties of care to subsequent purchasers that I have referred to. What I understand Mr Green to be saying is that **in addition** to that, there is the duty of care owed by the specialist contractor or subcontractor because of their specialist knowledge.

13.30. That applies in this case. Mr Bianca was employed (whether this be by the owners or by the builder – and I have found that it was in this case the owners) to carry out the plastering work to unit 18A. He was the specialist plasterer. He was the one who had had training in the Duraplast system. Mr Bakker introduced him to the job because of the training that he had been given with that system. It was a sophisticated system requiring compliance with not only the instruction manuals from Plaster Systems Limited, the promoter and distributor of Duraplast, but also with known standards of workmanship and compliance with the performance requirements of the Building Code. Mr Bianca had an obligation to ensure that the work that he did complied with those requirements and met those performance standards. In my opinion he had a duty of care to subsequent owners, including the claimants, to do that work without negligence.

13.31. As to policy considerations the starting point may be the emphasis that the Court of Appeal in *Rolls-Royce* placed on "the need for commercial

certainty" (para 118) and the fact that in that case the parties were "sophisticated commercial parties capable of looking after their own interests" was a policy factor pointing strongly against there being a duty of care (para 123).

13.32. Mr Green as adjudicator in *Simpson Family Trust* referred also to the floodgates argument and said:

> "In leaky building claims, the risk in any particular case is limited to a claim by the owner of a dwellinghouse from time to time and the cost of repair or replacement, together with foreseeable consequential loss."

He also referred to the longstop limitation period in s91(2) of the Building Act 1991 (and there is its successor in s393 of the Building Act 2004) of 10 years in bringing civil proceedings relating to building work (para 173). He referred to the succession of cases over the last 30 years imposing a duty of care on those who build and inspect dwellings (para 174); and that:

> "… there is no morally just reason why a subcontractor whose primary fault caused damage and loss to the owner of a dwellinghouse should be immune from suit and thus liability to that owner (or any other person liable in respect of that same damage) merely because there is no contractual nexus, or because that nexus is broken by the insolvency of others in the contractual chain and about whose financial affairs an owner has no knowledge and is unable to protect himself/herself from the risk." (para 175)

He referred too to the need for commercial certainty as the main policy factor (para 177); but also to the:

> "… general lack of sophistication and the vulnerability of the owners of residential properties." (para 178)

13.33. Taking all those principles and factors into consideration I have formed the conclusion that it is, to use the primary test prescribed by *Rolls-Royce*, just and reasonable that a duty of care should be imposed on Mr Bianca in this case **in respect of the work that he did**. That duty of care is limited to that work but it includes all aspects of that work.

Application of Duty

13.34. The question then is whether the work done by Mr Bianca meets the necessary standards and discharges the duty of care he owed to the claimants as subsequent purchasers. There is also the question of supervision to which I shall refer.

13.35. The position Mr Bianca was in was largely one of "*fait accompli*", that is, a situation had been created into which he was placed. The dwelling at 18A had been, or was in the course of being, constructed by Mr Jason Williams. Mr Williams had completed, or had the responsibility for, the installation of the joinery and the cladding of the dwelling. Those factors combined to produce the situation where the joinery windows were neither face fixed nor recessed but a compromise between both. Mr Williams also had responsibility for the parapet cappings and for the application of the membrane over the parapets and there had been the nailing of that membrane which penetrated it. Mr Williams had the responsibility for the construction of the internal gutters and adequate provision for flow of water from them without risk of blockage or overflow. Mr Williams had the responsibility for the clearance between cladding and ground and between cladding and floor. He had the responsibility for the construction of the balustrades and glazing on the front decks. All of that was done, or in the course of being done, when Mr Bianca came to do his work.

13.36. Likewise there was also in place the contract for the work (insofar as there was one) and the price to be paid and Mr Bianca was presented with that by Mr Bakker. He did, of course, choose to accept that.

13.37. Mr Bianca then, as I interpret the facts, proceeded with the plastering work at the appropriate time. Apart from supervision issues to be mentioned, he

proceeded with the work as he was best able. He plastered over the surfaces that had been clad and concluded the Duraplast system work.

Sill and Jamb Flashings

13.38. Questions arise concerning the workmanship, first as to the aluminium joinery installations, the use of (or lack of) appropriate flashings and the application of sealant. I have referred to the detail of this above. It is my view that, faced with the outcome that the windows were not clearly face fixed or recessed but a compromise between the two, appropriate steps should have been taken to ensure that the plastering work was nevertheless consistent with the Duraplast instructions and was going to be effective in achieving the performance standards of the Building Code concerning water penetration prevention. That did not occur. Although there may have been in unit 18B a flashing which achieved some objectives, that was not the case with unit 18A. The principal cause of water leaking had been agreed between the technical experts at the meeting they had as sealant failure. Mr Bianca was not part of that discussion but I take their view strongly into account and Mr Bianca gave no real objective evidence about the adequacy of the sealant. I have come to the conclusion that that was a factor in relation to the failure of unit 18A in respect of the sill and jamb flashings to the aluminium window and door joinery.

Parapet Tops to Front Gable and Side Elevations

13.39. When Mr Bianca came to do the plaster work to these parapet tops in my view he should have noticed that the parapet tops did not have any cap flashing and appeared to be nailed. In my view he should have questioned this with the builder and raised with him the prospect that nailing the cladding to the top of the parapets without a flashing would run a significant risk of water entry.

Gutter Flashings

13.40. I do not consider that Mr Bianca has failed in his obligations in respect of the gutter flashings. As I interpret it, these were in place and he simply plastered over them and I do not think it was for him to inquire about the adequacy of water drainage from them.

Glass Penetrations

13.41. In respect of the work done by Mr Bianca, Mr Earley does not give any evidence of any failure or required repair in respect of the glass penetrations (as he does not in respect of the plaster work at no 18B by Mr Philip Murphy). Accordingly I do not need to consider that.

Cladding to Paved Decks and Ground Level

13.42. Likewise I do not think it was for Mr Bianca to do more than plaster the cladding that had been installed. He may have questioned to himself the adequacy of the clearance between the cladding and the ground level on the one hand and decks on the other but, in my view, it was appropriate that he would take it that this had been done in accordance with design and/or for good reason and that it was appropriate to proceed with the plastering. I reach that conclusion not in the context of today's standards and with hindsight but having regard to the evidence of, and my knowledge of, building standards at the time. Although Mr Earley has expressed the view that Mr Bianca has failed to ensure adequate separation in these cases, in my view the primary responsibility for that lay with the builder and I do not consider, at the time this dwellinghouse was built, that Mr Bianca had the responsibility to do more than plaster over the cladding that had been installed.

Liability Outcome

13.43. Accordingly I find that there has been a breach of standards and duty of care to the claimants by Mr Bianca in respect of the first and second items referred to above, namely the sill and jamb flashings issues and the parapet tops.

13.44. The amounts of repair costs included in the claim arising in respect of those two items total $111,700.00 made up as follows:

South-west elevation	$48,145.00
North-east elevation	48,855.00
Parapets	14,700.00
Total (excluding GST)	$111,700.00
Total (including GST)	**$125,662.50**

13.45. As to the supervision issues raised by Mr Bianca, namely direction that he said he received from Mr Bakker, I deal with that below in the context of Plaster Systems Limited and its liability and in the context of apportionment. I do not think that, even if he was receiving guidance, direction and supervision from Mr Bakker, that exonerates Mr Bianca from his primary duties as specialist plasterer to carry out the plastering work in accordance with the Duraplast material and to meet the performance standards of the Building Code.

13.46. Accordingly I find that Gino Bianca, the tenth respondent, is liable to the claimants, Andre De Wet and Annette Cornelia De Wet, in the sum of **$111,700.00** plus GST, namely **$125,662.50**, for repair construction costs.

13.47. I also find him liable for a proportion of the other losses claimed as set out above subject to allowances and deductions I have made. The end result is:

Metal capping and sealant purchased and applied early 2005	$981.00

Painting of house by Shiny Painters (claimed now to be wasted effort and cost)	1,500.00
Cost of repairs referred to – para 13.46	125,662.50
Documentation costs	10,000.00
Project management fees	16,000.00
GST on last two items	3,250.00
Building consent fees (inc GST)	10,059.00
Removal and storage costs for vacating the dwelling and storage of household furniture and effects for six weeks	1,614.00
Cost of alternative accommodation – six weeks at $450.00	2,700.00
Compensation for distress, anxiety and inconvenience – Mr De Wet (para 5.16)	7,000.00
Compensation for distress, anxiety and inconvenience – Mrs De Wet (para 5.16)	6,000.00
Total	$184,766.50
Less deduction items (paras 5.3 and 5.5)	14,014.00
Balance	**$170,752.50**

13.48. I **ORDER** that the tenth respondent, **Gino Bianca**, pay to the claimants, **Andre De Wet and Annette Cornelia De Wet**, the sum of **$170,752.50** forthwith (with the adjustment between them then for general damages).

14. Liability – Eighth Respondent – Plaster Systems Limited – Duraplast Supplier

14.1. Plaster Systems was actively involved throughout the hearing and I was helped with evidence and submissions on its behalf.

14.2. In closing submissions dated 19 May 2006 there are some matters of fact contained which were not given as evidence but essentially those submissions concentrate on:

14.2.1. the extensive reputation that Plaster Systems has with the work that it has done;

14.2.2. the fact that Mr Jack Bakker retired from Plaster Systems four years ago and cannot recall what took place, although it is speculated that because there were different sill flashings used at no 18B and none at all at 18A it is unlikely that Mr Bakker would have supervised either;

14.2.3. the March 1995 Duraplast system specifications would have been available in March 1995 and certainly once the second pre-line inspection no 1950 was made on 4 July 1995 when it is assumed the plastering would still not have commenced.

14.3. There was no claim made that the Duraplast system was itself at fault and liability is only claimed on the basis of Mr Bakker's involvement, it being claimed that this was an "advisory capacity" which gave rise to a duty of care in accordance with the principles in *Bowen & Ors v Paramount Builders (Hamilton) Ltd & Anor* op cit.

14.4. As to Mr Bakker's involvement, Mr Bianca's statement affirmed at the hearing was, as I have said above, that he was introduced to the job by Mr Bakker and that the job had already been priced by Mr Bakker. Mr Bianca said that Mr Bakker "took the responsorblity [sic] for the site …" and that his "job on site was to ensure that the standard of work that we carried out was up to Plaster Systems Limited standards". He does also say, however, that:

> "[i]f there were any problems with the work that we done [sic] it was the responsibility of **the builder** to approach us, so that we may fix the problem …" (emphasis added)

He says the builder, Mr Jason Williams, did not approach him or his team and he says that "Plaster Systems Limited approved the standard work without question".

14.5. At the hearing Mr Bianca said that Mr Bakker was on site every couple of days, that Duraplast was a new system at the time and he needed a lot of instruction from the supervisor, Mr Bakker, including how to install the flashings and how to set the screed for the plaster work. He produced a sample of Duraplast and emphasised its difference from solid plastering. He said that Mr Bakker quality controlled the whole job but he also said that any problem was solved **with Mr Jason Williams** who was next door for some 8 to 9 hours per day; but then later said that if he had any problems he would call Mr Bakker and ask him the best way to do the job. He said that Mr Bakker and Mr Williams both said they would be doing the flashings to the parapets and they told him to plaster the parapets initially and they would be putting the top flashing on later.

14.6. He conceded to Mr Hesketh of Plaster Systems that he was not a licensed applicator at the time.

14.7. The evidence was that No 18A was done first and No 18B second although there may well have been some overlap. Mr Philip Murphy who did the plastering at 18B said that the Plaster Systems representative visited the site three or four times "to check whether the job was going OK and to look at the job because it was a new product at the time". He said at the hearing that he had advice from the Plaster Systems representative and he did query that the windows were neither face fixed nor recessed and that this was one of the reasons the Plaster Systems representative was on site. He said he would not have done what he did without advice.

14.8. Having considered this evidence I have come to the conclusion that there was a measure of supervision and advice given to Mr Bianca by Mr Bakker. He has said so quite clearly. Mr Bakker did not give evidence to the contrary or at all and indeed the closing submissions alluded to the fact that he could not remember the site. Duraplast was apparently a relatively new system at the time. Mr Bianca was an unlicensed Duraplast applicator but

had been offered the job by Mr Bakker despite having been unlicensed. He attended the site. Materials were supplied by Plaster Systems Limited. There was the question that arose about the window and door joinery not being either face fixed or recessed and some compromise was required. The 18A job being done by Mr Bianca was the first of two and the issue had not yet arisen with Mr Philip Murphy at 18B. I am satisfied that Mr Bakker did give advice to Mr Bianca in respect of 18A and then in due course Mr Philip Murphy in respect of 18B – and indeed it may be that that advice, which included reference to the appropriate jamb and sill flashings, may have been as the result of experience learned at 18A. So far as the rest of the job is concerned I do not find any evidence that Mr Bakker's advice led to any of the problems which have since been identified and indeed I have dealt already with the extent to which Mr Bianca as plasterer can be held responsible for those.

14.9. Accordingly I find that Plaster Systems Limited did owe a duty of care to the claimants as subsequent purchasers in respect of the participation in the construction by their agent, Mr Bakker. The advice that he gave which was relied on by Mr Bianca has led to the problems in respect of the sill and jamb flashings. The time to correct that would have been before the plaster went on so that the detail of the system could have been followed more thoroughly and the right result achieved.

14.10. I do not find any negligence on its part through its agent, Mr Bakker, in relation to any other aspects of the construction.

14.11. The claim against Plaster Systems is limited to the repairs to the south-west elevation only along with associated losses and claims as set out in paragraph 5.2 hereof.

14.12. The net liability then of Plaster Systems Limited to the claimants is **$72,743.00** made up as follows:

Total of claims (para 5.2)		120,492.00
Less deduction items in paras 5.3 and 5.5	14,014.00	
Less CoveKinloch account 30/6/05	6,735.00	
Less claimed general damages	40,000.00	
Plus general damages Mr De Wet (para 5.15)		7,000.00
Plus general damages Mrs De Wet (para 5.15)		6,000.00
Balance due	**72,743.00**	
	$133,492.00	$133,492.00

14.13. I **ORDER** that that sum, **$72,743.00**, be paid by the eighth respondent, **Plaster Systems Limited**, to the claimants, **Andre De Wet and Annette Cornelia De Wet**, forthwith (with the adjustment between them then for general damages)..

14.14. I deal with contributions between respondents below.

15. Liability – North Shore City Council – First Respondent – Territorial Authority

15.1. The claims against the Council are in respect of the issue of the building consent, inspections and the issue of the Code Compliance Certificate and the claimants rely on a long line of authorities including *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 and the summary of these duties by the adjudicator in claim 134 *Kellaway & Ors v Waitakere City Council & Ors*, namely:

- A Council inspector must act as a reasonably prudent Council inspector would act.
- The standard in relation to any inspection may depend on the magnitude of the consequences.
- A Council inspector is not a clerk of works.

- Council are obliged to ensure works are carried out in accordance with consent and code.
- The standard of care does not extend to identifying defects which require testing.
- Council are obliged to put in place proper inspection processes at appropriate intervals and stages during construction to maximise inspector's ability to ensure compliance with the Building Code.
- Council must undertake necessary research.

15.2. There have been lengthy submissions in reply from the Council raising these matters.

- Is there a duty of care owed?
- If so, has that been breached measured against standards and the statutory framework at the time?
- If there has been a breach is there a causal nexus between that and the claimants' losses?
- If there is a liability is this reduced by virtue of contributory negligence and/or a failure to mitigate the claimed losses? (and I have dealt with that above).
- Quantum which I have dealt with above.

Duty of Care

15.3. The introductory submissions for the Council are that:

> "[f]or the claimants to succeed they must bring themselves within the category of individuals afforded protection by the principles set down in the [C]ourt of [A]ppeal and Privy Council decisions in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) (**the *Hamlin* decisions**)"

It is the Council's submissions that the claimants do not fall within that category but also that the obtaining of the pre-purchase report and the

issues in that report take them outside the protection afforded by the principles set out in the *Hamlin* decisions.

15.4. In the substantive submissions the Council goes further and, after an analysis of the *Hamlin* decisions the submission is made that three recent decisions in New Zealand and Australia proscribe the parameters within which the *Hamlin* decisions might be applied. Those decisions are *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 and *Rolls-Royce* (see above).

15.5. The primary issue in *Hamlin* was whether existing New Zealand common law principles should have been reconsidered in the light of the House of Lords decision in *Murphy v Brinkwood District Council* [1991] 1 AC 398. The Court of Appeal judgments recorded at length the development of the New Zealand common law on this topic and then addressed that question. The Court of Appeal found that it was appropriate to remain with the New Zealand principles and not to follow *Murphy*. Cooke P at p522 said:

> "The upheavals in high level precedent in the United Kingdom [referring to *Murphy* and a number of other cases] have had no counterpart in New Zealand. The case law has been at least reasonably constant."

He referred to *Bowen v Paramount Builders (Hamilton) Ltd* (op cit) and that since then it had:

> "… been accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities …".

Richardson J at p524 referred to the "major question" of whether the Court of Appeal:

> "… should depart from what has been the settled law in this country for nearly 20 years in relation to the liability of local authorities for latent defects caused or contributed to by the careless acts and omissions of

> building inspectors in carrying out inspection of houses under construction."

He said at p525:

> "The bylaws and the question of whether it was just and equitable for the local authority to be under a duty of care to the owner (and successors in title) in discharging responsibilities in relation to the inspection of houses under construction, have to be considered against that background **which was special to New Zealand of the times**" (emphasis added) [having referred to six "distinctive and longstanding features of the New Zealand housing scene].

15.6. The principal outcome of the Privy Council judgment was to affirm that it was appropriate for the New Zealand Courts to continue the development of its distinctive common law on this issue and to diverge from the position in England as established by the House of Lords in *Murphy***.**

The judgment emphasised first that a number of New Zealand cases had:

> "… extended the principle [that a local authority owed a duty of care] to cases where there was no physical damage as such nor any certainty that there would be";

secondly that those cases recognise the element of reliance in establishing a duty of care in economic loss cases; and thirdly that they mark the point where it had been properly said by Cooke P in *Brown v Heathcote County Council* [1986] 1 NZLR 76 that:

> "The lineaments of the contemporary New Zealand law of negligence in this and related fields are now … reasonably firmly established by a series of cases …"

The judgment considered developments in Canada and Australia and acknowledged that there were diversities between the jurisdictions and from the English situation.

Relevance of Building Act 1991

15.7. As to any argument that the facts of *Hamlin* predated the Building Act 1991 and therefore the principles enunciated in *Hamlin* are affected by the Building Act 1991, that statute was expressly referred to in the judgments of both the Court of Appeal and the Privy Council.

15.8. Richardson J in the Court of Appeal referred to the history behind the Building Act 1991 and said at p526:

> "The Building Act 1991 introduced a new perspective on building and planning controls. Section 6 states the governing purposes and principles and the statute contains provision for owners to engage approved certifiers to monitor and approve performance of building code requirements. Central features of the legislation are that all building work must comply with the code (s7); territorial authorities are charged with the responsibility of enforcing the Act (s24); consents for building work can only be issued by territorial authorities (ss32 and 33), which are entitled to inspect work for compliance with the Act (s76); the territorial authority issues the final code compliance certificate (s43); and even where a private certifier is used the territorial authority retains overriding control (s57 and reg 8 of the Building Regulations 1992 (SR1992/150)). The legislation is performance oriented. It is intended to promote greater efficiencies. Owners may have a degree of choice between territorial authorities and private certifiers with competitive charging by territorial authorities and private certifiers for their services. And territorial authorities have overriding responsibility for administering the new building control system.
>
> Importantly there is nothing in the legislation to preclude private damages claims in accordance with the existing New Zealand law for losses arising out of the negligent exercise of building control functions. On the contrary that may properly be regarded as part of the accountability at which the legislation is directed. More specifically s91, which imposes a longstop limitation period of civil proceedings, recognises that those involved in the building industry and in building controls, including territorial authorities, will be liable for carelessly created or carelessly overlooked latent building defects." (p526)

At p527 he said:

> "The point of all this is that over a period of ten years building controls were the subject of detailed consideration, quite dramatic changes in approach were taken reflecting a particular economic and philosophical perspective, but without questioning the duty of care which the New Zealand Courts have required of local authorities in this field. While it may be going too far to characterise the Building Act 1991 as a ringing legislative endorsement of the approach of the New Zealand Courts over

> the last 20 years, there is nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in this field."

In the Privy Council the joint judgment also referred to the provisions of ss.90 and 91 of the Building Act 1991 as indicating that:

> "… the Act clearly envisage [envisaged] that private law claims for damages against local authorities will continue to be made as before." (p522)

15.9. They also noted that there was nothing in the Building Act to abrogate or amend the existing common law in New Zealand so as to bring it into line with *Murphy*.

Economic Loss

15.10. There is certainly debate in the authorities about whether a claim such as is brought in this adjudication is for economic loss or not. In *Bowen v Paramount Builders (Hamilton) Ltd* Cooke P at p423 found that the loss in that case was **not** purely economic. The building had undergone some damage and deterioration and the damages claimed were "merely the measure". He revisited that in *Hamlin* at p522 without expressly answering the question.

15.11. In *Bryan v Maloney* (1995) 182 CLR 609 the High Court of Australia categorised as economic loss the diminution in value of a house where the fabric of the building had cracked because the footings were inadequate.

15.12. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (op cit) at paras 19 and 20 the majority judgment (Gleeson CJ, Gummow, Hayne and Heydon JJ) categorised the loss in that claim as economic but said:

> "Circumstances can be imagined in which, had the defects not been discovered, some damage to person or property might have resulted from those defects. But that is not what has happened. The defects have been

> identified. Steps have been taken to prevent damage to person or property."

They then debated the position that had pertained in England for a time where **physical** damage to a building was not a claim solely for economic loss but referred to the categorisation of such a claim as economic loss by the House of Lords in *Murphy*.

15.13. Despite that debate I have concluded that I must follow the predominant judicial viewpoint in this case that the claims made by the claimants are for economic loss. There is damage to their dwellinghouse from the leaks which have occurred but that is damage to their "financial wellbeing or prosperity" (as that expression is used in the Law of Torts in New Zealand, 3rd edition, Todd, para 1.2.2(e)) that is in question.

15.14. Accordingly, as the Privy Council recognised in *Hamlin*, the cases in New Zealand require an element of reliance to establish a duty of care in economic loss cases. That appears to be affirmed in Australia where, in *Woolcock Street Investments* at para 24, the majority said:

> "In other cases of pure economic loss (*Bryan v Maloney* is an example) reference has been made to notions of assumption of responsibility and known reliance."

15.15. For the Council, it is submitted that the criteria identified by the Court of Appeal in *Hamlin*, especially the six "distinctive and longstanding features" referred to by Richardson J at pp524-525, may no longer be as applicable, and specifically in this case. The Council submits that the Hamlins' reliance was on the premise of community reliance in the context of the particular circumstances mentioned.

15.16. My view is that, although there may have been general changes in the housing scene since those described by Richardson J and there are in fact specific differences in this case, there is nevertheless reliance by the

claimants, both in general and in specific terms, sufficient to create a duty of care.

15.17. The Building Act 1991 prescribed a performance based régime for building construction. It prohibited any building work except in accordance with the building consent issued by a territorial authority (s32). It required that an owner advise the territorial authority when building work was completed (s43(1)) and it required a territorial authority to issue a Code Compliance Certificate if satisfied on reasonable grounds that the building work complied with the Building Code (s43(3)); but that latter course could be achieved by a building certificate or Code Compliance Certificate issued by a building certifier (s43(2) and s56).

15.18. That very brief summary of the statutory régime established, in my opinion, an atmosphere of reliance. Those owners proposing to build relied on the processing of their application for building consent and they relied on the proper assessment of the construction work to ensure that it complied with the Building Code sufficiently for a Code Compliance Certificate.

15.19. Once a Code Compliance Certificate was issued there is, in my opinion, general reliance by the public on the accuracy of that document and a reliance that the building did comply with the Building Code.

15.20. The submissions of counsel for the Council refer to *Three Meade Street* which I shall refer in due course but essentially my view is that that case is limited to issues concerning commercial construction on the one hand; and furthermore the limitations it expresses in relation to the obligations created by a Code Compliance Certificate are limitations arising, not from the certificate itself or the statutory régime, but rather from the absence of a pre-existing duty of care. I shall deal with that in detail later.

15.21. Suffice it at this stage to say that my view is that in relation to residential dwellings where there is an established duty of care on the part of the Council, that duty extends to the issue of a Code Compliance Certificate and the issue of a Code Compliance Certificate creates a general reliance on that certificate that the residential dwelling did comply at the time of issue of the certificate with the Building Code.

Impact of Subsequent Cases

15.22. The Council's submissions are that the decision in *Hamlin* first must be considered in its own context and secondly that the more recent decisions nominated may impact on the general statements of principle in *Hamlin* and militate against a "too wide an application of *the Hamlin decisions*".

Three Meade Street

15.22.1. The judgment of Venning J in *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 dealt with a claim by the owner of a motel in Rotorua against the territorial authority. Although the company, Three Meade Street Ltd, had been the original owner of the land and the builder of the motel (through another company which was owned by the same shareholder), by the time the claim was made Three Meade Street Ltd was owned by other parties. The original shareholder had been one Mr Coervers and he was also the shareholder in Limberg Construction Ltd, the contracted builder of the motel. The work in fact was done by Mr Coervers. In due course there was a sale of the business which was effected by a sale of the shares in Three Meade Street Ltd. That company sued the territorial authority, the Rotorua District Council, alleging a duty of care owed to it, Three Meade Street Ltd.

15.22.2. It would be immediately seen that there was a significantly different set of circumstances. First, the owner of the land was the plaintiff in the claim. Mr Coervers, the then owner of the plaintiff, was the builder. The Court found it would not be just to hold the Council under a duty to recompense **a plaintiff** for economic loss sustained as a result of the shareholder's negligent work.

15.22.3. Secondly, the company as initial developer could have protected itself by contractual arrangements with builders, engineers and the like and its failure to do so should not be visited upon the Council.

15.22.4. Those two matters are in themselves significant distinguishing factors from the present claim. The present claim is by subsequent purchasers who had absolutely no control over the construction or the contract terms for construction.

15.22.5. Furthermore, *Three Meade Street* involved a commercial property and that was found to be a significant factor distinguishing it from the cases cited for the plaintiff which included *Bowen*, *Johnson* and *Hamlin*. Indeed counsel for the Council expressly submitted that *Hamlin* was not authority for the proposition that a Council owes a duty of care to a **commercial property owner** to protect them against financial loss (judgment para 22). In the present claim the submission is made that a finding by an adjudicator in another WHRS adjudication claim that *Three Meade Street* is incorrectly distinguished on the grounds that it relates to a commercial rather than a residential property flies directly in the face of not only the judgment in *Three Meade Street* but indeed the submissions of counsel for the Council in that case. It was

submitted as a distinguishing factor. It was found to be a distinguishing factor. In the judgment at para 39 Venning J said:

> "The current position in New Zealand is this. *Hamlin* is authority for the proposition that a council owes a duty of care to houseowners and subsequent owners and will be liable to them for economic loss arising out of defects caused by a council's negligence in the course of the building process. However, in my judgment, because of the particular circumstances of the housing and building industry in New Zealand noted in *Hamlin* the principle does not automatically extend further so that a duty of care will inevitably be owed by councils to industrial and/or commercial property owners."

15.22.6. Finally, significant reference was made to the contractual relationship between *Three Meade Street Ltd* and its contracting parties and I shall refer to this below but at para 30 Venning J said:

> "Given the basis for the conclusion reached in *Hamlin*, there is a real issue whether the duty of care owed by councils to homeowners extends to the owners of commercial property where they sue for economic loss. In *Hamlin's* case itself Cooke P left the point open but observed at p520 that in a case of commercial or industrial construction:
>
> > '… the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded.' "

15.22.7. In considering policy issues His Honour referred to the "floodgates" argument of indeterminate liability and found that that was not a matter that had caused difficulty with the application of principle in *Hamlin's* case (para 46).

15.22.8. He then considered the statutory framework and the performance-based criteria to which the Building Act 1991 referred and the emphasis of that Act upon safety and sanitary requirements. At para 48 he said:

> "While in *Hamlin* Richardson J observed that there was nothing in the Building Act to preclude private damages claims in accordance with existing New Zealand law for losses arising out of a negligent exercise of building control functions, the existing New Zealand law referred to by Richardson J was the existing authority in relation to the obligations owed by councils and others involved in the building process to homeowners. There is no such existing authority for the extension of that obligation to commercial property owners."

15.22.9. In my opinion that is a significant distinction and any argument about the limits of reliance on the building consent and code compliance certification process that may pertain to **commercial** property issues do not pertain to **residential** property issues. Venning J has expressly made the distinction; and he continues to do so at para 50 where he refers again to the contractual matrix:

> "In expressing reservations as to whether the duty recognised in *Hamlin* would extend to commercial property Cooke P acknowledged the contractual relationships and the ability of a party to protect themselves from damage by means of those contractual obligations. In the first place the initial purchaser or developer of a commercial building can protect itself by contractual arrangements with the builders, engineers and architects involved in the project. In the present case the first plaintiff failed to do so. Why should its failure to do so be visited on a council which has a different role in the building process? Although the position of subsequent purchasers is not directly relevant in the present case, given the second plaintiff purchased the shares in the first plaintiff, it must be acknowledged that subsequent purchasers can also protect themselves by warranties. It is reasonable to expect a commercial building owner to look first to the builder, its engineers and architects and other parties involved in the construction project that it had a direct contractual relationship with in relation to the building because those parties provide professional services for which they will have charged professional fees as part of the construction process."

15.22.10. The judgment does refer to the relatively limited cost structure that a territorial authority may have by comparison to professional fees that may be charged (para 50) and it does have reference to the emphasis in the Building Act upon safety and sanitary

requirements. In my opinion first those comments must be taken as having been made in the context of commercial property construction; but secondly, and perhaps more importantly, they go not to the existence of any duty of care (which has clearly been established by *Hamlin* and others) but the extent of that duty and questions of contribution.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd

15.22.11. The Council has referred to this judgment, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, as being relevant to a consideration of the applicability of the principles enunciated in *Hamlin*.

15.22.12. The judgment is referred to in *Three Meade Street* as having been referred to the Court after the hearing but before delivery of the decision. At para 36 of *Three Meade Street* the Court categorised *Woolcock Street* as a decision that:

> "… there was no duty owed by a consulting engineer to the owner of a **commercial** building, namely a warehouse and office space" (emphasis added)

with specific reference to the decision of the majority in *Woolcock Street* that it was distinguished from *Bryan v Maloney* because the latter established the duty in relation to owners of **dwellinghouses**.

15.22.13. That is, in my opinion, a critical distinction to make in this case as in others cited for the Council when considering the principles enunciated in *Hamlin*.

15.22.14. *Woolcock Street* was indeed a claim against consulting engineers in respect of defective foundations to commercial premises, a

warehouse and offices complex. The Court held there was no duty of care.

15.22.15. Although that outcome was different from *Bryan v Maloney*, the majority judgment did say at para 17 that there is no "bright line" between cases concerning the construction of dwellings and cases concerning the construction of other buildings because of the variability of constructions that there are, particularly buildings for mixed purposes. It also referred to:

> "… 'the overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another'. It was the application of this 'conceptual determinant' of proximity that was seen as both permitting and requiring the equation of the duty owed to the first owner with the duty owed to the subsequent purchaser. Decisions of the Court after *Bryan v Maloney* [31] reveal that proximity is no longer seen as the 'conceptual determinant' in this area." (para 18)

15.22.16. The judgment referred to the issues of vulnerability and assumption of responsibility and known reliance, vulnerability being described as:

> "… a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way that would cast the consequences of loss on the defendant." (para 23)

15.22.17. The terms of the contract between the original owner and the builder were referred to but the Court found it unnecessary to decide on issues affecting disconformity between those obligations and the duty of care owed to a subsequent owner.

15.22.18. That aspect of vulnerability is referred to by Venning J in *Three Meade Street* in similar terms as:

> "… whether the plaintiff was able or not to protect itself from the risk of damage." (para 52)

15.22.19. Also to note is that McHugh J said at para 54 that:

> "New Zealand Courts have been the most liberal of the Courts in common law jurisdictions in permitting an action in negligence for economic loss caused by defective premises"

citing *Bowen v Paramount Builders (Hamilton) Ltd & Anor* [1977] 1 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Stieller v Porirua City Council* [1983] NZLR 628; [1986] 1 NZLR 84; *Brown v Heathcote County Council* [1986] 1 NZLR 76; *Chase v De Groot* [1994] 1 NZLR 613 and *Invercargill City Council v Hamlin* [1994] 3 NZLR 513. That acknowledgement having been made, care must be taken in considering Australian (and other overseas) authorities and their applicability to New Zealand law.

Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd

15.22.20. I have considered this case above in the context of general principle statements affecting any alleged duty of care owed by a subcontractor.

15.22.21. In the present context the Council has referred to the general statements of principle in *Rolls-Royce*.

15.22.22. Those principles as stated in *Rolls-Royce* are first that there should be an inquiry into the degree of proximity or relationship between the parties (para 58). This reflects a balancing of the plaintiff's **moral** claim to compensation for avoidable harm and the defendant's **moral** claim to be protected from undue restrictions on its freedom of action and from an undue burden of

> legal responsibility which in turn involves a consideration of how close the nexus is between the alleged negligence and the claimed loss and degree of harm. It also involves consideration of the burden on the defendant of taking precautions against the risk and also whether the consequences may be out of proportion to its fault. The plaintiff's vulnerability can be taken into account which may require concentration on whether "a defendant with special skills has power over a vulnerable plaintiff" (para 61). Other remedies that a plaintiff could realistically have taken are relevant (para 62) as is the nature of the loss (para 63) and the statutory and contractual background (para 64).

15.22.23. The second issue is then whether there are wider policy considerations that tend to negative or restrict or strengthen the existence of the duty.

Principles – Duty of Care - Conclusion

15.23. I will not attempt to restate in full the various principles that have emerged from a consideration of those cases. I am satisfied that the question is not simply one of whether there has been a residential construction which therefore imposes duties of care including duties on a territorial authority. The nature of the contract must be considered first. That may be a contract for a residence *simpliciter*, as is the case here, or it may be a contract for a more complex development such as a combined commercial/residential development (a block with retail shops on the ground floor and residences above being an example). It may be a more significant contract for a more obviously commercial development such as a motel (*Three Meade Street*). It may be a strictly commercial contract in detailed terms with commercial subcontracts in detailed terms for a substantial construction (*Rolls-Royce* – co-generation plant at timber mill). Each category of contract must be considered in its own merits.

15.24. Normally, however, there is a more likely duty of care in the case of the construction of a residential dwellinghouse *simpliciter* as is emphasised by *Hamlin* and the cases on which it is based.

15.25. The terms of the individual contracts, whether these be a head contract, or subcontracts, or a group of individual contracts as in a labour-only construction, are important. In those individual contracts the contractors agree on the extent of their exposure to liability and the parties, particularly the owner, agree to any limitation on, or exclusions from, that liability. The owner of a site may expressly agree with the head contractor that its liability is restricted or excluded to a greater or lesser extent and that head contractor is entitled to take advantage of the rights that that creates. There may be insurance issues which arise from clauses restricting or excluding liability. Clauses of that kind do emphasise to the owner the importance of ensuring that its interests are protected in some other way.

15.26. Also important in the contractual context is the agreement for sale and purchase by which the plaintiff buys the residence (if there is such as is the case here). Any claim by the purchaser of a dwellinghouse against any party with which that purchaser did not have a contractual relationship must sue on some other legal basis. This is normally in tort for negligent breach of a duty of care. Relevant to any such claim must be the terms on which that person purchased the dwellinghouse. There will be the contractual terms with the vendor. There will be any exclusion or limitation of liability clauses on the part of the vendor and there will be any further clauses which may be relevant to the question of reliance.

15.27. Contractual terms will be even more significant when the plaintiff/claimant was the owner of the land at the time the dwellinghouse was constructed. The terms of that person's contract with the builder will be relevant (as in WHRS claim 1092 *Auckland City Council v S J Brentnall Ltd*); and the

contractual terms between the head contractor and subcontractors or direct contracts for subtrades between the owner and those respective contractors.

15.28. The three cases to which the Council has referred (*Three Meade Street*, *Woolcock* and *Rolls-Royce*) have, to a greater or lesser extent, emphasised the relevance of the contractual terms in that way.

15.29. In the context of alleged negligent breach of a duty of care there will also be the questions of proximity, vulnerability (including the adequacy of means for self-protection by the claimant), the nature of the loss and the statutory and contractual background.

Code Compliance Certificate

15.30. It is submitted for the Council that in general principle the Council's liability for the issue of a Code Compliance Certificate is significantly limited.

15.31. The submissions refer to *Three Meade Street* and to *Attorney-General v Carter* [2003] 2 NZLR 160.

15.32. In *Three Meade Street* Venning J considered *Carter*. *Carter* involved the issue of an interim certificate of survey for a ship under the provisions of the Shipping and Seamen Act 1952. The Court of Appeal held that the purpose of the survey requirements was the safety and seaworthiness of ships and there was nothing in the legislative scheme or its individual provisions to suggest the survey certificate were intended to be issued or relied on for economic purposes.

15.33. In reliance on that authority Venning J said that in *Three Meade Street*:

> "It is not part of the statutory scheme [the Building Act 1991] that by issuing a Code Compliance Certificate the Council was guaranteeing the motel was free from defects which might otherwise cause economic loss to an owner." (para 64)

It is said that a strict approach is taken but he concluded (para 67) that the first plaintiff:

> "… [could not] refrain its claim as a breach of statutory duty to overcome its failure to establish a duty of care."

I take it from that that the Court was saying that if there **was** a duty of care then that could be the foundation for the breach of a statutory duty claim by which I take it that the Court meant that in a case such as the present, if there is a duty of care found to be owed by the Council to the claimant (and I do so below), then the claimant can **also** claim for breach of the statutory duty – to the extent that duty extends – which has caused it loss.

15.34. The statutory scheme under the Building Act 1991 was considered by Richardson J in the Court of Appeal in *Hamlin* and at p526 he made express reference to include the following:

> "… consents for building work can only be issued by territorial authorities (ss32 and 33), which are entitled to inspect work for compliance with the Act (s76); the territorial authority issues the final Code Compliance Certificate (s43); and even where a private certifier is used the territorial authority retains overriding control … The legislation is performance oriented. It is intended to perform greater efficiencies. Owners may have a degree of choice between territorial authorities and private certifiers with competitive charging by territorial authorities and private certifiers for their services and territorial authorities have overriding responsibility for administering the new building control system."

15.35. In that context Richardson J referred to the 1990 report of the Building Industry Commission "Reform of Building Controls" where in volume 1 para 2.16 there is this:

> "2.16 The purpose of a building control system should be to ensure that essential provisions to protect people from likely injury and illness and to safeguard their welfare will be satisfied in the construction, alteration, maintenance, use and demolition of buildings."

15.36. In *Three Meade Street* Venning J emphasised the health and safety aspects of a territorial authority's responsibility under the Building Act 1991. That was, however, in the context of the commercial premises to which that case referred and, as I have said, although counsel for the Council submitted to me that the adjudicator in claim 277 *Smith v Waitakere City Council*, was incorrect in concluding that *Three Meade Street* could be distinguished as it applied to commercial properties only, that was the very distinction that was argued by counsel for the Council in *Three Meade Street* before Venning J.

15.37. In conclusion, in general principle, provided the other issues concerning the existence of a duty of care to which I have referred are considered and in a particular case do establish a duty of care, in my view the Council can be liable for the economic loss consequences of a Code Compliance Certificate issued by it negligently.

16. Council Liability: Specific Issues

16.1. The claim against the Council by the claimants is in three aspects:

16.1.1. Issue of building consent.

16.1.2. Inspections.

16.1.3. Issue of a Code Compliance Certificate.

16.2. I will deal first with the general principles raised and secondly the specific application of those to individual aspects of water entry and damage.

Issue of Building Consent

16.3. The Council submits that there is no obligation on the Council before issuing a building consent to seek further information and no obligation to refuse a building consent on the grounds of insufficient information. Reliance is placed on *Three Meade Street* at para 39 where Venning J clearly held that the Council's obligation is to grant or refuse the application for consent under s34 of the Building Act 1991. Although it has the power under s34 to

suspend the relevant period until further information is provided that is not, His Honour effectively held, a statutory empowerment for the Council to require the provision of further information.

16.4. The Council has relied on statements of principle in WHRS claims 27 (*John Gray Family Trust v Lay & Ors*) and 1276 (*Hartley v Balemi*).

16.5. The Council also submits that the standards must be judged by the conduct and standards **at the time** of the conduct complained of and refer to *Aspen v Knox* [1989] 1 NZLR 248, *Lacey v Davidson & Anor* (Auckland High Court; A546/65; 15/5/86; Henry J), *Hartley v Balemi* (op cit) and WHRS claim 1917 (*Hay v Dodds*). I accept that that is so, namely that in assessing negligence the standards at the time of the negligent conduct are those which are relevant.

16.6. In light of those authorities my view on s34 of the Building Act 1991 is clear that the obligation on the territorial authority was to grant or refuse the application (subsection (1)) and to do so within the prescribed period which it could suspend until any further information reasonably required was supplied (subsection (2)) but that it had no obligation to insist on further information. The territorial authority's obligation under subsection (3) was to grant the building consent:

> "… if it [was] satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application."

16.7. That requirement meant however, in my view, that as it considered the application for building consent the territorial authority had to determine whether the plans and specifications submitted with the application would mean that a building properly completed in accordance therewith would satisfy the provisions of the Building Code. Under subsection (4) the territorial authority could impose waiver, modifications or conditions and in

doing so was required under subsection (5) to have "due regard to the provisions of the Building Code and the matters set out in section 47 …".

16.8. Those obligations were reflected in the further obligation under s43 that the territorial authority issue a Code Compliance Certificate:

> "… if it is satisfied on reasonable grounds that … the building work to which the certificate relates complies with the Building Code [or any approved waiver or modification contained in the building consent]".

16.9. In support of their claim the claimants adduced evidence from Roger William Cartwright who had worked for the Auckland City Council for 18 years, the first 12 as a building inspector. On the basis of his interpretation of certain sections of the Building Act 1991 he listed certain information that would, in his opinion, be required to satisfy the Council on reasonable grounds that the provisions of the Building Code would be met, an expression which clearly refers to the requirements of s34 mentioned above. There were eight categories of detail which he said would be required and in his opinion the plans and specifications that were on the file did not contain sufficient detail for the Council to be so satisfied and he dealt with the specifics in relation to each category of claimed defect.

16.10. In reply for the Council Mr M B Jones, an employee of the Manukau City Council and a person with significant background involvement in Council inspection and certification, disagreed and expressed the opinion that with the level of information generally required and accepted **at that time** there was sufficient information available to the Council to enable it to issue consent. He did not elaborate. In my view, as expressed above, the Council should have refused to issue consent if the information provided did not satisfy it on reasonable grounds that the provisions of the Building Code would be met if construction was in accordance with the information.

16.11. There was no part played in this adjudication by the person responsible for the drawings and specifications, the fifth respondent, Mr Smits, and I have above drawn inferences from that that he accepted that there were design issues implicating him for which he was at fault.

16.12. That being so, I have considered the respective aspects of water entry and damage in the context of design inadequacy and Council processing of those inadequacies below.

16.13. The evidence from Mr Roxburgh on all issues was in the context of individual aspects of defect and damage and I shall address those later. Mr Grigg did not address the issue of Council processes at all. The issue was not addressed at the technical meeting referred to at paragraph 3.9 above.

Inspections

16.14. Counsel's submission on the authority of WHRS claim 134 (*Kellaway & Ors v Waitakere City Council & Ors*) is that:

- The Council inspector must act as a reasonably prudent Council inspector would act.
- The standard in relation to any inspection may epend on the magnitude of the consequences.
- A Council inspector is not a clerk of works.
- Council are obliged to ensure works are carried out in accordance with consent and code.
- The standard of care does not extend to identifying defects which require testing.
- Council are obliged to put in place proper inspection processes at appropriate intervals and stages during construction to maximise inspector's ability to ensure compliance with the Building Code.
- Council must undertake necessary research.

Code Compliance Certificate

16.15. I have referred above to the requirements of the Building Act 1991 as to the issue of a Code Compliance Certificate and my view that there is a liability if this is issued by a territorial authority negligently where there is a duty of care. Mr Cartwright's evidence is that the satisfaction on reasonable grounds that code compliance has been achieved can be obtained by undertaking the necessary inspections or by other means such as producer statements or product appraisals. He said that the 16 inspections apparently undertaken were deficient in failing to identify a number of breaches of the Building Code that were "readily apparent" and I deal with the specifics below. Neither Mr Jones nor Mr Roxburgh nor Mr Grigg gave specific evidence on this issue other than in the context of the respective defects.

16.16. The Council submits there is no reliance in this case. That is on the basis of Mr De Wet's concession in evidence that he was unaware of the meaning of a Code Compliance Certificate other than being told that he ought to obtain one and the further concession that he did not obtain legal advice on the meaning of a Code Compliance Certificate and was not aware of s43 of the Building Act 1991.

16.17. If a claim is based on a defective Code Compliance Certificate in circumstances where the Council owed a duty of care and has negligently breached that in the issue of the certificate, then a claimant cannot proceed with a claim unless there is evidence of reliance on the defective certificate. Clearly a certificate sitting in a Council file which is not inspected by a person purchasing a property cannot form the basis of any reliance. It may be that if there were evidence that a Code Compliance Certificate had been issued and this was known by a purchaser/claimant at the time of purchase there could be some argument that the knowledge or understanding that a certificate had been issued is sufficient to establish some reliance. The

Council has by that certificate certified that the dwelling does meet the performance standards in the Building Code and an awareness of the issue of a certificate (assuming it had in fact been) indicates a reliance on the Council's certification. In this case, however, apparently Mr De Wet did not make inquiry as to whether there was in fact a certificate and merely was aware of the advices that he should obtain one. I do not think that that amounts to reliance so as to found a cause of action in itself on the defective Code Compliance Certificate.

16.18. I turn now to consider the specific areas of water ingress.

Inadequate Waterproofing to Parapet Tops

16.19. In his evidence in support of the claim in this respect Mr Earley simply refers to the evidence of Mr Cartwright but in his summary alleges that the Council has:

> "… failed to identify construction not in accordance with consented plans at construction stage".

That is an inspection issue.

16.20. Mr Cartwright referred to sheet 5 of the approved plans showing parapets having a "pre-finished steel capping as flashing to top". He said that at the inspection on 6 September 1995 (and I think in error he referred to "1996") and the three that followed it should have been clear to Council inspectors looking from ground level that there was steel capping on the rear parapets but none on the side parapets and none visible on the front parapets. The 6 September 1995 inspection was for unit 1 and the final inspection for both units was on 18 March 1996.

16.21. For the Council Mr Jones first made general comments about the extent of knowledge of weathertightness issues at the time of construction and the general practise of inspections at the time. He referred to the matters that

would have been considered at a pre-line inspection and matters at a final inspection. He said that there was effectively no individual who had been personally involved in these two units now available to give effective evidence. He explained that there were a number of methods of construction of a cladding system such as this so far as parapets were concerned including installation of a metal capping and installation of a sloped surface covered in a proprietary waterproof membrane. He referred to the side parapets as being "said to have no slope" and he said it would be unlikely that a Council officer would have been on site at the time of installation of any membrane covering over the parapets or the nailing of the Hardibacker surface. He said that any slope would have been toward the roof which would not have been visible from ground level.

16.22. Mr Roxburgh too referred to the sloped parapet construction in accordance with Duraplast details of March 1995 as being an acceptable alternative to the cap flashing and said that it was:

> "… not common practise for Council inspectors to undertake roof level inspections and they were not supplied with the equipment to do so".

16.23. Mr Hursthouse in cross-examination, while conceding that either the capping or the membrane had potential to work and it would not be expected to see the capping if the membrane had been used, did confirm that at the technical experts meeting it had been agreed that the requirement in the drawings for capping meant continuous capping.

16.24. Mr Grigg did not comment on the matter from the point of view of Council responsibilities or inspection.

16.25. This aspect was identified at the experts technical meeting referred to at para 3.9 as one of the two most significant causes of leaking and damage (refer para 3.9.9).

16.26. The amounts that are claimed in respect of this aspect of the work total $111,700.00 plus GST made up as shown in paragraph 6.14 above.

16.27. In deciding the Council's liability in this matter I have taken account of standards that pertained at the time and the increased knowledge of weathertightness issues that has been learned since. I take into account that Mr Cartwright conceded that in 1995/96 inspectors were not issued with a ladder but he did say that if needed an inspector can try to climb onto the roof or gain access in some way.

16.28. The drawings required cap flashings. In my view the Council inspections should have ascertained whether those cap flashings were supplied or not. Although that may have been difficult to see from the ground appropriate steps should have been taken to find out if the cap flashings had been used. It may subsequently have become more apparent that water penetrates parapets if uncapped but that is not an issue here where the drawings were required to be capped and some at least of them were not. That should have alerted the inspector to make further inquiry to ascertain how the parapets were protected from any water entry.

16.29. In my opinion the Council has been negligent in its inspection process in failing to identify this departure from the drawings and to check that the construction course followed in fact achieved weathertightness to meet the performance standards of the Building Code.

16.30. Accordingly I find the Council liable to the claimants in this area in the sum of **$111,700.00** plus GST, namely **$125,662.50**.

Window and Door Joinery Flashing Installation

16.31. Mr Earley's schedule, apparently relying on other evidence, is that the Council has:

> "[f]ailed to confirm details of proprietary cladding system at consent stage and failed to identify construction not in accordance with Duraplast details at inspection stage."

16.32. Mr Cartwright's evidence refers first to an obligation on the Council to request details of window flashing and junction and the applicant for building consent could have provided the Duraplast technical information. I do not think the Council has any liability in that respect because, as Mr Cartwright's evidence makes clear and I have mentioned in detail above, the Duraplast technical information was not followed.

16.33. Mr Cartwright then refers to the failure to note that the window joinery as in fact installed was neither face fixed nor recessed. Mr Cartwright has referred to the as built sketch by Mr Earley but that, of course, refers to unit 18B. Of more assistance is the cut out inquiry that was made during the course of the hearing which revealed that there was no flange as I have described above. Mr Cartwright referred to the gib bracing inspection and said that that should have revealed that the joinery was not installed in accordance with specifications or with an acceptable solution.

16.34. Mr Jones' evidence was that the sill and jamb flashings to the windows and joinery had been correctly installed in accordance with the Plaster Systems detail but I have found that that was not the case. The window and door joinery was neither face fixed nor recessed and further, in respect of unit 18A, there was not the appropriate flange. Mr Jones said that those flashings would not have been visible at the time of the inspections.

16.35. Mr Roxburgh gave similar evidence stating that most Council inspectors would not have been able to tell the difference between stucco and Duraplast at final inspection and that it would be impossible to confirm how the sill and jamb flashings had been formed after the plaster finish was applied. The standard form of pre-line site visit checklist applicable at the

time does not include express reference to joinery installation or flashings. It has been found in other adjudications that sill and jamb flashings were not standard at the time.

16.36. The Council relies on the principle that standards must be judged in their then contemporary context. In *Askin v Knox* [1989] 1 NZLR 248 at 252 Cooke P said:

> "Even by the standard of the balance of probabilities there is a natural reluctance to condemn [the two inspectors who had died before the hearing] as negligent. In the early 1960s inspectors, acting according to the standards then regarded as reasonable, may have been less conscious of the risk of subsidence that has been underlined by the litigation of more recent decades. This unwillingness to find negligence may be a misfortune for the plaintiffs, but it also illustrates the drawback of trying to resolve a dispute or fact more than 20 years afterwards."

16.37. Having considered all the evidence and submissions I have come to the conclusion that the Council was not negligent in respect of window and sill flashings. There was clearly a departure from the required installation of that joinery which in turn required that the plasterers respectively modified the plastering system to allow for the created situation. I have dealt with the liability of other parties above. I do not think that, given those circumstances and given the standards at the time, it could be said that the Council inspections should have identified that there was a potential risk of water entry and damage. In the circumstances it was appropriate for the inspector(s) to accept advices given on site that the necessary installation and plastering had been done. Given particularly that the agreed view of the technical experts was that sealant failure was a principal issue in relation to joinery failure, I do not think that the Council inspections could have, or at least should take responsibility for, finding sealant issues and identifying potential failures. In any event it is submitted for the claimants that there was no cladding inspection and therefore no inspection of the installation of the window joinery. It is not for a Council to initiate an inspection. A Council cannot be found liable for a negligent inspection that did not occur.

16.38. Although there is reference to fault at design stage my view is that there is no evidence of any aspect of the design that was wanting and no obligation on the Council to question the design issues or suspend the time for issue of a building consent in that respect.

16.39. Accordingly I find the Council has no liability for that defect.

Cladding Below Ground and Floor Level and Cladding Hard Down to Paved Decks

16.40. Mr Earley's schedule refers to both these issues as both consent and inspection issues.

16.41. Again as to consent stage, Mr Cartwright's position is that because there was nothing on the plans showing where the plaster was to finish relative to ground level or deck level the Council should have requested these details. On the authorities discussed above my view is that the Council was under no obligation to do so as such but could have suspended the time for issue of building consent.

16.42. Against that Mr Roxburgh conceded in his evidence that the Council officer should have noticed cladding in contact with the ground at the time of final inspection provided the concrete had by then be laid; and he conceded the Council would have seen retrofitted drainage as a sensible attempt to provide separation. He expressed the view that the problem of plaster was not considered to be a high risk at the time. As to the cladding to decks, he said that there was less "clarity available" but conceded that it was an unsatisfactory practise that the Council should have recognised as inappropriate.

16.43. He said that the capillary action from these cladding issues was less likely to have caused decay than from other causes. That was the agreed position of

the technical experts, namely that wicking damage was significantly less than damage caused by other defects (see para 3.9.5 above).

16.44. Mr Jones accepted that there was insufficient height between internal and external floor levels and that cladding was in contact with the exterior ground level. He conceded that the difference in the former was visible at the time of construction and that the Council inspection picked this up. He said that the side elevations were not under cover and would have been the only area considered at risk and he referred to the front elevations as containing the garage. He expressed the opinion that the inspector would not have been able to tell that the Duraplast literature had not been followed at the time of his final inspection and would have noted the retrofitted channel in front of the garage.

16.45. Having considered the evidence and submissions I have formed the view that the Council has been negligent in respect of the aspects relating to ground and floor levels. The witnesses have conceded that this issue was before the Council inspections and in my view the Council inspector should have taken steps to ensure compliance. Having said that, however, I have not been persuaded that that was such a significant issue that the Council should be contributing to the cost of repair in respect of the ground levels. There is a significant element of duplication with the parapet tops repair costs and the only extra is to the nib wall, $9,400.00. On balance I do not see that the Council has any additional liability in respect of wicking so far as ground levels are concerned.

16.46. As to the paved decks, Mr Cartwright's view was that from the final inspections it would have been obvious that plaster was taken hard down on to the deck with no step down from lounge and bedroom on to the deck and that a prudent inspector would know that this was a breach of the performance standards of the Building Code.

16.47. Mr Jones confirmed that the inspection did detect an issue with relation to drainage to the decks and that the inspector asked for it to be rectified. His expectation was that when the officer returned he did not go up on to the deck but simply observed the drainage overflow from the exterior of the house. Mr Roxburgh, as I have said, acknowledges that the Council should have recognised the unsatisfactory practise of plaster hard to decks as inappropriate.

16.48. The amounts claimed for cladding to decks total $56,800.00 made up as shown in paragraph 6.53 above.

16.49. I find that the Council was negligent in respect of these latter matters and **ORDER** it to pay to the claimants the sum of **$56,800.00** plus GST, namely **$63,900.00**.

Internal Gutter Flashings

16.50. This is identified by Mr Earley's schedule as an inspection issue:

> "Failed to identify construction not in accordance with consented plans at construction stage."

16.51. Mr Cartwright expressed the view that Council inspectors should have noticed the lack of capping during final inspections. Mr Jones' evidence was that:

> "It was not the practise of Councils at the time of construction to inspect areas in and around roofs. They simply did not have the equipment to do so"

and for that reason defects were not visible. Mr Roxburgh gave similar evidence.

16.52. Mr Cartwright provided a statement of evidence in reply and did not respond to Mr Jones' statement as quoted above.

16.53. It may seem strange in 2006 that an inspection to ensure compliance with the performance standards of the Building Code such that a Code Compliance Certificate could be issued does not include a roof inspection. It is trite to say that water falls down and first onto the roof and questions of water entry are bound to start there. It has often been said that gravitational water damage is much more significant than entry from other means. However I have to assess the standards as they applied at the time of construction of this dwellinghouse in the light of the evidence that is submitted. The claimants rely on s76(4) of the Building Act 1991 which provided that:

> "… every person engaged in any building work shall give every reasonable facility to enable the territorial authority's authorised officers to inspect all or any part of the building or the building work"

and submitted that that required the inspector to request a ladder. That statutory provision does not of itself impose an obligation on the inspector. It simply imposes the obligation on the owner to provide the facility.

I refer again to the statement of principle by Cooke P in *Askin* at para 16.36 above.

16.54. Given that the evidence from both Messrs Jones and Roxburgh is that roof inspections were not normally carried out at that time and given that that is not replied to by Mr Cartwright in his statement, I have formed the view that there is insufficient evidence for me to determine that the Council was negligent in its inspection of the guttering at the roof level as is alleged by the claim.

16.55. There is, in the amounts claimed, a duplication in respect of repairs to the south-east elevation, $27,300.00, which relates to cladding onto the paved decks which I have already ordered that the Council pay. As to the balance

claimed, north-west elevation, $16,000.00, and rear deck, $1,500.00 (total $17,500.00), I do not find the Council liable for that sum.

Glass Penetration to Flat Tops of Balustrades

16.56. This is identified in Mr Earley's schedule as both a consent and an inspection issue:

> "Failed to insist on weathertight details for critical junctions at consent stage and failed to identify the vulnerable junction during inspections."

16.57. The amount claimed for this issue is $56,800.00 which is a direct duplication of the amount claimed for cladding hard to paved decks as referred to in paragraph 16.49. Accordingly there is to a degree no need for me to consider this matter further I having already ordered the Council to pay that sum for those repairs.

16.58. Mr Cartwright's view was that at consent stage the Council should have requested a cross-section of the deck barrier and, for the reasons I have mentioned above, I do not find that the Council had an obligation to request further detail as has been claimed. Mr Cartwright also says that it "should have been obvious" that glass penetration of the balustrades was a source of moisture ingress and that it was "surprising" that the Council allowed toe holds around the glass.

16.59. Mr Jones conceded that the glass balustrade walls were installed as outlined by Mr Earley but said that, even if the Council inspector had gone onto the deck once the glass balustrades had been installed, he would have been unlikely to have considered the manner of installation as in breach of the Code or have recognised that it would give rise to weathertightness issues at a later date.

16.60. Mr Roxburgh gave a qualified answer relating to reliance on sealants.

16.61. Having considered the evidence and heard the witnesses and seen the photographs I have formed the view that the glass penetration to the balustrades was quite inadequate and I have dealt with this earlier in relation to other parties. That should have been quite apparent to an inspector at the time such that questions concerning the adequacy of drainage from the penetration should have been raised.

16.62. I find the Council negligent in relation to that matter and repeat the order that it pay the sum of **$56,800.00** plus GST, namely **$63,900.00**, for the repairs identified in paragraph 6.53 hereof.

Code Compliance Certificate

16.63. The Council has a liability as I have found on the basis of negligent inspections and it is perhaps unnecessary then to consider any further liability under the Code Compliance Certificate. I have expressed the opinion above that there can be a liability for the issue of Code Compliance Certificate which is wrong but I have limited this to a claim in respect of a dwellinghouse and only where there is a pre-existing duty of care. I have found there to be that duty of care owed by the Council to the claimants in this case. The Code Compliance Certificate is in fact wrong in that the dwelling did not comply with the Code at the time the certificate was issued and further, to use the words of s43(3) of the Building Act 1991, there was not proper ground to satisfy the Council on reasonable grounds that the building work complied with that Code. There is, however, no evidence of any reliance on that Certificate by the claimants.

17. Result – Council Liability

17.1. I find that certain of the claims against the Council are made out and it has a liability to the claimants for the following repairs:

South-west elevation	48,145.00

North-east elevation	48,855.00
Parapets	14,700.00
South-east elevation	27,300.00
Front decks	23,500.00
Master bedroom internal repairs	6,000.00
	168,500.00
GST	21,062.50
Total	**$189,562.50**

17.2. Although the evidence of Mr Roxburgh was that he disagreed with Mr Earley's apportionment of repair costs to damage caused, my view is that the Council's liability is for the damage resulting from its negligence. If the negligence relates to one cause of damage but not another, in my view the Council has a liability for the full cost of the repairs even although there were other causes as well for which the Council does not have a liability. That question may go to one of contribution and I mention that later, but it does not, in my view, affect the Council's primary liability for repair costs for damage occasioned as the result of water leakage which could have been avoided by compliance with proper standards.

17.3. In addition there are the other aspects of claim referred to at paragraph 5. The total liability for the Council to the claimants is therefore:

Metal capping and sealant purchased	981.00
Painting of house	1,500.00
Cost of repairs (para 17.1)	189,562.50
Documentation costs	10,000.00
Project management fees	16,000.00
GST on those items	3,250.00
Building consent fees	10,059.00
Removal and storage costs	1,614.00
Alternative accommodation	2,700.00
General damages – Mr A De Wet	7,000.00
General damages – Mrs A C De Wet	6,000.00

Total	$248,666.50
Less deduction (para 5.6)	14,014.00
Balance	**$234,652.50**

17.4. I therefore **ORDER** that the first respondent, **North Shore City Council**, pay to the claimants, **Andre De Wet** and **Annette Cornelia De Wet** (with the adjustment between them for general damages), the sum of **$234,652.50**.

18. **Liability: Ninth Respondent: E Lakay: Pre-purchase Inspection**

18.1. Mr Lakay did not participate at all in the adjudication. His solicitors wrote to WHRS stating that he would not be taking any steps as his personal and financial circumstances prevented him from doing so. They acknowledge that as adjudicator I am entitled to draw adverse inferences from his failure to respond.

18.2. The claim against him is in respect of the first of two pre-purchase inspection reports he provided to the claimants being dated 24 April 2003. In that report there are these extracts:

> "The foundations for the dwelling are in good condition with the footings well found into solid ground, there are no indications of slumping or failure in any of the foundations. The timber mid-floor likewise is in good condition with no significant defects visible."
>
> "Generally in good condition this dwelling has been very well maintained during its life and with a regular maintenance schedule should require little in the way of significant remedial work for some years to come."
>
> "The interior walls have been initially plaster finished with a good layer of paint applied to protect and provide visual enhancement. There were a number defects [sic] noticed however nothing that would suggest any major problems with the framing substrate. The plaster cracks are a direct result of the disadvantage of substrate timber movement, this movement is however common within all dwellings."
>
> "We did note that the joinery has been well installed with good head flashings and sills formed. The required PVC flashings both under the window joinery and around the perimeter have been installed. The installation of the plaster system has been well carried out but we did find

> numerous plaster cracks that could be cause of concern in terms of water tightness unless attended to promptly. This can be relatively easy [sic] achieved with the application of thin glass fibre tissue embedded in good quality exterior paint over all cracks."

18.3. Mr De Wet said that Mrs De Wet picked up the report on 24 April 2003; and that he and Mrs De Wet were both pleased with the report and decided to proceed with the purchase.

18.4. In support of the claim the claimants rely on s9 of the Fair Trading Act 1986 and the decision in claim 1240 *Auckland City Council v Russell*.

18.5. I find that the report is misleading. First there are the express matters mentioned which are clearly contrary to the correct position. Expressly the reference to flashings around joinery is quite wrong as is the reference to the installation of the plaster system. Secondly, the general tenor of the report is misleading. Although there is reference to numerous cracks the implication is that if these were attended to by application of thin glass fibre tissue and painting there would be no problem. Regrettably the situation was by then significantly worse than that implies. Thirdly, when confronted with leaks found by Mr & Mrs De Wet, Mr Lakay returned in September 2003 and completed a report dated 19 September 2003 in which he refers to moisture meter readings having been taken and concludes that the moisture content is in excess of 18% and not compliant with the Building Code or the New Zealand Standards Specification. Again he refers to the cracks being filled with tissue and painted. Although the claimants do not rely on that second report as such, in my view the fact that Mr Lakay was able to carry out those moisture meter tests at that stage indicates that he should have considered that in April 2003 when he found the cracks to which the report refers and should have carried out moisture meter testing then.

18.6. The report of 24 April 2003 is signed by Mr Lakay personally as follows:

> "Signed For and on Behalf of Futuresafe Building Inspections Ltd

> Yours Sincerely
> Eric Lakay
> Building Surveyor"

18.7. The report is on Futuresafe Building Inspections Ltd letterhead but the front page expressly refers to it having been:

> "Prepared By Eric Lakay"

18.8. Mr Earley in his evidence said that in light of the matters found by Mr Lakay to which he refers in his report he believed the correct advice should have been that there were serious risks in proceeding with the purchase of the property and that a comprehensive watertight survey was required which should include invasive moisture readings to establish the condition of the timber frame.

18.9. He said that in his view the report was misleading and fell below the standard expected.

18.10. That view was not challenged by any other evidence or cross-examination from Mr Lakay.

18.11. I dealt with the liability of the author of a pre-purchase inspection report at length in claim 1240 *Auckland City Council v Russell* and I adopt what I said there about the legal principles and the exposure personally to liability of the author of the report.

18.12. Having considered the report and the evidence presented to me I have formed the view that Mr Lakay has a liability to the claimants under the Fair Trading Act 1986. The claim against him is for all the losses sustained by the claimants as set out in paragraph 5 and I find that he has a liability to the claimants for those losses given that he has not taken any steps in the

proceeding and given that I have the power to draw inferences from his failure to do so which I do.

18.13. I accordingly **ORDER** that the ninth respondent, **Eric Lakay** pay the sum of **$264,915.00** to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, (with the adjustment between them then for general damages).

19. **Contribution**

19.1. Various respondents have made cross-claims for contribution under s17(1)(c) of the Law Reform Act 1936 which provides as follows:

> "**17. Proceedings against, and contribution between, joint and several tortfeasors—**
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
> …
> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

19.2. It will be seen from s17 that there can only be recovery from one tortfeasor against another.

19.3. The only submissions of substance made are on behalf of the Council where it is submitted that Councils are typically never found responsible for more than 20% of losses flowing in respect of the losses for which it is found responsible with reference to the following cases:

> *Young v Tomlinson* [1979] 2 NZLR 441 – Council 10 - 25%
> *Riddell v Porteous* [1999] 1 NZLR 1 – Council 20%
> *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 – Council 20%
> *Scott v Parsons* (High Ct; CP 776/90; 19/9/94; Cartwright J) – Council 15%
> *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 – Council 10%

19.4. There has been no cross-claim made by Mr Lakay. In any event I do not consider he has any entitlement to cross-claim under s17 Law Reform Act 1936 because his liability to the claimants is under the Fair Trading Act 1986 and not in tort.

19.5. In approaching the issue of apportionment I have first looked at the individual areas of repair and the respective causes of damage occasioning that repair which I now tabulate:

Item	Cause %	Cause %	Cause %
	Cladding to ground	**Parapet tops**	**Joinery**
S/W Elevation	10	45	45
N/E Elevation	-	50	50
Nib Wall	100	-	-
Parapets	-	100	-
	Gutter Flashings	**Cladding to Deck**	**Glass Balustrades**
S/E Elevation	65	15	20
N/W Elevation	100	-	-
Rear Deck	100	-	-
Front Decks	-	30	70

19.6. I have then considered the respective contributions of the relevant parties to those repair areas taking the repair costs and adding GST and the resultant contribution to the cost as follows:

Item	Party	%ge Fault	Repair Cost	GST incl	Share Total
S/W elevation	J Williams – 3rd resp	50	48,145.00	54,163.12	27,081.56
	Developers – 4th resp	10			5,416.31
	NSCC – 1st res	10			5,416.31
	Plaster Systems – 8th resp	15			8,124.47
	G Bianca – 10th resp	15			8,124.47
		100			$54,163.13

N/E elevation	J Williams – 3rd resp	70	48,855.00	54,961.88	38,473.31
	Developers – 4th resp	10			5,496.19
	NSCC – 1st resp	10			5,496.19
	G Bianca – 10th resp - (20% x 50%)	10			5,496.19
		100			$54,961.88
Nib Wall	J Williams – 3rd resp	90	9,400.00	10,575.00	9,517.50
	Developers – 4th resp	10			1,057.50
		100			$10,575.00
Parapets	J Williams – 3rd resp	75	14,700.00	16,537.50	12,403.13
	Developers – 4th resp	5			826.88
	NSCC – 1st resp	10			1,653.75
	G Bianca – 10th resp	10			1,653.75
		100			$16,537.50
S/E Elevation	J Williams – 3rd resp	80	27,300.00	30,712.50	24,570.00
	Developers – 4th resp	5			1,535.63
	A G Smits – 5th resp	5			1,535.62
	NSCC – 1st resp	10			3,071.25
		100			$30,712.50
N/W Elevation	J Williams – 3rd resp	85	16,000.00	18,000.00	15,300.00
	Developers – 4th resp	5			900.00
	A G Smits – 5th resp	10			1,800.00
		100			$18,000.00
Rear Deck	J Williams – 3rd resp	85	1,500.00	1,687.50	1,434.38
	Developers – 4th resp	5			84.37
	A G Smits – 5th resp	10			168.75
		100			$1,687.50
Front Decks	J Williams – 3rd resp	80	23,500.00	26,437.50	21,150.00
	Developers – 4th resp	5			1,321.88
	A G Smits – 5th resp	5			1,321.87
	NSCC – 1st resp	10			2,643.75

		100			$26,437.50
Master Bedroom	J Williams – 3rd resp	80	6,000.00	6,750.00	5,400.00
	Developers – 4th resp	5			337.50
	A G Smits – 5th resp	5			337.50
	NSCC – 1st resp	10			675.00
		100			$6,750.00
			$195,400.00	$219,825.00	

19.7. I have then considered the other damages claims which total $45,090.00 made up as follows:

Metal capping and sealant	981.00
Painting of house	1,500.00
Documentation costs	10,000.00
Project management fee	16,000.00
GST on documentation and project management	3,250.00
Building consent fees	10,059.00
Removal and storage costs	1,614.00
Alternative accommodation costs	2,700.00
General damages – A De Wet	7,000.00
General damages – A C De Wet	6,000.00
Total	$59,104.00
Less items mentioned para 5.3 above	14,014.00
Balance	$45,090.00

19.8. I think the fairest way to apportion these losses between relevant respondents is to take the same percentage of the total repair costs and GST referred to above (totalling $219,825.00) as follows:

Party	Repair Cost Liability (para 22.6)	Percentage	Share Other Losses
J Williams – 3rd resp	155,329.87	70.66	$31,860.91
Developers – 4th resp	16,976.25	7.72	3,482.13
A G Smits – 5th resp	5,163.75	2.35	1,059.18
NSCC – 1st resp	18,956.25	8.62	3,888.26
Plaster Systems – 8th resp	8,124.47	3.70	1,666.47
G Bianca – 10th resp	15,274.41	6.95	3,133.05
Total	$219,825.00	100	$45,090.00

19.9. If each respondent pays the amount that he or it is due to pay, the totals will be as follows

Party	Repair Cost Liability (para 22.6)	Share Other Losses	Grand Total
J Williams – 3rd resp	155,329.87	$31,860.91	$187,190.78
Developers – 4th resp	16,976.25	3,482.13	20,458.38
A G Smits – 5th resp	5,163.75	1,059.18	6,222.93
NSCC – 1st resp	18,956.25	3,888.26	22,844.51
Plaster Systems – 8th resp	8,124.47	1,666.47	9,790.94
G Bianca – 10th resp	15,274.41	3,133.05	18,407.46
Total	$219,825.00	$45,090.00	$264,915.00

19.10. If all respondents pay their respective contributions as set out above there will be total recovery by the claimants. The liability of one respondent to another is a separate issue from the liability of each respondent to the claimants which I have referred to above and in the result below.

19.11. In fixing these various percentages I have had regard to all the evidence from all witnesses. No witness gave express guidance as to percentages but, as I have mentioned at length in this Determination, there were many factors which pointed to appropriate apportionment and I have made the apportionment accordingly. Without attempting to restate matters in full or

provide an exhaustive explanation there are these factors which I have considered:

19.11.1. In relation to the south-west elevation the cladding to the ground issues are relatively minor but I have decided that the likely cause of damage is otherwise shared equally between the parapet tops and the joinery issues. There is no design issue at stake and that does not involve Mr Smits. There are significant construction issues in relation to both the parapet top completion detail and in relation to the fixing of the joinery for which Mr Williams is liable. The liability of the plasterer, Mr Bianca, and Plaster Systems for its supervision is shared equally between them particularly in relation to the joinery, plastering and advice issues. The Council has a liability in respect of inspection of the parapets. The developers have an overall responsibility.

19.11.2. The north-east elevation is attributed, in my view, equally to parapet tops and joinery issues. Again the lion's share lies with the builder, Mr Williams, but there is a liability on the part of the plasterer, Mr Bianca, which I have taken at 20% of the one-half contribution cause (the joinery). There is the residual liability of the developers and a liability of the Council.

19.11.3. The nib wall I have taken as being solely attributable to cladding issues which is the major responsibility of the builder and an overall responsibility of the developers.

19.11.4. The parapets liability must lie primarily with the builder for the fixing issues mentioned but also I think there is some liability for the plasterer in failing to question the fixing process followed (para 13.39). There is inspection liability on the part of the Council and an overall liability on the part of the developers.

19.11.5. The south-west elevation details relate primarily to construction questions concerning the gutter flashings, the cladding to the deck and the balustrades and the largest proportion for that must lie with the builder. There is also an inspection liability on the part of the Council, a design liability on the part of Mr Smits and the developers' overall responsibility.

19.11.6. The north-west elevation repairs should be met primarily by the builder with some liability on the designer and an overall liability on the part of the developers.

19.11.7. The same issues relate to the rear deck.

19.11.8. Likewise with the front decks the primary responsibility is with the builder but there is some responsibility for the Council, the designer and the developers as shown.

19.11.9. Finally, the same issues relate to the master bedroom.

19.12. All respondents must realise that these comments are in relation to contribution issues only and do not affect the primary liability that **each** has to the claimants as set out earlier.

20. Costs

20.1. No party has expressly claimed costs in this adjudication.

20.2. Costs are dealt with by s43 of the WHRS Act and allow for a determination of costs if it is found that a party has caused costs and expenses to be incurred unnecessarily by another party by bad faith or allegations or objections that are without substantial merit.

20.3. I do not find those grounds to exist in relation to any of the parties in this claim. So far as the seventh respondent is concerned, although there is no claim found against him and it was apparent at an early stage that he was not involved in this dwellinghouse, nevertheless any costs incurred by him relate to his defence in relation to no 18B and I do not find there have been any costs incurred unnecessarily by him. Certainly so far as the doubt about his involvement in the plastering at 18A is concerned that continued for a time until it was clarified that it was the tenth respondent involved and there is no evidence that Mr Philip Murphy incurred any further expense once that became clear such that there should be any order for costs in his favour.

20.4. The claimants' claimed costs for the CoveKinloch report but I do not regard those as any different from any other costs incurred by them in the bringing of this claim and I make no order in respect of that.

21. **Result**

21.1. I find the third respondent, **Jason Thomas Williams**, liable to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, in the sum of **$264,915.00** and I **ORDER** that that sum be paid to them.

21.2. I find each of the fourth respondents, **Grant Hearle Williams**, **Jason Thomas Williams** and **Desmond Sarjant Williams,** liable to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, in the sum of **$264,915.00** and I **ORDER** that that sum be paid to them.

21.3. I find the fifth respondent, **Anthony G Smits**, liable to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, in the sum of **$121,927.50** and I **ORDER** that that sum be paid to them.

21.4. I find the tenth respondent, **Gino Bianca**, liable to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, in the sum of **$170,752.50** and I **ORDER** that that sum be paid to them.

21.5. I find the eighth respondent, **Plaster Systems Limited**, liable to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, in the sum of **$72,743.00** and I **ORDER** that that sum be paid to them.

21.6. I find the first respondent, **North Shore City Council**, liable to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, in the sum of **$234,652.50** and I **ORDER** that that sum be paid to them.

21.7. I find the ninth respondent, **Eric Lakay**, liable to the claimants, **Andre De Wet** and **Annette Cornelia De Wet**, in the sum of **$264,915.00** and I **ORDER** that that sum be paid to them.

21.8. When those payments are received the claimants are to make the necessary adjustment between them to reflect the different amount of general damages, namely the claimant **Annette Cornelia De Wet** is to pay the sum of **$500.00** to the claimant **Andre De Wet**.

21.9. If any of the respondents shall have paid to the claimants a sum greater than is shown alongside that respondent's name in the column "Grand Total" in para 19.8, that respondent is entitled to recover from each other respondent such sum, not exceeding the respective percentage of the total amount claimed, $264,915.00, on the following percentages:

Party	**Percentage**
J Williams – 3rd resp	70.66%
Developers – 4th resp	7.72%
A G Smits – 5th resp	2.35%
NSCC – 1st resp	8.62%

Plaster Systems – 8th resp	3.70%
G Bianca – 10th resp	6.95%
Total	100%

so that the percentage contribution shown in that column are achieved between respondents; and I emphasise that the claimants are not entitled to any sums greater than totalling $264,915.00 and, if payments are made to the claimants by any respondent or respondents which duplicate, then refunds are to be made so that the stated percentages of contribution are received. The entitlement to contribution recovery by a respondent **does not** affect the primary liability of the individual respondents to the claimants as set out above.

DATED at Auckland this 2nd day of October 2006

_____
David M Carden
Adjudicator

Notice

Pursuant to s41(1)(b)(iii) of the Weathertight Homes Resolution Services 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 amounts for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.