CLAIM NO: TRI-2007-101-00003

UNDER the Weathertight Homes Resolution Services Act 2006

IN THE MATTER of an adjudication

BETWEEN	**Craig Easton and Tania Easton**
	Claimant
AND	**Brian Mayers**
	First Respondent
AND	**Nelson City Council**
	Second Respondent
AND	**Murray Pine**
	Third Respondent
AND	**Cathryn Grace Leov**
	Fourth Respondent (now removed)
AND	**Susan Margaret Leov**
	Fifth Respondent (now removed)

Dates of Hearing: 17, 18, 19 December 2007

Appearances: Alistair Darroch and Luke Acland for the Claimants
Anthony Stallard for the First Respondent
Todd Greenwood and Callum McLean for the Second Respondent
Phillip Bellamy for the Third Respondent

Date of Decision: 29 February 2008

FINAL DETERMINATION

Adjudicator S. Pezaro

BACKGROUND

[1] This claim by Tania Easton and Craig Easton is for the cost of carrying out remedial repairs on their home at 14 Clifford Ave, Nelson. The work has been completed and the claim was filed for the total cost of repairs of $123,131.81 plus GST. This sum was reduced to $113,093 plus GST at the conclusion of the hearing as the claimants accept that there has been some betterment in relation to the roof, the eaves and the exterior painting.

[2] The first respondent, Brian Mayers, built the dwelling at 14 Clifford Ave that now belongs to the claimants. Mr Mayers obtained a building permit for the dwelling on 24 July 1992 and purchased the section on 27 July 1992. Between 3 August 1992 and 1 February 1994 the Council inspected the building eleven times. A letter dated 8 October 2003 from the Council, document 52 in the claimants' bundle,[1] shows that Mr Mayers moved into the house before it was completed. In this letter, Danny Beattie, the building inspector, states:

> "It is now in excess of six months since you moved into your dwelling at the above address, and outside cladding has yet to be applied. As the builder of the dwelling you are, no doubt, aware that breather type building paper when exposed to the weather has a functional life of only four weeks.
>
> You are required to replace within four weeks of receipt of this letter all building paper over the entire dwelling before the outside cladding is applied.
>
> Please notify the writer for an inspection when this work is ready."

[3] There is a handwritten note at the bottom of this letter which states *"Building completed. Paper not replaced before stucco applied. Tested ok"*. This note is not dated or signed; however document 59 records the Council's inspections. On 6 September 1993 there was a handwritten note *"netting on for stucco"* and on 1 February 1994 another handwritten note *"stucco completed".* Beside these notes there was a further note that *"letter sent re durability of B Paper see site file"*. From the dates of these notes I find that the netting was applied before the letter of 8 October 1993 was written but that the stucco was not and

[1] All document numbers in this decision refer to the claimants' bundle.

that, despite the content of this letter, the Council did not require Mr Mayers to replace the building paper before applying the stucco.

[4] Mr Mayers lived in the house until 24 May 1996 when he sold the house to Cathryn Leov and Susan Leov. These women are apparently sisters and have now been removed as the sixth and seventh respondents to these proceedings. Within weeks of living in the property the Leovs noticed leaks. On 16 July 1996 the Nelson City Council wrote a letter to Mr Mayers requesting him to attend to eight items. This letter is document 54 and states that the items needing rectification were noticed during a final inspection at 14 Clifford Avenue. This letter which was signed by Mr Beattie, stated that the work was to be completed by 2 August 1996.

[5] Mr Mayers did not do return to do the work and the Leovs called in Murray Pine, the third respondent, to attend to the items referred to in the letter of 16 July 1996. Repairs were carried out by Mr Pine and the Leovs subsequently claimed in the Disputes Tribunal for the cost of these repairs. The Disputes Tribunal found against Mr Mayers on 15 July 1997. Mr Mayers subsequently appealed but his appeal was dismissed. The amount awarded in the Disputes Tribunal was $3,000.00 based on the tax invoice from Mr Pine for the sum of $2,929.80.

[6] In July 1998 the claimants purchased 14 Clifford Avenue from the Leovs by way of an exchange. The Eastons paid the Leovs the difference in value between the home previously owned by the Eastons and 14 Clifford Avenue. Mr Easton's statement of evidence sets out the events that happened after the purchase. In summary, the Eastons noticed a leak within a few months. Over the next four years they noticed various leaks and attempted to fix them. In 2002 they registered their claim with the Weathertight Homes Resolution Service ("WHRS") and filed the application on 13 February 2003. The full repairs were carried out in 2005/6. The claim was withdrawn from the WHRS and filed in the Weathertight Homes Tribunal on 4 May 2007.

THE CLAIM

[7] The Eastons claim that Mr Mayers breached his duty to construct the dwelling in accordance with the required standards and that he owed this duty to subsequent purchasers. The Eastons' claim against the Council is that the Council breached its duty to future homeowners to exercise reasonable care when inspecting the dwelling. The Eastons claim that Mr Mayers and the Council are jointly and severally liable for the cost of repairs and damages. The Eastons have no claim against Mr Pine.

[8] The first and second respondents argue that the claims against them are time-barred. They raise other defences but I will deal first with the limitation defence because if this defence succeeds, there is no need to address the other defences raised by these respondents.

[9] The third respondent, Murray Pine, was joined to these proceedings on the application of the second respondent. Mr Pine denies that he was negligent such that his work caused or contributed to the weathertightness issues that gave rise to the claim.

LIMITATION

[10] The first issue that I have addressed is the question of whether the claims by the Eastons against the first and second respondents are time-barred by section 4(1) of the Limitation Act 1950:

> (1) Except as otherwise provided in this Act … the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,-
>
> (a) Actions founded on simple contract or on tort.

[11] The question to be addressed in terms of this defence is what constitutes the cause of action on which the claim is founded and when did this cause of action occur. The relevant timeline is set out at paragraph 7 of the Memorandum of Submissions on behalf of the first respondent and this timeline is agreed between the parties. The first and second respondents submit that the claim is time-barred because the cause of action should be calculated from the date on which the defects became obvious to the Leovs, at the latest in July 1996, and that, because the application to the WHRS was not filed until February 2003, the claim is out of time.

The cause of action

[12] The claim by the Eastons against the first and second respondents is a claim in the tort of negligence. The test for determining when the cause of action arose is set out in *Invercargill City Council* v *Hamlin* [1996] 1 NZLR 513 (PC). According to *Hamlin*, the time limit for actioning a claim based on contract or tort is calculated from the date on which the cause of action accrued. Where the claim is based on negligence the cause of action is not complete until the damage has occurred. When a cause of action is based on a latent defect, the cause of action accrues when the damage is so bad that a reasonable homeowner would call in an expert.

[13] In *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) at para 69, Tipping J confirmed the view in *Hamlin* that the accrual of the cause of action is an occurrence-based, not a knowledge-based concept. In other words, the accrual of the cause of action depends on an objective test of reasonable discoverability and not a subjective test. In *Hamlin* the date of accrual of the cause of action was further described as the time when the defects would be obvious to a potential buyer or his expert. The Privy Council said that this would be the moment when either the cost of repairs, if it is reasonable to repair, can be established or the loss of value can be calculated. Loss of value is measured by depreciation in the market value of the property.

[14] In *Hamlin* the Privy Council held that in the common case the occurrence of the loss and the discovery of the loss would coincide.[2] But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. The Privy Council said that the loss occurs when the defects would be so obvious that any reasonable homeowner would call in an expert, and the defects would then be obvious to a potential buyer or his expert. This time marks the moment when the economic loss occurs.

When were the defects reasonably discoverable?

[15] The Eastons claim that the defects were latent and were not able to be discovered or identified by a reasonable homeowner prior to the time when the Eastons purchased the property. The Eastons submit that Mr Pine had rectified those defects that were identified by the Council and that the serious defects that either were present at that time or later became evident were not able to be identified either by the Leovs or by the Eastons when they purchased the property.

[16] The respondents argue that by 16 July 1996 the latent defects in the property became patent defects and that the cause of action accrued to the Leovs. The respondents argue that the defects were reasonably discoverable at this date because:

a) the Council had identified certain defects related to weathertightness issues in its letter dated 16 July 1996 to Mr Mayers.

b) the Leovs should have realised that the defects identified by Mr Beattie on behalf of the Council indicated that there were further, more major defects that required repair.

c) Mr Pine's comments to the Leovs in late August 1996 should have made the Leovs aware of the serious problems with construction.

[2] *Invercargill City Council* v *Hamlin* [1996] 1 NZLR 513(PC) at 526

[17] The first and second respondents have cited *Pullar v The Secretary for Education* (BC 2007 62200) as authority for the proposition that, once defects are apparent, it is not necessary to identify with precision the exact cause of every defect for time to start running. Mr Greenwood submitted that, once defects or damage are discovered, the owner of the property at the time suffers a reduction in market value and the cause of action accrues to that owner. On this basis the first and second respondents argued that the cause of action accrued to the Leovs. Mr Greenwood further submitted that if the owner resold for full value, as the Leovs did, the loss, which was suffered, has been mitigated.

[18] The respondents submit that if the Tribunal finds that the cause of action accrued in 1996, or the loss of value occurred at this time, the claim is time-barred by s 41 of the Limitation Act as the claimants did not register their claim until 13 February 2003.

[19] In *Pullar* there was no doubt that the defects were patent as there had been a report to the Ministry of Education by an expert. In the case before this Tribunal there is no doubt that the Leovs knew about the items listed in the letter from the Council dated 16 July 1996. The question is whether these defects, which were then repaired, or any others that the Leovs were likely to have noticed, met the test in *Hamlin* for defects that are so bad or sufficiently obvious that the reasonable homeowner would call in an expert.[3]

The Council inspection

[20] On the other hand, the claimants submit that the inspection by Mr Beattie in July 1996 could not reasonably be expected to have made the Leovs aware that there were more significant weathertightness defects. The claimants submit that the serious defects were not reasonably discoverable at this time because once Mr Pine had completed the work required to attend to the defects identified by the Council, it was reasonable for the Leovs to believe that all necessary repairs had been carried out.

[21] The Leovs have not been called to give evidence on this issue but the test for reasonable discoverability is an objective one. Therefore the issue that I am required to determine is when the reasonable homeowner, in the circumstances of the Leovs, would have discovered the relevant defects.

[22] In applying the reasonable discoverability test in *Hamlin*, it is important to consider what was reasonable at the time that the respondents claim that the cause of action arose. To accept that the Leovs should have been aware in 1996 of the extent of the defects with the property, I would need to be satisfied that *at that time* it would have been reasonable for someone in their position to have concluded that there were extensive problems with the property related to weathertightness. In particular, I would need to be satisfied that either the Council's letter dated 16 July 1996, or the comments of Mr Pine that they had purchased a 'lemon', or the observations of a reasonable homeowner in the Leovs' circumstances would have led the reasonable homeowner either to comprehend the extent of the defects or to call in an expert.

[23] On behalf of the claimants, Mr Darroch submitted that the Council's submissions, on the question of when the defects were reasonably discoverable, were inconsistent. The Council conducted eleven inspections during construction and failed to identify the serious defects with the property. The Council argued that its inspections were conducted to the expected standard, and that the inspector may have relied on the assurances of Mr Mayers that certain aspects of the work complied with the Building Code. On the other hand, Mr Darroch says the Council claims that the Leovs should have identified the defects at this time, although the Council inspector did not.

[24] The letter written by Mr Beattie is headed "Final inspection at 14 Clifford Avenue permit no. 21815". The letter finishes by saying that the eight items listed were to be completed by 2 August 1996. I find that this letter gives the clear impression that there was nothing else outstanding at this time and that, provided

[3] *Invercargill City Council* v *Hamlin* [1996] 1 NZLR 513(PC) at 526

those items were attended to, the Leovs were entitled to think that any problems or any outstanding work had been completed and rectified.

[25] I am not satisfied that the average homeowner, in receipt of the letter written by Mr Beattie, could reasonably be expected to have realised that the letter indicated defects more serious than those listed or to have felt obliged to investigate the problems in greater depth than the Council inspector.

Knowledge of 'leaky buildings' in 1996 - 1998

[26] The parties' experts have given evidence on what the reasonable homeowner and purchaser could be expected to know about leaky buildings in the period between 1996, when the Leovs purchased the property, and 1998, when the Eastons purchased the property.

[27] Grant Hunt gave evidence as the expert witness for the claimant. Mr Hunt said that prior to 1999/2000 very few people were interested in obtaining pre-purchase inspections. He said that the 1999/2000 period marked the onset of what is known now as "leaky building syndrome" and a heightened awareness of the need for pre-purchase inspections.

[28] Donald Frame gave evidence as the expert witness for the first respondent. Mr Frame stated in his brief of evidence that it would have been impossible to know what damage had occurred in 1996. He also stated that it was difficult to see how a reasonably diligent inspector could have missed any serious water problems. Under cross examination by Mr Greenwood, Mr Frame stated that at the relevant time it was customary to follow an inspection by looking at the roof, although that may not have involved getting right on the roof.

[29] Mr Frame stated, at para 6.5 of his brief, that *"..the Leovs had lived in the house for two years between June 1996 until August 1998. They were aware that*

the house experienced water penetration issues, and in my view would no doubt have knowledge and location (sic) of these building defects."

[30] At para 7.5 Mr Frame said that *"At that stage in August 1996 the Leov sisters already knew they had a leaky building that had been pointed out by the Council. Mr Pine only reinforced the Council's comments"*. Mr Frame also stated that Mr Pine had done work additional to that specified by the Council and that the work that Mr Pine carried out had possibly saved parts of the building from further decay.

[31] Under examination Mr Frame said that he had no direct knowledge from Mr Pine or the Leovs that formed the basis of those parts of his brief referred to above. Mr Frame stated that he had gained the information in his brief about the conversation between Mr Pine and the Leovs from Mr Pine's brief.

[32] Under cross examination by Mr Darroch, Mr Frame conceded that on the basis of the letter from the Council, the remedial works carried out by Mr Pine and the lack of any evidence of continuing problems during the next two years, there was nothing to support a statement that the homeowner would have known that the dwelling was a leaky building.

[33] I find that the brief of evidence of Mr Frame supplied to the Tribunal and his testimony with respect to what the Leovs knew and what the reasonable homeowner should have known at that time are in conflict. Mr Frame has made statements in his brief about what the Leovs were likely to have known that cannot be substantiated from his own experience. Mr Frame's evidence that the work of Mr Pine was competent and prevented, rather than contributed to, further defects is not consistent with his opinion that the Leovs should have realised that the repairs had not resolved all issues.

[34] Philip Ruffell was called as a witness by the Council. Mr Ruffell started working for the Council late in 1994, after the period when Mr Mayers built the

dwelling. In his brief, Mr Ruffell at paragraph 2 said that "*In 1992 through to 1996 the council did not expressly focus on weathertightness issues as it was primarily concerned with structural issues*…". At paragraph 6 Mr Ruffell stated that "*As at 1996, the degree of knowledge concerning weathertightness issues was minimal compared to what it is today*". In oral evidence Mr Ruffell said that he would have expected Mr Beattie to list all defects that he saw or were visible during his inspection and that if the remedial work was carried out on each defect he would assume that the house complied with the relevant standards of the time.

[35] Keith Langham appeared as the expert witness for the Council. Mr Langham was not engaged by the Council or by another territorial authority until 1999. He therefore does not have the qualifications or experience to give expert evidence on the normal practice of Council inspectors, prospective purchasers or homeowners during the period of construction and inspection of the dwelling, between 1992 and 1998. Mr Langham has not included these areas of expertise as 'specialist fields' in his brief and did not give evidence on this issue.

[36] This issue was not put to the WHRS assessor, Lindsay Williams.

[37] Based on the evidence of Mr Hunt and Mr Ruffell I find that the average homeowner was not aware of the 'leaky building syndrome' until around 1999 – 2000 when this issue was publicised. I am not satisfied therefore that the defects that existed with the claimants' dwelling at that time were reasonably discoverable.

The repairs carried out by Mr Pine and his comments to the Leovs

[38] The first and second respondents have quoted Mr Pine's comment to the Leovs that they purchased a 'lemon' as evidence that the Leovs were aware of patent defects. Mr Pine's evidence was that when he was asked to do the work by the Leovs, he contacted Mr Beattie at the Council to clarify what was required. Mr Pine said that he met Mr Beattie onsite to discuss what work was required.

[39] Mr Pine said that when he got on the roof a number of the defects were visible without his doing any invasive testing. Mr Pine also said that the leaks in the roof were difficult to fix because it was a bit of a "hit-and-miss" process. He said that "*you just start at the beginning and work your way through until you hopefully eliminate it at a minimal expense*". Mr Pine also said that without opening the house up it was not possible to tell whether the problems were easy to fix or not. Mr Pine described how he told the Leovs that they had not got good value for money and that they should trade the house back. He said there were tell-tale signs everywhere of 'workmanship' and something major going on. In particular he said there was evidence of silicone applied to the stucco in the connection between the stucco and the fascia and that the stucco corners had silicon up the corners. He also said that the roofing iron was short in places.

[40] Mr Pine said that, as the work went more smoothly than he had anticipated, he charged the Leovs less than the quoted price. Mr Pine said that as he had completed the work he notified Mr Beattie that it was ready to be signed off at the final inspection. Mr Pine said that he believed that he had done everything on the list and that it was acceptable to the inspectors as he did not hear anything further. Mr Pine said that he had heard nothing further about the work until a few months before the hearing when he was joined as a respondent to these proceedings. Mr Pine did not know whether the house had continued to leak while the Leovs owned it after he completed the repairs.

[41] There is no evidence that the work carried out by Mr Pine failed. The only reference in the evidence to any potential defect in the work that Mr Pine performed is by Mr Langham at para 3 of his brief when he referred to the sub-floor insulation. Mr Langham says that the sub-floor insulation has been incorrectly placed hard up to the under side of the flooring. However Mr Langham stated that this is not a source of water ingress. It was Mr Hunt's evidence that the sisalation did not contribute to the weathertightness issue.

[42] The report of the experts' conference on 17 December 2007 indicated that some of the experts believe that there was a connection between the work that Mr Pine did and the problems identified on the leaks list. However, the experts did not

describe in their report the extent of the connection between Mr Pine's work and the leaks list or provide any costings for any work that they identified as connected to the leaks list. Mr Frame said that he could not attribute any costs to the work carried out by Mr Pine.

[43] I have also considered whether the Leovs 'shut their eyes' to the defects because, as Mr Pine said, they loved the house and it suited them as a place to live for their two families. For the following reasons I find that the Leovs were only aware of the defects identified by Mr Beattie and were not aware of the extent of the weathertightness defects to the property:

(a) The Council inspection by Mr Beattie identified eight items that needed attention before the final inspection was completed.

(b) The Leovs engaged Mr Pine to attend to these items, and Mr Pine repaired further items which he noticed while on the job. There is no evidence to suggest that the Leovs attempted to take any short cuts with the work required by the Council.

(c) The evidence of Mr Pine is that there had been previous attempts to fix the leaks at the property but that he believed he had rectified the problem.

(d) The Leovs did not contact Mr Pine to notify him that any of his work was unsatisfactory during the next two years. Mr Pine said that he had a friendship with the Leovs therefore it is likely that they would have notified him if there had been any problems.

(e) The Council did not notify Mr Pine that any work was required, other than the repairs that he carried out, before the Code Compliance Certificate could be issued.

(f) There was not the publicity about the leaky building syndrome in 1996 that there has been since 1999/2000. Therefore it is unlikely that, at the time when the Leovs owned the property, a prudent homeowner of a property constructed in the manner of this dwelling would have suspected that the presence of water leaks indicated that there was a further problem that needed investigating.

(g) Even if the Leovs did notice occasional leaks in the dwelling and ignored them during the next two years, at the time such leaks were not necessarily sufficient to put the Leovs on notice of the relevant defects.

Loss of value

[44] There is no evidence that there was any loss of value to the property before the Leovs sold it to the Eastons. The Leovs sold for the value established by the professional valuation (Exhibit "1") prepared for them prior to the sale to the Eastons. The onus is on the respondents to prove that a loss of value occurred, however no evidence of loss of value has been produced. The submission that the loss of value did accrue to the Leovs but was mitigated by the value of their sale to the Eastons rests on the respondents succeeding in their argument that the defects were patent to the Leovs. That argument has failed.

[45] For these reasons, I am not satisfied that the extent of the damage was reasonably discoverable or patent during the Leovs time of ownership and I therefore find that the cause of action did not accrue to the Leovs. The cause of action accrued to the Eastons in late 1998 when, as Mr Easton described, he noticed leaks in the house. An insurance assessor was called in and discovered that the leaks were not caused by defective plumbing. Mr Easton then examined the roof and noticed that the roofing iron was short and that there had been attempts to repair leaks. The exact date in 1998 on which the cause of action accrued is immaterial as the claim was registered less than six years from the date when the Eastons purchased the property.

[46] I therefore find that this claim is not barred by the provisions of s4(1)(a) of the Limitation Act 1950.

THE LONGSTOP PROVISION

[47] Section 393 of the Building Act 2004 ("the longstop provision") bars civil proceedings more than 10 years from the date of the act or omission on which the proceedings are based. This claim was registered on 13 February 2003, therefore the respondents have no liability for any acts or omissions that occurred prior to 13 February 1993.

[48] The last inspection recorded during the construction of the dwelling, before the final inspection referred to in the letter dated 16 July 1996, was on 1 February 1994 when the stucco was completed. (Document 59). I therefore find that the claim against Mr Mayers falls within the ten year period of the longstop provision.

[49] The Council argues that the claim against it in respect of the roof defects must be time-barred because the roof was already erected by 17 December 1992. The Council submits that because the roof was completed more than ten years before the claim was filed, no claim can be brought in respect of the roof. The letter dated 16 July 1996 from Mr Beattie refers to items related to the roof, item numbers 2 and 3. I am not satisfied that it is reasonable to separate the construction of the roof from the inspections of the roof for the purpose of the final inspection. Council has not referred to any case law that supports its contention that aspects of the claim can be divided for the purposes of limitation. I therefore find that the claim against the Council for the roof is not time-barred.

THE EXPERT EVIDENCE

The leaks list

[50] Two experts' conferences were convened. The first on 12 December 2007 was chaired by another Tribunal member, Mr Pitchforth. The second conference was convened on 17 December 2007, before the start of the hearing, and was chaired by the WHRS Assessor, Lindsey Williams. I directed the experts to

convene a second time as they had not signed a statement showing the areas of agreement and disagreement after the first conference and had not addressed the question that I had put to them about the repairs carried out by Mr Pine.

[51] The summary of the findings of the experts' conferences are attached to this decision as Appendix "A". These findings are signed as agreed by Lindsey Williams, the WHRS assessor, Mr Hunt, Mr Frame, and Mr Langham. Mr Hunt completed a report on the house for the claimants in 2004. His office prepared specifications for the repairs, applied for building consent, put the work to tender and supervised the repairs. The four experts who signed the report of the conference agreed to derive a comprehensive leaks list from Mr Hunt's leaks list. The experts agreed on the leaks list, the causes of the leaks, the damage caused, the repair work required and any betterment resulting from the repairs. The record of this agreement is set out in the table included in Appendix "A".

[52] The four experts identified ten causes of leaks as listed in the table. They agreed with the causes of each leak and the damage caused by each leak, apart from Item 9, the sub floor space. In Mr Williams' report for the WHRS he had noted that the sub floor was dry at the time of his inspection. More than one year later, Mr Hunt found that the sub floor was very damp. The difference in these reports could be attributable to the difference in the purpose of the reports that both Mr Williams and Mr Hunt referred to in evidence, or the time that elapsed between reports. I am satisfied, however, that Mr Hunt's report of the condition of the property at the time that he conducted his inspection is accurate as his report is comprehensive, is supported by photographs taken at the time and his leaks list was approved by the other experts.

[53] The experts' report recorded disagreement on whether insufficient ventilation was the sole cause of excessive moisture build-up within the sub floor. No evidence was produced that attributed a particular proportion of the remedial work or costs to factors other than the original construction work. Mr Hunt said that there was minimal cost in replacing the sisalation that had to be removed with the flooring. There may have been factors, other than the lack of ventilation, which contributed to the dampness in the sub floor and the resulting decay in the

framing but there is no evidence of the extent of this contribution, if any. Nor is there evidence that any other factors significantly affected the final cost of repairs to this area and, according to the experts, there has been no betterment. Therefore I find that the damage to the sub floor framing resulted from a failure during the construction of the dwelling to ensure adequate ventilation to this area.

[54] The only other area of disagreement relating to the cause of the leaks was the disagreement about the interpretation of the required standard for flashings [NZS 4251 1974] at the time of construction; nonetheless the experts agreed that if proper flashing had been installed there would have been no leaks. The interpretation of the standard for flashings is not material as the experts agree there was no sealant or flashings.

Remedial work and the cost of repair

[55] The remedial work required was agreed apart from four areas where the question of betterment was raised. The four experts agreed that the cost claimed for repairs was reasonable, including breakdowns provided by Mr Hunt during the conference and hearing. There was disagreement about whether the entire roof needed to be replaced, whether a cavity was required, and the cost of refitting windows. The cost of the roof and the eaves was agreed by the experts, as set out at page 2 of Appendix “A”.

Targeted repairs

[56] The first and second respondents argued that a full re-clad and re-roof was unnecessary. They submitted that a cavity was not necessary and that the installation of a cavity necessitated a complete replacement of the roof. Mr Williams’ opinion was that a full re-clad was necessary but the cavity may not have been required, provided the Council was satisfied that the proposed work met the objectives of the Building Code.

[57] The Eastons made their application for building consent for the repairs after the requirement for a cavity was introduced. There was argument from the first and second respondents to the effect that the application was delayed to justify the cavity. I do not accept this argument as there is no evidence of undue delay. The requirement for a cavity was introduced to address the defects that arise in this type of construction when there is no cavity. The lack of a cavity is now accepted as a major cause of weathertightness issues and for the respondents to suggest that the repairs would have been of a satisfactory standard without the installation of a cavity is simply implausible. I therefore find that the cavity was required to ensure that the weathertightness defects were addressed properly.

[58] The first and second respondents did not provide any evidence of the cost of targeted repairs. The only evidence of costs is from Mr Hunt who said that the cavity was the cheapest option. As the other experts accepted the costs that he submitted in relation to the repairs as fair and reasonable for the work required, I too accept Mr Hunt's evidence in relation to the cost of the cavity option.

[59] Mr Frame proposed a method of rectifying the problem of the short roofing iron that would have required replacement of only 30% of the iron. The method Mr Frame proposed involved removing all the iron and relaying it. This method is labour intensive and there are no costings to show that it would be significantly cheaper than replacing the entire roof. For this reason, and because I am satisfied that the cavity was required, I find that the roof required total replacement.

Betterment

[60] The claimants have conceded that there was some betterment in the roof, eaves and exterior painting, as set out in paragraph 35 of the claimants' closing submissions. The claimants have accepted the sums agreed by the experts as the value of the betterment in relation to the roof and the eaves. The amount that the claimants have conceded for the cost of exterior painting is $4,346.50 based on the breakdown provided by Mr Hunt. I accept this figure as the reasonable cost of exterior painting as all other costings provided by Mr Hunt were accepted as

reasonable by the other experts and there is no evidence challenging this figure. In fact, none of the respondents has provided any evidence in relation to the cost of repairs. The original sum claimed of $123,131.81 plus GST is therefore reduced by the amount of $10,038.80 plus GST to $113.093 plus GST.

[61] The only disputed area of betterment that I am required to address is the installation of the flat ceiling that replaced the skillion ceiling, and the installation of weatherboard cladding external mitres (item 8 on the leaks list). The experts agreed that the cost of the flat ceiling was $5,490 incl GST. Mr Hunt estimated the cost of the external mitres at $300 - $400.

[62] Mr Easton said that he did not see the flat ceiling as an improvement to the property. He said that he and Ms Easton preferred the skillion ceiling which was a feature of the house. The valuation that was prepared for the Leovs (Exhibit “1”) referred to the exposed rafters and macrocarpa tongue and groove ceilings as a feature of the property.

[63] The flat ceiling was installed on the advice of Mr Hunt who said that BRANZ advised that the changes to the flashings, the up-stand on the roofing iron and the cladding system would change the dynamics of the roof and put the area ‘at risk’. Mr Hunt said that therefore the decision was made to reinstate the roof, and its associated elements, in accordance with current trade practices. Mr Williams and Mr Frame said that in their opinion the flat ceiling was not necessary, although Mr Frame agreed that BRANZ recommended that there should be an air clearance in a ceiling. The issue of any betterment arising from the flat ceiling was not put to Mr Langham.

[64] Whether the claimants considered that the flat ceiling was an improvement is not the most relevant factor for the Tribunal when assessing betterment in this area. The issue for the Tribunal is whether the construction of a flat ceiling exceeds the work reasonably required to repair the weathertightness defects.

[65] Based on the extent to which the other expert witnesses agree with Mr Hunt's leaks list, his scope of repairs and costings, I prefer Mr Hunt's evidence of the work required to address the defects on this dwelling. Mr Hunt's office also sought the advice of BRANZ about the ceiling and Mr Frame agrees that the installation of a flat ceiling is consistent with the BRANZ recommendation. I therefore find that the installation of the flat ceiling was consistent with best practice guidelines at the time and that to ignore the BRANZ advice may have put the dwelling at risk. The installation of a flat ceiling therefore does not constitute betterment.

[66] As far as the external mitres are concerned, Mr Williams thought they were unnecessary. This issue was not put to the other experts. For the reasons given, I prefer the evidence of Mr Hunt on the issue of what repairs were necessary to comply with best practice and ensure that all defects were remedied. I therefore find that the external mitres did not constitute betterment.

Mr Mayers

[67] Mr Mayers admitted that he had a duty of care to the claimants and that he breached that duty of care by constructing the dwelling in a way which included the defects set out in paragraphs 19.1 – 19.3 of the Statement of Claim. Mr Mayers filed a response to the claim but failed to appear at the hearing although he filed a cross-claim against the third respondent and engaged Mr Frame as an expert witness. Pursuant to s 75 of the Weathertight Homes Resolution Services Act 2006, the Tribunal can draw reasonable inferences from Mr Mayers' non-appearance and determine the claim on the available information.

[68] Based on Mr Mayers' response to the claim, his failure to appear, the experts' evidence and the agreed leaks list that was produced on 17 December 2007, I find that Mr Mayers did not construct the dwelling in accordance with the required standards and that the leaks identified by the experts resulted from his defective work.

[69] Mr Mayers raised the following affirmative defences to the claim which are set out in counsel's closing submissions dated 18 December 2007:

a) The limitation defences. I have held that these failed.

b) The repairs were unnecessary. This defence is not supported by Mr Mayers' own expert, Mr Frame. Mr Frame accepted that some of the repairs were necessary and indicated how he would apportion liability for the cost of repair. Mr Frame signed the report of the experts' conference on 17 December 2007 which indicates that most of the repairs were necessary. These statements by Mr Frame clearly indicate that repairs were necessary as a result of the defects in Mr Mayers' work.

c) Betterment. I have addressed the issue of betterment.

d) Contributory negligence. I will address the question of contributory negligence when addressing apportionment of liability.

e) *Res judicata* or issue estoppel.

f) *Novus actus interveniens*.

[70] The defence of *res judicata* or issue estoppel was raised on the basis that the work done by the first respondent was the subject of a claim against him by the Leovs in the Disputes Tribunal in 1998. As a result of this claim Mr Mayers was found liable for the cost of the repairs carried out by Mr Pine and ordered to pay the Leovs the sum of $3,000.00. The Court of Appeal held in *Shiels v Blakeley* [1986] 2 NZLR 262 that issue estoppel applies where there has been a final judicial decision in respect of the parties to, and the subject matter of, the litigation. The parties to the proceedings in the Disputes Tribunal were not the same parties involved in these proceedings. Therefore I am not satisfied that the doctrine of *res judicata* assists Mr Mayers. Mr Stallard acknowledged the difficulty in applying this defence for these reasons.

[71] I accept Mr Stallard's argument that, if the repairs carried out by Mr Pine have been duplicated in any of the work that the claimants have carried out subsequently, it would be unfair for the claimants to recover the cost of that portion

of the work. However, there was no evidence produced to show that any of the repairs by Mr Pine were duplicated in the repair work carried out by the claimants. If there was duplication, there has been no evidence produced to show the value of the duplicated work. It is not disputed by the parties' experts that the re-cladding done by the claimant was necessary and I have found that the entire roof needed replacing. The work required to rectify the defects was far more extensive than that carried out in 1996 by Mr Pine. For these reasons this defence fails.

[72] The defence of *novus actus interveniens* raises the question of whether there was an intervening act that caused or contributed to the damage, such that the claimants cannot attribute the effect of any breach by Mr Mayers to the damage suffered.

[73] Mr Stallard suggests that the work done by Mr Pine for the Leovs constituted an intervening act. He says that if the defects had been properly identified and properly rectified at this time, and proper instructions had been given to Mr Pine, then further deterioration of the building would have been prevented. Mr Stallard suggests that Mr Pine was brought in to do a "patch-up" job to enable the Leovs to market the property.

[74] I am not satisfied that what Mr Pine did was a patch-up job. None of the respondents has produced any evidence that calls into question the quality of Mr Pine's work. Mr Mayers' own expert witness, Mr Frame, stated that the work done by Mr Pine was likely to have prevented further problems, rather than concealed any defects. As the Leovs remained in the property for two years after Mr Pine had completed his repairs, there is no evidence that this work was intended as a patch-up job, designed to enable them to sell the property. In fact the implication to be drawn from the Leovs remaining in the property is the opposite. This defence therefore fails.

The Nelson City Council

[75] In terms of the Eastons' claim against the Council, it is settled law that the Council owes a duty of care in tort to subsequent owners when inspecting buildings.[4] The defence raised by the Council that the claim is time-barred, either in whole or in part, has failed. The remaining issues to be determined in respect of the second respondent are the nature of the duty owed by the Council to the claimants and whether this duty was breached. I have therefore addressed the following issues:

a) whether the Council carried out adequate inspections in accordance with the regional bylaws to ensure that the first respondent complied with the conditions of the building permit and the standards for good trade practice applicable at the time, and

b) whether the Council adequately completed the final inspection in July 1996

Were the Council inspections adequate?

[76] The Council's obligations at the time were to administer the Building Act 1992 and the regulations and to enforce the Building Code. The number of inspections required to meet these obligations was not proscribed nor was the extent of each inspection. The question of the appropriate standard for council inspections under the Building Act 1992 was addressed by Baragwanath J in *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881. Justice Baragwanath held that it was a council's task to establish and enforce a system that would give effect to the Building Code.

[77] In *Dicks*, as in the Eastons' case, the council suggested that the ability to determine whether certain requirements had been met depended on whether the inspector happened to arrive at a fortuitous time that allowed him to observe the relevant work. In *Dicks* the question was whether the council had ensured that the seals were in place; in the Eastons' case there are several inspections at issue. In

[4] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC)

particular there are questions about whether the Council ensured that Mr Mayers either installed flashings or applied seals around the windows (there being disagreement between the experts about the required standards for flashings at the time); and whether the Council should have inspected the roof during construction.

[78] In *Dicks,* the High Court held that it was the task of territorial authorities to establish and enforce a system that would give effect to the Building Code.[5] The Council has the burden of proving that it did so in a manner that met the required standards.

[79] The Council did not call Mr Beattie who personally carried out the inspections, including the final inspection, as a witness. Mr Langham and Mr Ruffell both provided evidence on behalf of the Council and they were both cross-examined. However as Mr Ruffell was not a signatory to the record of the experts' conference I do not accept his evidence as being that of an expert in relation to any of the issues put to the experts' conference. Even if Mr Ruffell does have the required expertise to comment on these matters, to admit his evidence would allow the Council to circumvent the purpose of the experts' conference which is to deal efficiently and expeditiously with any disputed expert evidence. The Council therefore relied on the evidence of Mr Langham, who attended and signed the report of the experts' conference, for evidence in relation to the leaks list.

[80] Mr Ruffell also gave evidence of reasonable building practices and the practices of the Nelson City Council during the relevant period from 1992 to 1994, when all but one of the Council's inspections were conducted, and during 1996 when the final inspection was conducted. I admitted this evidence as it is outside of the issues considered by the experts' conference.

[81] Mr Ruffell gave evidence that he commenced work with the Council late in 1994. Prior to that time he worked as an engineer. Therefore he was not employed by the Council or working in a relevant capacity during the period when

the bulk of inspections were conducted on the claimants' dwelling. Mr Ruffell said that he gained knowledge about Council practices from other staff after he joined Council. However I am not satisfied that he has sufficient knowledge and experience of building practices before the end of 1994 to comment on the standard of Council inspections during the relevant period. I have not given any weight therefore to Mr Ruffell's opinion that the Council and its officers applied the knowledge and standards of the time in relation to the inspections conducted between 1992 and 1994.

[82] Mr Langham was employed by the Council between 1999 and 2005. Mr Langham has certificates in building and quantity surveying and between 1992 and 1999 worked as a contracts manager and project manager. Mr Langham said that he had particular expertise in designing and monitoring remedial works to buildings. Mr Langham gave evidence that it was acceptable for an inspector to accept an assurance from a contractor that certain work would be carried out. He also said that it was not usual, at the time, to inspect the roof. He said that the insufficient roof overhang, which was identified as a cause of water ingress, would not have been obvious to an inspector who did not climb on the roof as the guttering would have blocked the inspector's line of vision.

[83] Mr Langham said that Mr Beattie could not have seen whether there was sealant around the windows as the sill and jamb would have been covered up by the plastering and painting at the time of inspection. However, when Mr Beattie wrote the letter dated 8 October 1993, the windows must have been installed as it is highly unlikely that Mr Mayers was living in the property without windows and it is clear from the letter that the stucco had not been applied. Mr Hunt's evidence was that any sealant or flashings should have been applied before the netting. I therefore find that when Mr Beattie conducted the inspection that gave rise to the 8 October 1993 letter, he could have determined whether or not there was flashing or sealant around the windows.

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[5] *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 at [116]

[84] Applying the standard in *Dicks*, the Council could reasonably be expected to have established a system of inspections that was adequate to detect the defects in the roof and the failure by Mr Mayers to apply sealant or flashings. I therefore find that the Council officer should have detected these defects and required Mr Mayers to rectify them and that the failure by the Council to do so was negligent. The Council's standard of inspections therefore fell short of an acceptable standard.

[85] There are, however, two particular areas where the Council clearly failed to perform its obligations to ensure that the dwelling was constructed to the required standard – the application of the building paper and the final inspection. It is apparent from the letter dated 8 October 1993 giving Mr Mayers four weeks to replace the building paper that Mr Beattie had significant concerns about the integrity of the building paper. It is also apparent that the Council failed to ensure that Mr Mayers replaced the building paper before applying the stucco as required. The experts' conference reported that the building paper had decayed in several areas. I find that the failure to ensure that the building paper was replaced before the stucco was applied was negligent and contributed to the weathertightness defects in the dwelling.

The final inspection

[86] Mr Beattie set out the requirements for completing the final inspection in the letter dated 16 July 1996. Mr Pine's evidence was that he discussed the work required with Mr Beattie then notified Mr Beattie when the work was completed and ready for the final inspection. Despite setting a timeframe for completion of the work in his letter, Mr Beattie did not conduct a final inspection nor did the Council arrange for anyone else to do so. There is no evidence that the work that Mr Pine did was defective but a final inspection would have provided another opportunity for the Council to determine whether the construction met the required standard.

Contributory negligence

[87] I have found that the cause of action accrued in 1998, shortly after the Eastons purchased the property. The first and second respondents have submitted that the claimants contributed to their own loss by failing to obtain a pre-purchase inspection of the property or to search the Council file.

[88] In *Hartley v Balemi and Others*(CIV: 2006-404-2589) 29 March 2007 Stevens J held that reasonable foreseeability of harm by a claimant is a prerequisite to a finding of contributory negligence.[6] The test to establish contributory negligence is a question of fact and is generally determined by whether the claimant acted reasonably in all the circumstances.[7] The question for this Tribunal is therefore whether the reasonably prudent homeowner, purchasing a property of this type in July 1998, would have obtained either a pre-purchase inspection or a copy of the Council file.

[89] I have found that the average homeowner was not aware of the 'leaky building syndrome' until 1999-2000. I preferred the evidence of Mr Hunt on the knowledge of homeowners from 1996 to 1998. Mr Hunt's evidence was that very few people were interested in obtaining pre-purchase inspections during this period. For this reason I find that in July 1998, when the claimants purchased the house from the Leovs, it was not usual for prospective purchasers to obtain pre-purchase inspections.

[90] No evidence was provided to the Tribunal on the question of whether or not it was common practice at that time for prospective purchasers to search a council file. However, if the Eastons had searched the file, the most recent information would have been the letter from Mr Beattie identifying the items that needed attention before the final inspection was completed. It is not clear whether the Leovs provided the Eastons with Mr Pine's account for this work prior to

[6] *Hartley v Balemi and Others* (CIV: 2006-404-2589) 29 March 2007 at [105]
[7] ibid at [113]

settlement, but they could have done so and the Eastons would have been justified in assuming that there were no outstanding issues with the property.

[91] For these reasons I find that the Eastons acted reasonably and did not contribute to their loss by failing to obtain advice or information prior to purchase.

Failure to mitigate

[92] The first and second respondents also raised the question of whether the claimants failed to mitigate their loss by delaying the remedial work. This is also a question of fact.

[93] There are several factors that support the Eastons' claim that they acted promptly to mitigate the loss. Mr Easton bought a ladder and attempted to repair the defects in the roof immediately he noticed the leaks. He had a builder friend inspect the roof and had a new flashing made. He had the gutters replaced in a manner that made the flow of water into the downpipes more effective. He dug a drain and laid a drainage coil to try to move water away from the house.

[94] On the other hand Mr Easton stated that despite his efforts the house still felt damp and when it rained the leak came back in the same area. The internal wall was damp when a southerly came with rain. He was aware that there had been a lot of silicon used in an attempt to repair leaks. Mr Easton described his attempts to fill the many small cracks around the windows with as much sealant as he could and said "we didn't have enough money to carry out major remedial works".

[95] From Mr Easton's evidence I find that by the time the claimants had lived in the house for 18 months they should have been aware that more than silicone and extra flashing was required to address the weathertightness problems. It is likely that, if money had been no object, they would have sought expert assistance earlier than 2002 and I find that it would have been reasonable to do so. There is

therefore the possibility that the failure by the Eastons to thoroughly investigate the cause of the problem and carry out comprehensive repairs has contributed to the loss.

[96] A reduction in the amount awarded to the claimants for their failure to mitigate would be justified by a finding that the claimants' failure to act promptly meant that the repairs which they eventually carried out were more extensive than if repair had been completed earlier. No evidence has been brought on this point. However, from the evidence of the experts, I am satisfied that the construction was comprehensively defective. There is nothing to suggest that the delay in engaging an expert impacted on the cost of repairs. The delay in resolution of these proceedings is not due in any way to the actions of the claimants. For these reasons I have not reduced the sum awarded for repairs and interest.

[97] I have considered whether the award of general damages should be reduced on the basis that the stress and inconvenience suffered by the Eastons has been extended by their delay in carrying out repairs. Their delay lengthened the time in which they had to live in the leaky house, but on the other hand, had they repaired earlier there would have been no service such as the WHRS or the Tribunal providing an independent assessment of their claim and no forum, other than the court, for resolving the dispute about liability. Earlier action may therefore have been more stressful, with no guarantee of a faster resolution. The Eastons acted promptly once they had the relevant information from Mr Frame. I therefore have made an award of damages without any reduction for failure to mitigate.

The cost of repairs, damages and interest

Cost of repairs

[98] The cost of repairs, after the deductions made for betterment, is $127,229.60 incl GST.

Interest

[99] The Eastons claim interest at the rate of 7.5%. The Tribunal has jurisdiction to award interest at a rate not exceeding the 90-day bill rate plus 2%. Given my finding that the Eastons did not contribute to their loss and that there has been no proven loss from any failure to mitigate their loss, I have awarded interest at the rate claimed of 7.5%.

[100] The Eastons' invoices for the remedial work indicate that the bulk of the repair cost was paid by 31 March 2006. Some invoices were paid earlier and some later but I am satisfied that it is fair and reasonable to award interest from 31 March 2006. I order payment to be made immediately and therefore have calculated interest to 29 February 2008, a total of 23 months. The amount of interest payable on $127,229.60 is therefore $18,289.20.

Damages

[101] The Eastons claim general damages of $20,000. In *Smith & Preston v Wellington City Council & Others*, Claim No. 989, 6 August 2007, Adjudicator Dean reviewed the amounts awarded for damages by previous adjudicators and in the courts. He concluded that the average amount was around $6000. Adjudicator Dean concluded that, had he the power to award damages in the *Smith* case, he would have awarded modest damages of $5,000 to each of the owners.

[102] The Eastons are entitled to more than a modest award. As a direct result of the breaches by the first and second respondents, the Eastons have suffered the stress of discovering the major defects with their dwelling, coping with major repairs and the consequential disruption, as well as the financial implications. The assessor's report showed that stachybotrys was present in the building paper. This type of fungi produces toxins. Mr Easton stated that his son developed asthma when they moved into the house and that the asthma cleared after the repairs. There is no medical evidence to support Mr Easton's evidence but based on the tests carried out by Biodet Services Ltd (Document 140) I am satisfied that it is likely that the weathertightness issues affected the family's health, or at least provided a genuine source of concern about their family's health for the Eastons.

[103] For these reasons I have awarded damages of $6,500 to each of the claimants.

[104] The total amount payable to the Eastons is therefore $158,518.80 calculated as follows:

a) The cost of repairs	$127,229.60
b) Interest	$18,289.20
c) Damages	$13,000.00
	$158,518.80

Contribution

[105] For the reasons given I find that the first and second respondents breached their duty of care to the claimants and are jointly and severally liable for the claimants' loss of $158,518.80.

[106] Under section 17 of the Law Reform Act any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount for which a tortfeasor would otherwise be liable.

[107] The basis of recovery of contribution is provided in section 17(1)(c) as follows:

> Where damage is suffered by any person as a result of a tort … any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is … liable for the same damage, whether as a joint tortfeasor or otherwise …

[108] In accordance with section 17(2), the approach to be taken in assessing a claim for contribution is that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage.

[109] Section 72(2)(a) of the Weathertight Homes Resolution Services Act 2006 empowers the Tribunal to determine the liability of any respondent to any other respondent.

[110] As Mr Greenwood submitted, relevant cases show that the basis of determining the responsibility of a council is directly proportional to the level of involvement that the council had in the circumstances giving rise to the loss. In the Eastons' case, in addition to failing to carry out inspections of a reasonable standard, the Council has made two significant omissions which contributed to the loss.

[111] The two letters from Mr Beattie represent two occasions when the Council failed to follow up on defects that it identified with the construction. In particular, Mr Beattie's failure to ensure that the building paper was replaced made a significant contribution to the claimants' loss. The range for the contribution of the council in these types of cases is generally between 20 – 35% and has been as high as 60%. For the reasons given, I find that the contribution of the Council to the loss suffered by the Eastons is at the higher end of this range. I have therefore set the contribution of Council at 35% and that of Mr Mayers at 65%.

[112] For the reasons given, there is no evidence of negligence in the work that Mr Pine did for the Leovs, such that his work either caused or contributed to the weathertightness defects. I therefore find that he has no liability to contribute to the amounts ordered payable by the first and second respondents.

Orders

[113] For the reasons given, I make the following orders:

1. The first respondent, Brian Mayers, is ordered to pay the claimants the sum of $158,518.80 forthwith, and is entitled to recover a contribution from the second respondent of up to $55,481.58 for any amount that he has paid in excess of $103,037.22 to the claimants.

2. The second respondent, the Nelson City Council, is ordered to pay the claimants the sum of $158,518.80 forthwith, and is entitled to recover a contribution from the first respondent of up to $103,037.22 for any amount that it has paid in excess of $55,481.58 to the claimants.

3. The third respondent, Murray Pine, has no liability to the claimants or the first or second respondents.

Dated this 29th day of February 2008

S. Pezaro
Tribunal Member

WHT 2007-101-3 Easton v Mayers and anors

Summary of findings of expert conference held on 12 December 2007

1. Areas of disagreement about the leaks list

The Hunt leaks list is the agreed basis for all following comments.

A comprehensive leaks list was derived from the Hunt leaks list.

- Item 9 sub floor space. Disagreement that insufficient ventilation was the sole cause of excessive moisture build up.

1.1 Where does it leak?

It is agreed that the Experts' leaks list accurately recorded the location of leaks and that there were no additional points of water ingress.

1.2 Why does it leak?

1.2.1 The reasons provided in the Experts' leaks list are agreed.

1.2.1.1 Except for item 9 Sub floor. Some believe other factors contributed to excessive moisture build up within the sub floor.

1.2.2 There is disagreement as to the interpretation of the required standards for flashings [NZS 4251 1974] at the time of construction.

1.2.3 It is agreed that if proper flashing had been installed there would have been no leaks.

1.3 What damage has resulted?

The damage described in the Experts' leaks list is agreed.

1.4 What remedial work is required?

The remedial work required according to the Experts' leaks list is agreed with the exception of those issues raised under the heading of 'betterment'.

1.5 What is the cost of remedial work?

The cost claimed for remedial work is based on competitive tenders and is accepted as reasonable apart from those areas identified as betterment.

Mr. Hunt provided cost breakdown for various works, following a request at the previous experts meeting to do so. Those present accepted the cost as fair and accurate, but there was no discussion concerning their relevance or applicability per se.

Cost to re-roof - $ 11,013.93 plus GST.
Cost to install a 75mm*50mm battened cavity behind new stucco - $ 6,196.25 plus GST.
Cost to remove and re-fix existing windows, as a basis for comparison, if required - $ 8,799.58 plus GST.
Cost to fit polystyrene facings to windows, as a basis for comparison - $ 7,477.91 plus GST.

2. Betterment

- The replacement of the roof is identified as betterment as the original roof had 70% of its expected durability remaining.
- It was agreed that the sum of $ 2,388.10 plus GST constitutes betterment, being the cost to provide an eave where none was before.

- Whether or not the installation of the flat ceiling constitutes betterment is not agreed. The cost of lowering the ceiling was $5490 incl GST.

- Some cost of exterior painting constitutes betterment. There is disagreement about quantum.

3. Reasons for any costings that are not agreed

There was no discussion about costs other than as recorded above.

Signed_____ Lindsey Williams, WHRS Assessor

Date 17/12/07

Signed_____ Grant Hunt

Date 17/12/07

Signed _____Donald Frame

Date 17 December 2007

Signed_____ Keith Langham

Date 17/12/07

Signed _____ Murray Pine

Date _____

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Expert conference convened on 17 December 2007 and chaired by Lindsay Williams.

Present:

- Lindsay Williams, WHRS Assessor
- Grant Hunt, expert for the claimant.
- Donald Frame, expert for the first respondent.
- Keith Langham, expert for the second respondent.
- Phil Ruffell – Nelson City Council

The connection between the repairs carried out by the third respondent and the leaks list

The conference of experts is directed to answer the following questions and record their agreed answers and any areas of disagreement:

- What connection is there between the work that is subject of the quotation from Murray Pine dated 2 September 1996 and is the subject of the Invoice No 100 for $2929.80 contained in the claimant's bundle at 61 and 62 and the agreed leaks list?

It was noted there is a discrepancy between the invoice and quotation quantums. The invoice is not helpful and accordingly the quotation dated September 1996 was used to connect the work likely undertaken by Mr. Pine to the leaks, damage and remediation undertaken.

Referencing the numbered items in the quotation it is agreed as follows:

1. No connection.
2. Yes, connection.
3. Yes, connection.
4. Yes, connection.
5. Unsure, possible connection.
6. Unsure, possible connection.
7. Unsure, possible connection.
8. Unsure, possible connection.
9. No connection.
10. Yes, connection.
11. Yes, connection.
12. No connection.

- The cost of any remedial work required as result of any defective work by the third respondent was not quantified.

Signed_____ Lindsey Williams, WHRS Assessor

Date 17/12/07

Signed_____ Grant Hunt

Date 17/12/07

Signed _____Donald Frame

Date 17 Dec 2007

Signed_____ Keith Langham

Date 17/12/07

Signed _____ Murray Pine

Date _____

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Claim No: TRI-2007-101-3
The Experts Agreed Leaks List – 17 December 1007 at Nelson

Leak locations	*Leak causes.*	*Damages from leaks.*	*Repairs completed.*	*Betterment*
1. Junctions between the cladding and the windows.	• Primary cause is that no method was employed to seal between the cladding and the window jambs and sills. This includes with either sealant or flashings.	• Decayed framing members, predominantly bottom plates. • Decayed building paper. • Stachybotrys and other mould growth on MDF lining, building papers, and other building elements within the wall cavity.	• Flashings installed around all window and exterior door openings • Framing replacement. • Building paper replacement. • Insulation replacement. • Internal lining and associated trim replacement. • Replacement stucco plaster cladding around all windows.	• DISAGREEMENT.
2. Cracks in the Stucco cladding.	• Leaks at junctions led to swollen framing. • No control joints in the stucco led to excessive movement.	• Angled cracks in the stucco plaster beneath window corners, and other related stucco plaster cracks around and beneath the windows.	• Replacement of the balance of the stucco plaster cladding not already replaced in association with item one above	• DISAGREEMENT.
3. Flush junctions between barges and the cladding.	• A near flush finish between the cladding and barge flashings exposed the unsealed junction, which consequently allowed capillary and gravity forces to	• Decayed framing members in the vicinity of the leaks. • Decayed building paper.	• Roof plane extended to provide an eave. • Decayed framing members replaced in	• Refer item 7.

	transport water through the			
Leak locations	*Leak causes.*	*Damage from leaks.*	*Repairs completed.*	*Betterment*
	junction and thereby enter the wall.	• Stachybotrys and other mould growth on MDF lining, building papers, and other building elements within the wall cavity.	the vicinity of the leaks. • Insulation replacement. Internal lining and associated trim replacement.	
4. Junctions between the roof flashings and the cladding.	• The primary issue is that stucco plaster installed hard down on apron flashings enabled capillary forces to transport water up and over the apron flashing upstand, and thereby enter the wall. • Secondary issue is that apron barge flashings carry over one rib only, thereby allowing wind driven moisture and bounced water to enter and spill over the edge of the iron and thereby enter the roof space or wall respectively. • In some places poorly formed falls direct water back against the junction between the stucco plaster and apron flashings.	• Decayed framing members in the vicinity of the leaks. • Decayed building paper. • Stachybotrys and other mould growth on MDF lining, building papers, and other building elements within the wall cavity.	• New roof flashings installed in conjunction with new roofing iron. • Framing replacement. • Building paper replacement. • Insulation replacement. • Internal lining and associated trim replacement.	• Agreed roof flashings 30% through life
5. Junctions between the stucco plaster cladding and the weatherboard cladding.	• These junctions were flush butted and no method was employed to make the junctions weathertight. • Capillary and gravity forces transported water through the unsealed junctions and into the	• Decayed corner stud beside the front door. • Decayed building paper.	• This area was remedied in part by stucco cladding replacement covered under items 1 and 2. • Flashings and cover battens were	• Refer items 1 and 2.

Leak locations	*Leak causes.*	*Damage from leaks.*	*Repairs completed.*	*Betterment*
	wall.		installed to make the new junctions weathertight.	
6. Top end of the roofing iron, inplaces.	• There was no turn up at the top end of the roofing iron. Wind driven water was transported up and over the end of the iron and entered the roof space.	• Water staining of building elements. • Building paper deterioration.	• Turn ups provided to new roofing iron in conjunction with item 7.	• Refer item 7.
7. Insufficient roofing iron to spouting overlap.	• Approximately 10% of the roofing iron overlapped the spouting by 10mm, more or less, which consequently enabled wind driven moisture to enter the roof space beneath the iron.	• Water staining of building elements. • Building paper deterioration.	• Roofing iron replaced with appropriate length. • New ceilings constructed to provide clearance between the ceiling insulation and the building paper.	• Additional areas of roofing iron to provide an eave overhang where there was none before. Agreed that the cost of this is $2,388.10 plus GST. • Agreed that the original roof was 30% through its life.
8. Weatherboard cladding external mitres.	• The external mitres have opened up. Lack of back flashing and corner soakers has enabled water to enter the wall through the open mires.	• Water staining to timber framing.	• Existing weatherboards fitted with cover boards.	• DISAGREED.
9. Rumpus room sub-floor.	• Insufficient ventilation led to moisture build up in the sub-floor space, and the sub-floor framing consequently absorbed excessive moisture.	• Decayed sub floor framing.	• Decayed framing replaced. • Ventilation installed to foundations. • Outside ground levels lowered. • Polythene laid over	• ~~NONE~~ AGREED. betterment **Signatures have been removed from this page for website publishing**

Leak locations	*Leak causes.*	*Damage from leaks.*	*Repairs completed.*	*Betterment*
			the ground beneath the floor.	
10. Insufficient clearance between the cladding and the ground, in places.	• The plaster has been installed down to ground in some places. Capillary force has transported ground moisture up behind the plaster and consequently the bottom plate framing has absorbed the moisture to excessive levels.	• Decayed bottom plate framing, in places. • Decayed building paper, in places.	• Ground levels lowered. • New stucco plaster cladding work detailed in items 1 and 2 provided bottom edge drip edge screeds.	• Refer items 1 and 2.

17/12/07

17/12/07

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17/12/07

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