CLAIM NO: 1276

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN	**DAVID JASON HARTLEY** and **FLEUR DIANE HARTLEY** Claimants
AND	No first respondent, Jack Balemi having been struck out
AND	**BRENT BALEMI** Second Respondent
AND	**MANUKAU CITY COUNCIL** Third Respondent
AND	No fourth respondent, Brent Warren Lee having been struck out
AND	No fifth respondents, Grace Kit Ha Mak and Wong & Bong Trustee Co Ltd having been struck out
AND	No sixth respondent, Frans Kamermans having been struck out
AND	**BALEMI ENTERPRISES LTD** Seventh Respondent
AND	**FRANS KAMERMANS ARCHITECTS LTD** Eighth Respondent
AND	**BALEMI & BALEMI LTD** Ninth Respondent
AND	**JOE KAUKAS** Tenth Respondent
AND	No eleventh respondent, Margaret Mitchell having been struck out

---

DETERMINATION OF ADJUDICATOR
(Dated 11th April 2006)

INDEX TO DETERMINATION

1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS Act"). The claim was deemed to be an eligible claim under the WHRS Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS Act on 7 February 2005.

1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged and held in the meeting rooms of the Weathertight Homes Resolution Service ("WHRS") in Albert Street, Auckland, on 19 May 2005, for the purpose of setting down a procedure and timetable to be followed in this adjudication.

1.3 I have been required to issue eleven Procedural Orders to assist in the preparations for the Hearing, and to monitor the progress of these preparations. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the matters covered by these Orders may need to be referred to in this Determination.

1.4 The hearing started on 15 November 2005, but was adjourned until the following day because of the late delivery of responses and witness statements. When we reconvened on 16 November, the Claimants circulated a Notice of Withdrawal. This was strenuously opposed by all of the respondents. As a result of the ensuing debate, it was accepted by all the parties present that a further exchange of evidence should take place over the next ten days, and that the hearing should be adjourned until 5 December 2005.

1.5 The hearing eventually took place on 5 to 7 December 2005 in the meeting rooms of the WHRS in Albert Street, Auckland Central. The parties were represented as follows,

- Mr Tim Rainey, of Grimshaw & Co, represented the Claimants;
- Mr Paul Cogswell, of Hesketh Henry, representing the second and ninth respondents;

- Mr David Heaney and Ms Georgina Grant, of Heaney & Co, representing the third respondent;
- No appearance for the fifth respondents, as the parties had already agreed to consent to their removal;
- No appearance for the seventh respondent, and notification had been received that this company has been placed into liquidation;
- Mr John Bierre and Ms Kavita Deobhakta, of Morgan Coakle, representing the eighth respondent;
- Mr Bill Manning, barrister, representing the tenth respondent;
- Ms Margaret Mitchell, the eleventh respondent, represented herself.

1.6 I conducted a site inspection of the property at 2.00 pm on 2 December 2005, and each party was invited to send one representative to attend this inspection.

1.7 All the parties who attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses. Evidence was given under oath or affirmation by the following, listed in the order in which they gave evidence:

- Mrs Fleur Hartley, one of the Claimants;
- Mr David Hartley, the other Claimant;
- Mr Peter Jordan, a building consultant, called by the Claimants;
- Mrs Grace Mak, the previous owner of the property, called by the Claimants;
- Mr Christopher Bennett, a builder who has quoted to carry out the remedial work, called by the Claimants;
- Mr Brent Balemi, the second respondent, and a director of Balemi & Balemi Ltd, the ninth respondent;
- Mr Clinton Smith, a building consultant, called by the Claimants;
- Mr Brent Lee, a building consultant, called by Mr Balemi;
- Mr Paul Probett, the WHRS assessor, called by the adjudicator;
- Mr Peter Gillingham, a building surveyor, called by the Manukau City Council;
- Mr Jim Morrison, a registered architect, called by the Claimants;

- Mr Frans Kamermans, a registered architect and a director of Frans Kamermans Architects Ltd, the eighth respondent;
- Mr Bren Morrison, a registered architect, called by Mr Kamermans;
- Mr Robert de Leur, principle building officer with the Auckland City Council, called by the Manukau City Council;
- Mr Miles Seymour, building inspector, called by the Manukau City Council;
- Mr Joe Kaukas, the tenth respondent;
- Mr Grant Ewen, a quantity surveyor, called by Mr Kamermans, whose costing schedules were admitted by consent (although not accepted);

1.8 Before the hearing was closed the parties were asked if they had any further evidence to present or submissions to make, and all responded in the negative. All parties were invited to file written closing submissions by Friday 16 December 2005.

2. THE PARTIES

2.1 The Claimants in this case are Mr and Mrs Hartley. I am going to refer to them as "the Owners". They purchased the house and property at 34B Oakwood Grove, Eastern Beach, Auckland in April 2003.

2.2 The second respondent is Mr Brent Balemi, who was involved with the construction of the house in 1999. He is a director of Balemi & Balemi Ltd, which is the ninth respondent in this adjudication. The Owners are claiming that Mr Balemi supervised the construction of the house and made several key decisions that appear to have led directly to the problems that are the subject of this adjudication. The Owners claim that Balemi & Balemi Ltd built the house, and is responsible for the defects that caused the leaks. They claim that Mr Balemi has a personal liability for the claims made against his company. I will need to determine the claims against both Mr Balemi and Balemi & Balemi Ltd, but until I address that particular issue, I am going to refer to Mr Balemi and/or his company as "the Builder" for ease of description.

2.3 The third respondent is the Manukau City Council ("the Council"), which is the territorial authority responsible for administration of the Building Act in the

area. The Owners are claiming that the Council was negligent in its inspections and in its issuing of the Code Compliance Certificate.

2.4 The fifth respondents are the trustees of Mrs Grace Mak's Family Trust. They were the proprietors of this property before the Owners purchased it. At the beginning of the hearing I was advised that an application for removal had been received by WHRS from Mr David Wilson on behalf of the fifth respondents. It is normal for all other parties to be given the opportunity to make submissions either in support or in opposition of such applications. Therefore, I asked the parties for their views. I was advised that all parties has been made aware of this application and consented to this removal, so I directed that the fifth respondents should be struck out from this adjudication.

2.5 The seventh respondent is Balemi Enterprises Ltd, a company that owned the land at the time that it was subdivided and the two houses were built. It was the developer of the property. Mr Greg Bailey of Knight Coldicutt, who had represented the seventh respondent in this adjudication, notified WHRS on 14 November 2005 that Balemi Enterprises Ltd had been placed into liquidation on that day. He pointed out that legal proceedings against the company could not continue without the agreement of the liquidator, or by order of the High Court. When I indicated that I intended to remove the company from the adjudication, I was asked by the parties to refrain from striking out, and proceed with the adjudication whilst appreciating that no determination could be made concerning this company. The seventh respondent has played no part in this adjudication since 14 November, and I have proceeded as if the party had been struck out.

2.6 The eighth respondent is Frans Kamermans Architects Ltd, the architectural practice that designed the house, and prepared the documentation for the building consent. I will refer to this company as "the Architect". The Owners claim that the Architect was negligent in that there were deficiencies in the plans and specifications that contributed towards the leaks that developed in this building.

2.7 The ninth respondent is Balemi & Balemi Ltd, and I will refer to this company as “the Builder”, as mentioned in paragraph 2.2 above.

2.8 The tenth respondent is Mr Joe Kaukas, the person who supplied the materials and carried out the external plastering on this dwelling. The Owners are claiming that Mr Kaukas was negligent in the plastering work that has caused the problems and caused the leaks.

2.9 The eleventh respondent is Ms Margaret Mitchell, who was involved with the application of the waterproof membrane that was applied to the decks and flat roof areas. Ms Mitchell was joined as a respondent in this adjudication on the application of Mr Balemi, which was directed in my Procedural Order No 6 (30 July 2005). She applied to be removed on 22 August, and I declined her application after considering all submissions (Procedural Order No 9 – 18 October). She renewed her removal application on 15 November at the commencement of the hearing, as she believed that she had demonstrated to all concerned that the roof did not leak, and that she had no liability to the Owners. I indicated that I thought that she had made out a strong case for removal, and told the parties that I would be ordering her removal unless I received a notice of opposition from a party. A notice of opposition was received from Mr Cogswell on behalf of Mr Balemi, so that Ms Mitchell remained as a respondent until the hearing restarted on 5 December.

2.10 At the beginning of the hearing on 5 December 2005, I was advised by Mr Cogswell that his client no longer opposed the removal of Ms Mitchell. Therefore, I directed that Ms Mitchell should be struck out as a respondent in this adjudication.

3. CHRONOLOGY

3.1 I think that it would be helpful to provide a brief history of events that have led to this adjudication.

- 4 March 1998 Foundation inspection
- 24 April 1998 Blockwork inspection
- 20 May 1998 First pre-line inspection

- 20 August 1998 Second pre-line inspection
- 21 April 1997 Architect engaged to prepare design;
- 30 October 1997 Builder applies for Building Consent;
- 17 December 1997 Building Consent issued by Council;
- 23 February 1999 Sale & purchase agreement with G Mak;
- 3 March 1999 Council issue Code Compliance Certificate;
- 15 March 1999 Settlement and possession by G Mak;
- 20 March 2001 Transfer to Mak's Trust;
- 1 March 2003 Sale & purchase agreement with M Clinick;
- 4 April 2003 Sale & purchase agreement with Owners;
- 11 April 2003 Settlement by M Clinick;
- 11 April 2003 Settlement and possession by Owners;
- 10 September 2003 Owners lodge claim with WHRS;
- 29 September 2004 WHRS Assessor's report completed;
- 7 February 2005 Owners elect to go to adjudication;

4. THE CLAIMS

4.1 The original claims being made by the Owners in this adjudication were that "water ingress through the windows has resulted in damage to carpet and skirting in the main living room and master bedroom. Water ingress through the solid plaster cladding has resulted in rot and damage to internal linings". They were claiming for the estimated costs of repairs to remedy the problems at a figure of $300,000.00.

4.2 As a part of the preparations for the hearing, the Owners were requested to provide more details and particulars about their claims. This was done before the respondents were required to file their Responses pursuant to section 28 of the WHRS Act. The Owners identified a list of the problems with the external plaster system and the waterproofing of their house, and concluded that the house had to be reclad in order to correct all the problems.

4.3 The quantum of the claims was provided in a schedule, a summary of which follows:

1	Preliminary & general items	$ 71,600.00
2	Excavations & retaining wall	38,000.00
3	Decking	8,500.00
4	Remove solid plaster	11,060.00
5	Repair & waterproof Ground Floor	137,600.00
6	Repair & waterproof First Floor	108,600.00
7	Repair & waterproof Second Floor	77,570.00
8	Contingency of 10%	45,293.00
9	Margin of 12%	59.786.76
10	GST at 12.5%	69,751.22
11	Total repair costs	$ 627,760.98
12	Loss of rental income	20,800.00
13	General damages	30,000.00
14	Interest at 7.5% from date of filing claim	unquantified

4.4 At the Hearing it was clarified that the repair costs that were being claimed were based on quotations obtained by the Owners from Mr Bennett. These were explained to me by Mr Bennett when he gave evidence at the hearing, and entered into a most useful comparison schedule by Mr Ewen. These can be summarised as follows, and includes some rounding-off of figures:

1	Preliminary & general items	$ 84,100.00
2	Excavations & retaining wall	53,000.00
3	Decking	22,000.00
4	Remove solid plaster	8,200.00
5	Repair & waterproof Ground Floor	73,500.00
6	Repair & waterproof First Floor	84,500.00
7	Repair & waterproof Second Floor	96,000.00
8	Roofing repairs	11,000.00
9	Contingency	30,000.00
10	Margin	43.200.00
11	GST at 12.5%	63,150.00
12	Total repair costs	$ 568,350.00
13	Loss of rental income	20,800.00
14	General damages	30,000.00

4.5 In his closing submissions on behalf of the Owners, Mr Rainey has outlined an alternative position on quantum, in the event that I have some difficulty in preferring the evidence of Mr Bennett over that of the other experts. This alternative position relies upon the estimates prepared by Mr Smith, which can be summarised as follows;

1	Preliminary & general items	$ 65,100.00
2	Excavations & retaining wall	22,550.00
3	Decking	13,500.00
4	Remove solid plaster	11,060.00
5	Repair & waterproof Ground Floor	39,800.00
6	Repair & waterproof First Floor	72,600.00
7	Repair & waterproof Second Floor	36,530.00
8	Contingency of 10%	26,114.00
9	Margin of 12%	34.470.00
10	GST at 12.5%	40,216.00
11	Total repair costs	$ 361,940.00
12	Loss of rental income	20,800.00
13	General damages	30,000.00
14	Interest – to be determined	

5. FACTUAL ANALYSIS OF CLAIMS

5.1 In this section of my Determination I will consider each heading of claim, making findings on the probable cause of any leaks and consider the appropriate remedial work and its costs.

5.2 I will not be considering liability in this section. Also, I will not be referring to the detailed requirements of the New Zealand Building Code, although it may be necessary to mention some aspects of the Code from time to time. Generally, I will be trying to answer the following questions for each alleged leak:

- Does the building leak?
- What is the probable cause of each leak?

- What damage has been caused by each leak?
- What remedial work is needed?
- And at what cost?

5.3 The WHRS Assessor had identified in his report that he considered that moisture was entering the dwelling at a number of points or areas. When the hearing started on 15 November, I requested the experts to try and work to a common list, which I referred to as a "Shopping List of Leaks". I provided the WHRS Assessor with a draft list for him to check and ensure that I had included all the known points or areas of detected leaks.

5.4 Having heard the evidence from all the experts in this adjudication, I have focused my consideration on the following areas,

- External windows and doors;
- Parapets at roof level;
- External solid plasterwork generally;
- Eyebrows above windows;
- Beam to column junctions in pergola;
- Solid balustrades around decks;
- Penetrations through external walls;
- Retaining walls;
- Raised ground levels around buildings;
- Waterproofing membrane to roofs;

5.5 **External Windows and Doors**

5.5.1 It is accepted by all of the experts that there are leaks from around many of the windows and external doors. In his original report, the WHRS Assessor noted that water was leaking through the mitred joints at the junction of the sill and jamb sections of the bi-fold doors. He also noted in his supplementary report that most external doors were constructed without thresholds, and this could be contributing towards the water damage seen inside the external doors.

5.5.2 Mr Jordan's main criticism was that the jamb and sill flashings to most of the windows were embedded in the plaster, causing water to get behind the solid plaster cladding and into the wall framing. He says that this detailing is not in accordance with the Hardibacker backing sheet technical recommendations, and contrary to the BRANZ *Good Stucco Practice Guide*, as all such flashings should discharge over the external face of the solid plaster. Mr Smith expressed a similar view.

5.5.3 Mr Balemi told me that he was not involved in the manufacture or installation of the windows and doorframes or any aluminium joinery. However, Mr Kaukas has a different recollection of events. He told me that Brent Balemi required the plaster to be taken over the flashings almost right up to the window frames. Mr Kaukas remembers talking to Mr Balemi a number of times about this, and telling him that it would allow water in, rather than keep it out, but Mr Balemi insisted that it was done his way.

5.5.4 Mr Gillingham says that the as-built detail around the windows was considered acceptable in 1997/98, as buried flashings provided an aesthetically pleasing monolithic line to the building, but he accepts that there are leaks at the sills of several windows. Other witnesses gave evidence about whether it was a common practice in 1997 to bury the sill flashings beneath the solid plaster, although all the witnesses agreed that it is not considered today to be an acceptable detail. I will need to return to this topic when I consider liability.

5.5.5 The Claimants say that at least half of the windows were found to have leaks, and this was not seriously challenged by any of the experts or any of the respondents. Moisture readings were taken under or around about 50% of the windows and external doors, and all but one reading confirmed that water was leaking in the vicinity of these windows. I think that it is probable that most of the windows do leak, although the extent of the leaking will be dependant upon the degree of exposure to driving rain.

5.5.6 I am satisfied that most of the windows do leak. Mr Manning submits that there is no evidence to show that the taking of the stucco up to the window sills has allowed water to penetrate in or around the windows. I disagree. The evidence is in the photographs and on the site, and this shows that cracks have opened up at the junction of the plaster and the window frames, with the inevitable result that water will flow down the face of the windows and into these cracks. The moisture tests show that water has penetrated the timber framing around the windows. It is a logical conclusion that some, if not most, of that water has found its way into the framing as a result of the cracks. In fact, the evidence indicates that the way that the plaster has been finished over the flashings around the windows is the primary cause of the leaks around the windows, and external doors.

5.5.7 There are other possible causes for these leaks. As mentioned above, it has been suggested by the WHRS Assessor that the mitred junctions at the bottoms of the bi-fold doors are admitting moisture. This can easily happen to large window or doorframes, as they tend to rack when being moved around, which puts considerable pressure on the sealant that is sealing these mitred joints. There was no hard evidence that these mitres are leaking, as the frames would need to be removed to enable the mitres to be properly examined. It is just as likely that the sill flashings have been cut too short, or that water is finding its way behind the jamb flashings.

5.5.8 What damage has been caused by the leaks around the windows and doors? This is not an easy question to answer, as all the experts agree that all of the external plastering needs to be removed and redone, but the window leaks are only one of the problems with the plastering. However, if the window leaks were the only problem, then an assessment of the extent of the damage caused by the window leaks can be made. I would assess that the approximate area of the plasterwork that would need to be repaired around, and below, the windows and doors, is about 36% of the total wall area. However, I

will review this figure later in this Determination when I decide on the appropriate amount to allocate as the repair costs for these leaks.

5.6 **Parapets at Roof level**

5.6.1 The parapet detail around the perimeter of the flat roofs at second and roof levels, has not been constructed in accordance with the Architect's details, although it is not significantly different. The wall plaster has been taken up and over these rounded parapets, and finished against an aluminium edge angle. There are numerous cracks in the plaster parapets, and there is sufficient evidence to show that water is penetrating into the timber framing beneath the parapets.

5.6.2 None of the experts denied that the parapets are causing leaks. Mr Smith told me that the water was getting into the plaster through the numerous cracks, and then was being directed by the waterproofing membrane down behind the building paper, and thus into the Hardibacker and timber wall framing. There appeared to be a general consensus that this was the situation.

5.6.3 In the opinion of Mr Gillingham, and supported by Messrs de Leur, Bren Morrison, and Seymour, the main cause of the leaks in the parapets was the fixing points of the aluminium edge angle. He says that the angle tends to trap the water that falls on the top of the parapet, and then direct this water through any weak spots in the fixing points. I am not convinced that this is the main cause of the water penetration as the test results are inconclusive, but it may be a contributing cause.

5.6.4 Some of the experts were of the opinion that the parapet was built in a materially different manner to the detail shown on the Architect's drawings. I accept that the roof covering material was changed from Nuraply to a liquid membrane, and that Nuraply would be generally considered to be a superior product. I also accept that the profile was modified and an angle trim introduced along the exposed edge. However, these changes were not the cause of the leaks. I am

satisfied that the parapet would still have had the problems if it had been constructed strictly in accordance with the Architects detail on drawing A-18.

5.6.5 I find that the parapets do leak, and that the main cause of the leaks is that identified by Mr Smith – refer paragraph 5.6.2 above. What damage has been caused by these leaks? As mentioned above, all the experts agree that all of the external plastering needs to be removed and redone, but the parapet leaks are only one of the problems with the plastering. If the parapet leaks were the only problem, then I would assess that the approximate area of the plasterwork that would need to be repaired could be as high as 40% of the total wall area. However, I will review this figure later in this Determination when I decide on the appropriate amount to allocate as the repair costs for these leaks.

5.7 **External solid plaster (generally)**

5.7.1 It is accepted by all parties that there are a large number of random cracks in the solid plaster external cladding. All of the experts who inspected the building agreed that the cracking was so extensive that it was admitting water into the structure on a broad front. They all agreed that the solid plaster cladding had reached the state that it all needed to be removed, and the dwelling to be re-clad.

5.7.2 The experts were not in total agreement as to the cause of the cracking. Mr Probett and Mr Smith considered that the main cause was the complete absence of any control joints. However, at the Hearing, other causes started to take on greater prominence, and despite my pleas for help to the experts, the views of each expert remained fluid and tantalisingly elastic.

5.7.3 The following were offered as possible causes for the widespread and apparently random cracking:

(a) improper mix or mixing of component materials;

(b) inadequate curing methods;

(c) inadequate reinforcing at corners of openings or abutments;

(d) change from Riblath (specified) to wire netting (installed);

(e) improper application of the plaster.

5.7.4 This house was completed in March 1999. The Claimants purchased it in March 2003, when it was about four years old. Ms Mak (the vendor) and Mr and Mrs Hartley (the purchasers) all told me that there were only one or two small cracks in the plasterwork in March 2003. However, when the WHRS Assessor carried out his inspection in August 2004, he reported that,

> "Failure of Solid Plaster Cladding
> Ref PIC 003-016, Water is entering the cladding through the multitude of cracks in the reinforced plaster. There is virtually not a wall that is crack free."

5.7.5 How can a building that is apparently free of cracks in March 2003, develop into a seriously cracked building in about sixteen months? I have no reason to doubt that the Assessor's comments were accurate, because other experts have confirmed the state of the plaster, and I have seen it with my own eyes. Is it possible that the vendor and the two purchasers would not have been as vigilant in March 2003 as Mr Probett was in August 2004? I think that it is highly unlikely that they would have all failed to notice the serious cracking if it had been visible. Therefore, I must accept that the cracking was either predominantly concealed by the paint in March 2003, or was not anywhere near as serious in March 2003 as it was sixteen months later, in August 2004.

5.7.6 I am told by the experts that any random cracking caused by either improper mixing or inadequate curing, would have happened, and

should have been apparent, within six months of the completion of the plastering. As the building was painted externally with Hi-build acrylic paint, it is quite possible that the paint would have had sufficient elasticity to cover any hairline cracks. This means that many of the small cracks would not have been apparent to a casual observer, although they may have been visible to an expert. Therefore, it is possible that the cracking did occur soon after construction, but I am not inclined to accept that this was a probability on this house, as I do not think that it is likely that **no-one** would have noticed widespread cracking for four years. I am more inclined to adopt the views of Mr Probett and Mr Smith, in that it is possible that one of the causes of cracking has been the failure to include control joints within the plaster. I would also accept Mr Probett's opinion that the situation was not helped by the failure to properly reinforce the corners of openings, and the application of sealant around the windows in such a way that it prevented the water escaping.

5.7.7 It was submitted by Mr Manning, in closing, that the inescapable conclusion from the evidence given at the Hearing was that the Claimants have failed to properly maintain the building. This has, he submits, allowed the cracks to worsen, which have let in more water, which has caused more cracking as a result of the timber expanding and shrinking as it is periodically wetted and dries out. I must say that the evidence, as a whole, is supportive of the conclusion that the serious deterioration in the condition of the solid plaster has generally occurred after March 2003.

5.7.8 The building was leaking in the middle of 2003, because Mr Hartley had been in contact with Mr Brent Balemi about problems with the house, and confirmed his concerns in a written list in August 2003. This list includes three areas where water appeared to be getting in from the outside. However, there is no mention of cracks in the plaster, and I would have expected a person with Mr Hartley's building experience to have mentioned the cracks if he had noticed them.

5.7.9 I am not convinced that the widespread cracking has been caused by mixing or curing inadequacies. The cracks have probably been caused by the movement of the timber framing as the framing has become damp as a result of leaks from the parapets, or around the windows, or other leaks. I do not, at this stage of my Determination, rule out the possibility that there are other areas of leaking that have contributed to this movement in the structural timber framing. Furthermore, I am satisfied that the widespread cracking was not the original cause of water penetration, but is a symptom of the other leaks. The real damage has been caused by leaks at the parapet, and from around the windows, and possibly other areas that I have yet to consider.

5.7.10 Therefore, I find that the general cracking has been as a result of the timber framing swelling, caused by moisture penetration from other leaks. Some of these cracks must be admitting more water, which has led to more timber movements. The consequential damage of the general cracking is to create the need to completely re-clad this dwelling. The costs of this remedial work should be allocated to the causes of the primary leaks.

5.8 **Eyebrows above Windows**

5.8.1 Projecting eyebrows have been constructed across the top of several of the large windows or door openings. They are a feature of the external appearance of this house. Mr Smith has carried out moisture testing and found that moisture has penetrated into the timber wall framing behind most of these window eyebrows.

5.8.2 There are no construction details shown on the drawings for these eyebrows. They could have been made out of polystyrene or GRP, but were built as pre-fabricated timber frames, covered with building paper, and plastered after they had been bolted to the building. The experts do not seem to disagree that there are leaks from these eyebrows, and that the probable causes are a failure to waterproof the

top surface, and a failure to install a flashing along the top at the junction with the building wall

5.8.3 The extent of the damage caused by these leaks is, in the opinion of the experts, not significant. If these had been the only leaks in this building, the general view of the experts is that the repairs would have been localised, and modest. None of the experts put a figure on the extent of the damage, or the possible repair costs. As with previous areas of leaks, I will need to make an assessment of the extent of the damage caused by the leaks in the eyebrows. I would assess that the approximate area of plasterwork that would need to be replaced around the eyebrows, and the tops of the windows, is about 8% of the total wall area. However, I will review this figure later in this Determination when I decide on the appropriate amount to allocate as the repair costs for these leaks.

5.9 **Beam to Column Junctions (pergola)**

5.9.1 There are three plastered columns that support pergola framing above the decks at first floor level. Mr Probett was critical of the lack of apparent waterproofing at the top of these columns. Mr Smith took moisture readings and found that water was tracking down the inside of these columns, and in times of heavy rains, water would drip through the ceiling of the garage. None of the experts denied that water was getting into the columns at the top, and the reason was a failure to waterproof (or flash) the junction between the beams and the columns. The beams are old railway sleepers, or similar, and they are fixed to the tops of the columns. The fixings are not visible so that it is not possible to know what type of brackets or fixings have been used, but it is probable that they are coach screwed or bolted to the top plate in the columns

5.9.2 There is no waterproofing membrane over the top of the columns. The plaster has been taken up and over the top, and finished up to the sides of the timber beams. It is not surprising that water gets into the tops of these columns. I am satisfied that this leak was one that was

noticed by the Owners soon after moving in. I am also fairly sure that Ms Mak, the previous owner, had had workman back to try and fix this leak, but they were clearly unsuccessful

5.9.3 The extent of the damage caused by these leaks is, in the opinion of the experts, reasonably significant. The water has managed to penetrate the garage ceiling and walls. If these had been the only leaks in this building, the general view of the experts is that the repairs would have greater than the damage caused by the eyebrows, by a factor of about two. None of the experts put a figure on the extent of the damage, or the possible repair costs. As with previous areas of leaks, I will need to made an assessment of the extent of the damage caused by these leaks. I would assess that the approximate area of plasterwork that would need to be replaced as a result of these leaks is about 12% of the total wall area. However, I will review this figure later in this Determination when I decide on the appropriate amount to allocate as the repair costs for these leaks.

5.10 **Solid Balustrades around Decks**

5.10.1 The decks have solid balustrades made up of timber framing, and plastered on both sides and over the top. The top has been finished with a curved profile so that water will be deflected away from the horizontal top. There is a pipe handrail, on short vertical supports, fixed around the top of the solid balustrades. The vertical supports penetrate the plastered balustrade top and are spiked and glued into the timber top rail.

5.10.2 Mr Smith took moisture readings in the framing beneath one of the handrail supports, and found that water was penetrating into the balustrade framing. He also checked the end of one of the balustrades, where the balustrade joined the main house framing. He found that this junction was leaking, probably because there were no saddle flashings used at the top of the balustrade. These findings were not challenged by any of the experts.

5.10.3 I am satisfied that there are leaks into the solid balustrades, and the cause of the leaks is the fixing of the handrail support posts. There is no evidence to indicate that the tops of the balustrades are currently leaking, although the extent of the cracking on and around the solid balustrades would strongly suggest that leaks will eventually develop through the cracks, especially those across the top surface. The evidence shows that the junctions with the house walls also leak.

5.10.4 What damage has been caused by these leaks? The experts agree that there has been a reasonable amount of damage caused by these leaks, but as with previous items, none of the experts put a figure on the extent of the damage, or the possible repair costs. I will need to make an assessment of the extent of the damage caused by these leaks. I would assess that the approximate area of plasterwork that would need to be replaced on the solid balustrades and on the adjacent walls of the house, is about 15% of the total wall area. However, I will review this figure later in this Determination when I decide on the appropriate amount to allocate as the repair costs for these leaks.

5.11 **Penetrations through external walls**

5.11.1 This is a minor item, which the parties agreed should be addressed as a part of the re-cladding issue. I will be considering any penetrations through the block retaining wall as a part of that claim.

5.12 **Retaining walls**

5.12.1 Mr Probett recorded in his original report that the Study/Bed 4 room on the ground floor had water entry problems on its two exterior walls. He also noted high moisture indications on the rear wall in the bathroom/WC. When he returned to the house just prior to the Hearing, Mr Probett reported,

> "The recent inspection with improved "search" equipment and some intrusive testing has confirmed that water has percolated from high level through either cracks in cladding and more likely failure of the interface between the top rear exterior wall and the adjacent ground.

> This has affected strapping and linings on central areas of both the upper floor (wardrobe and lounge) and the mid-floor (bathroom and WC). It is suspected that water will have worked its way to the central part of the rear wall of the ground floor, but the stairwell cavity was not available for inspection."

5.12.2 It is submitted by Mr Heaney, on behalf of the Council, that there is insufficient evidence to support the claim that the retaining wall leaks. He submits that it is much more likely that the moisture that has been detected in these areas is from the leaking parapets above, or the cracking in the solid plaster wall that is built on top of the rear retaining wall. Mr Gillingham is certainly of that view.

5.12.3 The rear retaining wall has been waterproofed by means of three coats of a brush-on bituminous membrane, which is probably "Flintcote". The drawings specified "Bituthene" which is a sheet tanking membrane, but I accept that it was common practice in the 1990's to use brush-on bituminous membranes, particularly on domestic retaining walls. There is no evidence to show that the substitution of materials has had any effect on the present problems. The membrane can be seen in a few places, and there is no suggestion that the Flintcote was not applied over the whole area of the retaining wall.

5.12.4 There is insufficient evidence to conclude that water is finding its way through some punctures or holes in the Flintcote. It is more likely that water is tracking down the timber wall framing, and thus finding its way down the inside face of the blockwork – behind the strapping. It is in situations like this that it would have been preferable if the Owners had taken further steps to ascertain the cause of these leaks. Cut-outs in the internal linings may have provided much useful information as, after all, it is for the Owners to prove their claims. After considering all of the evidence, I will accept Mr Heaney's submission as being the most probable situation. The leaks that are manifesting themselves on the inside of the southwestern retaining wall, are caused by water entering the structure from the parapet or plastered wall above. Damage has been caused to some internal linings, and these will need to be removed and replaced.

5.13 **Raised Ground Levels (around buildings)**

5.13.1 This claim was not actively pursued at the hearing, and no evidence was produced to support the claim that there were leaks caused by raised ground levels around the building. I will not allow this claim.

5.14 **Waterproofing Membrane to Roofs**

5.14.1 All claims directed against the roofer were withdrawn when the parties all agreed to allow the removal of the eleventh respondent. As there was no evidence to support the claims that the roof leaked, I will dismiss the claims for lack of evidence.

6. REPAIR COSTS

6.1 The Owners are claiming that the only reliable assessment of the cost of the repair work is the quotation provided by Mr Bennett, which is the basis for their claims of $627,761 (refer paragraph 4.3 above). When Mr Bennett was questioned at the Hearing, it became apparent to me that some of his allowances and figures were unrealistically high. For example, he allowed scaffolding for eight months, when he considered that the job would take about four months; and he had allowed to rebuild the retaining walls when all that was needed was to re-waterproof these walls (assuming that they were leaking). I said at the Hearing that I was not convinced that Mr Bennett's figures were anything like as reliable as the figures produced by Mr Smith, Mr Gillingham, Mr Ewen or the WHRS Assessor.

6.2 I have now had the opportunity to study all of the repair estimates provided by the experts, and I am still of the opinion that Mr Bennett has been excessively cautious in his calculations. He is the only witness who was prepared to give a firm quotation, but I think that that would be one of the reasons that he is so much higher than the estimates provided by the other experts. Repair work is notoriously difficult to price, as there is so much that is unknown until the work is actually done. If a builder is prepared to give a firm price for this type of work, then he will either price it on the basis of a "worst case" scenario, or he will be taking a very great risk that the work will

cost more than the quotation. I am not going to ignore Mr Bennett's figures, but I am going to treat them with caution.

6.3 I have been given five different schedules of estimates which show the following total costs, all being inclusive of GST;

- Mr Bennett $ 568,350
- Mr Smith $ 361,940
- WHRS Assessor (Ortus) $ 321,101
- Mr Ewen $ 301,921
- Mr Gillingham $ 217,980

6.4 These estimates do not all include for the same amount of remedial work, so that some local adjustments will need to be made to the figures, but they are generally comparable. Mr Ewen has prepared a very useful comparison of these estimates, which he submitted on an electronic spreadsheet. He also gave me his version of how these estimated costs related to the various leaks.

6.5 I have considered all of these estimates, and have prepared a summary of the figures that I feel most accurately reflect the extent of the remedial work that I have found to be necessary. This summary, which follows the headings and work items shown in Mr Ewen's schedule, is;

Preliminary & general		
Scaffold	16,000	
Tarpaulins	9,000	
Rubbish & general P & G	12,000	
Protection	5,000	
Design, consents & supervision	20,000	62,000
Retaining wall		
Check & repair waterproofing	1,300	
Plumbing & tiling work	5,000	
Replace strapping & linings	2,200	8,500
Decking		

Lvl 1 remove & replace	5,200	
Boarding & waterproofing	1,300	
New handrails	4,000	
Lvl 2 replace deck handrail	2,300	12,800
Remove solid plaster		7,800
Repairs & waterproofing		
Remove garage doors/handrails	500	
Prop deck/floor/roof	4,500	
Windows & exterior frames	9,500	
Remove garage walls	1.400	
Deck columns & beams	3,300	
Replace garage door jambs	400	
Replace timber walls & balustrades	18,500	
Replace floor framing	500	
Re-form parapets	6,500	
Replace boundary joists	2,000	
Replace interior wall & ceiling linings	6,000	
Stopping & internal painting	7,700	
Solid plaster externally	33,000	
Paint externally	9,200	
Replace carpet	4,000	
En suite repairs	2,800	
Install finishings	2,000	
Remove & re-fix pergola	2,500	114,300
Contingency allowances		20,540
Builders margin		27,113
Goods & Services Tax		31,632
TOTAL Cost of Repairs		284,685

6.6 As I have already mentioned, Mr Ewen has allocated the estimated repair costs to the various leaks and, although the other experts stated that they did not agree with this allocation, none of them gave me an alternative proposition. I have worked my way through his schedule and it seems to me to be as good an allocation as it is possible to achieve under the

circumstances. If I apply my own findings to his methodology, the repairs costs are allocated as follows;

• External windows and doors;	54,024
• Parapets at roof level;	26,544
• External solid plasterwork generally;	148,114
• Eyebrows above windows;	9,353
• Beam to column junctions in pergola;	12,400
• Solid balustrades around decks;	16,483
• Retaining walls;	17,767
TOTAL Cost of Repairs	284,685

6.7 In paragraph 5.7.10 of this Determination, I found that the costs of repairing the general cracking in the plaster should be allocated to the causes of the primary leaks. As I worked my way through the other defects in the plaster work I set a percentage figure for the area of plaster that was likely to be affected by each type of leak. I stated that these percentages would need to be reviewed later in the Determination. I will now review these percentages to decide on an appropriate amount to be set against each type of leak.

6.8 The percentages that I placed against the leaks were as listed below. As they do not add up to 100%, they will need to be adjusted proportionately. I have shown this adjusted figure in the second column:

	Assessed	**Adjusted**
• External windows and doors;	36%	32%
• Parapets at roof level;	40%	36%
• Eyebrows above windows;	8%	7%
• Beam to column junctions in pergola;	12%	11%
• Solid balustrades around decks;	15%	14%

6.9 In paragraph 5.12.4 of this Determination, I found that the leaks that are manifesting themselves on the inside of the south-western retaining wall, are caused by water entering the structure from the parapet or plastered wall above. Therefore, I will need to redistribute the costs that were allocated to

repairing the retaining walls, to the costs of rectifying the parapets and the plastered walls above.

6.10 Therefore, the remedial costs for each type of leak become:

• External windows and doors;	104,580
• Parapets at roof level;	92,718
• Eyebrows above windows;	20,588
• Beam to column junctions in pergola;	29,251
• Solid balustrades around decks;	37,548
TOTAL Cost of Repairs	$ 284,685

7. OTHER CLAIMS FOR DAMAGES

7.1 The Owners are claiming, not only for the cost of repairing the leaks and the consequential damage, but also for the lost rental income, and general damages, and interest on the amount claimed. I will consider each of these three claims separately.

7.2 **Lost Rental** This is a fairly straightforward claim based upon the assumption that the dwelling will need to be vacated whilst the remedial work is ongoing. The claim is for 32 weeks rent at $650.00 per week, or a total of $20,800.00. There were no submissions in opposition to this claim, either as to principle or to quantum. The only challenge that was made was a suggestion that, if Mr Bennett's evidence was to be preferred, then he estimated that the remedial work would be completed in slightly over four months, rather than 32 weeks.

7.3 I have decided that Mr Smith's estimates are to be preferred over those of Mr Bennett. Mr Smith estimates that the house will be uninhabitable for 32 weeks, as opposed to Mr Bennett's 17 weeks. I accept the figure given by Mr Smith. I also accept that the house will not be reasonably habitable whilst the noisy and intrusive work of re-cladding the outside is undertaken. Therefore, I will allow the claim for lost rental, in the amount claimed of $20,800.00.

7.4 **General Damages** The Owners are claiming the amount of $30,000.00 for general damages. The details provided either in support of, or in opposition to, this claim are scant.

7.5 The claim is that the Owners have suffered considerable stress and anxiety since they discovered that the house was not weather-tight. It is alleged that their anxiety was exacerbated by Mr Brent Balemi's refusal to talk to them about, or address the problems with their house. Mr Rainey made mention of this claim in both his opening, and his closing submissions, but restricted himself to saying that the Owners "… were entitled to claim general damages in an amount to be determined by the adjudicator."

7.6 Both Mr and Mrs Hartley told me that they had suffered stress and anxiety, worrying about the extent of the damage, and how they can afford to repair the damage. In January 2005, they decided to move to another house, and rent out this property to help pay their interest costs.

7.7 None of the respondents accepts this claim, but the only specific opposition to this claim has been voiced by Mr Bierre, on behalf of the Architect. He says that the Owners have not been forced to remain living in this house and suffer the hardship and stress associated with the leaks, as they have rented the property to tenants.

7.8 Adjudicators have the power to make awards of general damages, as has been confirmed by Judge F W M McElrea in the Auckland District Court in *Waitakere City Council v Smith* (CIV 2004-090-1757, dated 28 January 2005). I am aware of awards for general damages that have been made by adjudicators in previous WHRS determinations. I will refer to the comments made in one of the earlier determination by Adjudicators Carden and Gatley in *Putman v Jenmark Homes Ltd & Ors* (WHRS Claim 26 – 10 February 2004). In paragraph 14.12 they said:

> The availability of general damages for pain and suffering, humiliation, distress and loss of enjoyment has been part of our law for some time. In the context of house construction there was $15,000.00 awarded to the plaintiffs in *Chase v de Groot* [1994] 1 NZLR 613. That was a case of defective foundations requiring complete demolition of

> the house following a fire. The recorded judgment does not include Tipping J's detailed consideration of issues of damages but in *Attorney-General v Niania* [1994] 3 NZLR 98 at page 113 l22 he refers to his earlier judgment in *Chase* and the fact that the award in that case (and another in 1987, *Dynes v Warren* (High Court, Christchurch, A242/84, 18 December 1987)) had been made after a detailed examination of a number of comparative authorities. On the basis of what he said there the authors of Todd, *Law of Torts in New Zealand* 3rd edition page 1184 said that his remarks indicated "these amounts [in *Chase* and *Dynes*] were considered to be modest". We do not read those words into His Honour's judgment in *Niania*. We were also referred to *Stevenson Precast Systems Limited v Kelland* (High Court, Auckland, CP 303-SD/01: Tompkins J; 9/8/01) and *Smyth v Bayleys Real Estate Limited* (1993) 5 TCLR 454.

7.9 The Owners cannot succeed with a claim that relies upon stress or anxiety caused by litigation, and the stress must be as a direct consequence of a breach of a duty of care, whether the claim is based in contract or in tort.

7.10 Having carefully considered the evidence I am not satisfied that the Owners have made out a case for an award of general damages. Whilst I have no doubt that the condition of their house has caused them considerable anxiety, I am not convinced that it was to a level that would justify compensation. Modern life, as we know it in the 21st century, includes daily doses of worry, disappointment, stress and hardship. In this particular case, the Owners convinced me that they are reasonably experienced in the building and property world, and are used to the tensions and stresses that are a part of that business. I will not allow their claim for general damages.

7.11 **Interest** In the Summary of the Claimants case, filed by the Owners on 26 August 2005, the Owners were claiming interest at 7.5% pursuant to s.42 of the WHRS Act from the date of filing the claim up to the date of adjudication. This claim was not mentioned by Mr Rainey in either his opening or closing submissions, and no evidence as to quantum was given on the topic of interest. This suggests that the claim was not being pursued. However, as the Owners have not yet expended any monies on remedial costs, nor have they yet lost any rental income, I cannot see that a claim for interest can be sustained. I will dismiss this claim by the Owners.

8. THE BUILDER

8.1 The Owners are claiming that the Builder owed a duty of care to all subsequent purchasers of this property, and that the Builder breached that duty by failing to properly build the house so that it did not leak. The Owners claim that Balemi & Balemi Ltd (called "B & BL") was the Builder of this house, and that Mr Brent Balemi is also liable to them in his personal capacity as either a director of B & BL, or as an employee of B & BL, or as the site supervisor/foreman/project manager. I will firstly address the claims against B & BL.

8.2 The Duty of Care

8.2.1 The existence of a duty of care between builders and subsequent purchasers, has been clearly established in New Zealand between builders and subsequent purchasers, as can be seen by reference to two reasonably recent court cases:

- Greig J in *Lester v White* [1992] 2 NZLR 483, at pages 492-493

  The law here, so far as it is applicable to the duty of builders and of a borough council to derivative owners of land, has been well and long established and has been reaffirmed. Reference needs only to be made to *Bowen v Paramount Builders (Hamilton) Ltd* [1997] 1 NZLR 394, *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Brown v Heathcote County Council* [1986] 1 NZLR 84 to show that this is a reasoned maintained approach of local authorities, builders and others who have been involved in claims which have been settled and in conduct which has anticipated and perhaps prevented the damage which this kind of case examples.

- Tipping J in *Chase v de Groot* [1994] 1 NZLR 613 at pages 619-620

  I look first at [the Builder's] position. In this respect the law can be stated as follows:

  1. The builder of a house owes a duty of care in tort to future owners.

  2. For present purposes that duty is to take reasonable care to build the house in accordance with the building permit and the relevant building code and bylaws.

  3. The position is no different when the builder is also the owner. An owner/builder owes a like duty of care in tort to future owners.

8.2.2 None of the parties appears to have challenged this position, so I will proceed on the basis that it has been accepted.

8.2.3 Mr Rainey submits that the standard of care required of a builder in performing his/her services is the care reasonably to be expected of skilled and informed members of his/her profession judged at the time the work was done. I accept that this is a fair generalisation of the required standard.

8.3 **Balemi & Balemi Ltd**

8.3.1 Mr Brent Balemi told me that this property was owned by Balemi Ltd, a company in which Mr Jack Balemi (Brent's father) had the controlling interest. Balemi Enterprises Ltd, which I shall refer to as BEL, has recently been placed in liquidation and took no part in this adjudication. BEL contracted with Mr Brent Balemi's company, B & BL, to build the house on the property.

8.3.2 B & BL's contract was a cost reimbursement contract. It charged for the labour employed, the materials that were purchased, and for the costs of employing subcontractors for specialist trade work (such as plumbing, electrical and plastering). Invoices were submitted to BEL at approximately fortnightly intervals, which listed the hours worked by B & BL's labour, and the materials and subcontractors' costs. The evidence is that this company organised, managed and supervised the construction work. I am satisfied that this demonstrates that B & BL was the "builder" of the house, and must accept the responsibility for the work that was carried out on site.

8.3.3 I will return later to consider the question as to whether B & BL was negligent in the way its work was carried out, and whether that negligence (if it is found to have existed) led to the leaks and defects in this building. Before I do that I will consider the claims against Mr Brent Balemi personally.

8.4 **Brent Balemi**

8.4.1 The Owners are saying that Mr Brent Balemi (whom I will refer to as Mr Balemi, unless I need to differentiate between Messrs Jack or Brent Balemi) wore a number of different hats during construction, and owed them a duty of care whilst wearing each of these hats. They say that he was:

- A director directly involved in the building work; and
- An employee of B & BL, acting as the site foreman or site supervisor.

8.4.2 Mr Balemi denies that he has any personal liability to the Owners, and denies that he carried out any of the work in his personal capacity. He says that, at all times, he was acting as a director of B & BL. He admits that he was on site during construction from time to time, but never did any of the actual building work on any of the parts that now leak. He was a director dealing with the company's business.

8.4.3 Mr Cogswell submits that the leading case on the assumption of personal liability by directors is the Court of Appeal in ***Trevor Ivory v Anderson*** [1992] 2 NZLR 517. This case sets out the test to determine whether a director should be seen to have assumed an actual or imputed duty of care to other persons. I accept that I should use ***Trevor Ivory*** as the cornerstone to my considerations.

8.4.4 The test to be applied to directors of small companies was mentioned in the judgment of McGechan J in ***Trevor Ivory*** at page 532,18,

> When it comes to assumption of responsibility, I do not accept a company director of a one-man company is to be regarded as automatically accepting tort responsibility for advice given on behalf of the company by himself. There may be situations where such liability tends to arise, particularly perhaps where the director as a person is highly prominent and his company is barely visible, resulting in a focus predominantly on the man himself. All will depend upon the facts of individual cases, and the degree of implicit assumption of personal responsibility, with no doubt some policy elements also applying. I do not think that this is such a case, although it approaches the line.

8.4.5 The difficulties arise when one faces the task of deciding whether an individual has assumed personal responsibility, or that there has been an assumption of responsibility. It does not need to be an overt action of assumption, and the assumption can be implied. It needs to be remembered that the ***Trevor Ivory*** decision was anything but a foregone conclusion, and Hardie Boys J regarded the case as approaching the borderline (at page 528,15).

8.4.6 Mr Cogswell submits that Mr Balemi's situation is on all fours with the decision of Faire AJ in ***Drillien v Tubberty*** (Auckland High Court, CIV 2004-404-2875, 15 February 2005). He says that the Court reviewed the involvement of a Mr Tubberty in the construction of a house in Remuera, which was developed by Mr Tubberty's company. It was held that the cause of action pleaded against Mr Tubberty could not succeed, and summary judgment was entered in his favour.

8.4.7 In response to a request from myself, Mr Cogswell submits that the decision in ***Morton v Douglas Homes Ltd*** [1984] 2 NZLR 595 is distinguishable on its facts. He says that in ***Morton*** the building company owned the land, was held to be the developer, and that the law is quite clear that a developer bears a non-delegable duty to ensure that proper care and skill is exercised in the building of houses. He submits that the Court found that Morton was unusual, in that there was a known and obvious problem or area of risk with the building site, and that the directors had failed to take proper steps to avoid the risks.

8.4.8 The determination of the liability of individuals associated with building work is a frequent problem in WHRS adjudications. Several of the parties in this adjudication have referred me to previous Determinations, some of which have been my own. I would not pretend that it is an easy subject, and yet it is of vital importance to individuals engaged in the construction industry. One thing that is

certain, is that each case needs to be considered and decided on its own individual facts.

8.4.9 I am not convinced that, to establish personal liability, that there must be evidence to show that a director or an employee physically worked on parts of a building that subsequently are found to be defective. It is not necessary for him to have held the hammer that drove in the nails. In ***Morton***, Mr Douglas Parker did not physically drive the piles, but he did take control of the work and it was held that he owed a duty of care to the owners to ensure that the piles were properly driven. It is suggested the Owners that Mr Balemi was "in control" of the construction work, in that he purchased the materials, selected and paid the workers, and was regularly on site for a considerable amount of the construction period.

8.4.10 Mr Cogswell relies heavily on the ***Drillien*** case. In his judgment, Faire AJ noted the position of the directors in the ***Morton*** case, and distinguished it from the situation of Mr Tubberty. With respect to Mr Cogswell, I am not sure that this is correct to distinguish ***Morton*** from the facts in this adjudication. As Hardie Boys J stated in ***Morton*** at page 595:

> "The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control."

8.4.11 It is just as interesting and informative to see why Hardie Boys J found that Mr George Parker should not be found personally responsible for the piling problems, as it is to see why he found Mr Douglas Parker had a personal responsibility. In the case of the father, Mr George

Parker, he was the person who was in sole charge of the running of the company (Douglas Homes Ltd). As explained by the Judge "He answered the telephone, dealt with sales inquiries, received and passed on the carpenters' requests for materials and purchasers' complaints and maintenance requirements. He was in charge of the books and exercised overall control. He participated in regular meetings in the office at which plans were made and problems resolved. In all these matters, he was the final authority." However, he was not in control of the building operations to the extent that attracted a personal liability.

8.4.12 However, Mr Douglas Parker, the son, was found to have been negligent and to be personally liable. He undertook the responsibility of administering the construction of the second pair of flats at No 29 Cutts Road, and he was negligent in his administration of the piling work. He failed to take reasonable care to ensure that the correct number of piles was driven, in the correct places, and to solid bearing.

8.4.13 The legal position that is contained in the judgments to which I have been referred can, it seems to me, be summarised as follows:

(i) Where a company gives negligent advice and acts solely through its director in doing so and it is made clear that it is only the company that is giving the advice and there is no representation of personal involvement of the director, it is only the company that can be held liable at a substantive hearing (***Trevor Ivory***).

(ii) However, the facts may show that there has been an assumption of responsibility by an individual acting on behalf of the company (***Trevor Ivory***).

(iii) In construction cases directors of a company may owe a duty of care independently of the company and may be liable in negligence if they had some involvement in matters of

construction giving rise to the plaintiff's claims (***Morton****; **Callaghan v Robert Ronayne Ltd*** (1979) 1 NZCPR 98).

(iv) The fact that the company may be vicariously liable for the negligence of its employees/agents does not relieve those employees/agents from personal liability if the appropriate level of duty of care is established and that person is shown to have acted negligently (***Callaghan***).

(v) The assumption of responsibility for a statement or task, in which a defendant is found to have failed to exercise reasonable care, and it is foreseeable that the plaintiff will rely on that statement or task, creates an assumption of legal responsibility and, subject to any countervailing policy factors, a duty of care will arise; or where it is "fair, just and reasonable" to do so, the law will deem a defendant to have assumed responsibility; but this depends on a combination of factors including assumption of responsibility, vulnerability of the plaintiff, special skill of the defendant, the need for deterrence and promotion of professional standards and lack of alternative means of protection (***Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd***, [2005] 1 NZLR 324).

8.4.14 It is submitted by Mr Rainey that Mr Balemi has accepted that at all material times he was an employee of B & BL and that it was in that capacity that he carried out all work in conjunction with the construction of the property. I do not find that Mr Balemi accepted this in cross-examination, as he firmly maintained his view that he was acting at all times as a director of B & BL.

8.4.15 Having listed carefully to the evidence, I am satisfied that in this building project Mr Balemi was closely involved in all aspects of the building work. He made the application for the building consent, albeit erroneously signing the application as if he were the owner of the property. He selected the subcontractors and suppliers, negotiated the

scope of their work, and the prices. He worked to the Architects plans and specifications, but was the person who authorised any changes from these documents. He was in control of the building work, although he did not carry out much of the physical work on site. The time records confirm that Mr Balemi was involved in organising or managing this building project on most working days during the construction period.

8.4.16 To the casual observer, Mr Balemi was the builder of this house. When Ms Mak had problems with the building, she contacted Mr Balemi. She did not address her complaints to B & BL. When the Owners had problems, they contacted Mr Jack Balemi. They were told to deal with Mr Brent Balemi. They were not told to deal with B & BL. There was no evidence to show that Mr Brent Balemi ever told either Ms Mak or the Owners that he was acting as a director of a company. They were entitled to assume that he was acting in his personal capacity.

8.4.17 It is my conclusion that Mr Brent Balemi was personally in control of this building project, to the extent that he owed a duty to subsequent purchasers to use reasonable care to ensure that the building was properly built. Was he negligent and, if so, did his negligence cause defects in the building work? To answer that question I will need to review each area of leaks.

8.5 External Windows and Doors

8.5.1 Mr Balemi told me that he was not involved in the manufacture or installation of the windows and door frames or any aluminium joinery. Mr Kaukas says that he expressed concern to Mr Balemi about the sill detail, but was told to complete the detail as shown on the drawings. I prefer the evidence of Mr Kaukas on this point, which shows that Mr Balemi was involved in the decision as to how to finish off the plaster at the window sills.

8.5.2 I have found that the main reason why these windows leak is the way in which the sill flashings were installed, and the way that the plaster

was finished over the flashings, rather than the flashing finishing over the plaster. Mr Balemi was personally involved in this matter and, in my view, was negligent in allowing the as-built detail to proceed. He will say that he relied upon the Architect to produce a correct design detail, but this does relieve a builder from knowing how to build in such a way that the building should not leak. He may well be entitled to receive some indemnity from his Architect, but that does not alter his responsibility to the Owners. I will address contribution between respondents later in this Determination.

8.5.3 I find that both B & BL and Mr Brent Balemi were negligent in relation to the way in which the window flashings were installed, and the finish of the plaster up to and around the window and door frames.

8.6 **Parapets at Roof Level**

8.6.1 I have found that the main cause of the leaks from these parapets was the water entering through the numerous cracks, and then being directed down behind the building paper. The Builder changed the detail shown on the drawings. If the Architect's detail had been followed, then this situation would possibly not have arisen. It has happened because the roofing membrane was dressed down on the inside face of the building paper. It probably would not have occurred if the specified sheet membrane roofing had been used.

8.6.2 No one was able to tell me who changed the type of roofing membrane. However, I think that it is most probable that this change would have been instructed by Mr Balemi. It is highly unlikely that the labour-only carpenters would have initiated such a change. Mr Kaukas says that he discussed the parapet detail with Mr Balemi, who approved the way that the parapets were built and finished. The fact that the roofing membrane was taken down behind the building paper, was a failure of two sub-trades to work in a co-ordinated manner. It was Mr Balemi's job to ensure that this did not happen.

8.6.3 I find that both B & BL and Mr Brent Balemi were negligent in relation to the way in which the parapets were constructed.

8.7 **Solid Plaster Generally**

8.7.1 I have found that the remedial costs for repairing the widespread , and the costs of the re-cladding of this dwelling, should be allocated to the causes of the primary leaks. Therefore, there is no purpose in considering the liability of the Builder for the general cracking in the plaster.

8.8 **Eyebrows above Windows**

8.8.1 I have found that the leaks around the window eyebrows have probably been caused by a failure to waterproof the top surface, and a failure to install a flashing at the back, along the top at the junction with the external wall of the house.

8.8.2 This was another matter that Mr Kaukas told me was discussed with Mr Balemi at the time that the plastering was carried out on this dwelling. I am told that Mr Balemi was made aware that the tops were not waterproofed, but he elected to instruct the plasterer to proceed to plaster the eyebrows. The flashing along the back would normally have been installed by the carpenters, or the tradesmen who fixed the backing board and building paper. It was Mr Balemi's job to ensure that the flashing was installed, and to ensure that the tops of the eyebrows were properly waterproofed.

8.8.3 I find that both B & BL and Mr Brent Balemi were negligent in relation to the way in which the eyebrows were not waterproofed.

8.9 **Beam to Column Junctions (pergola)**

8.9.1 I have found that the leaks from the tops of these columns have been caused by a failure to waterproof the tops of these columns, and a failure to ensure that the beam-to-column junction was properly sealed.

8.9.2 The situation with regard to these problems is very similar to the situation of the eyebrows. I am satisfied that Mr Balemi was told by Mr Kaukas that the tops of these columns should be waterproofed. He either chose not to take that advice, or he did not take the right steps to ensure that the tops of the columns were waterproofed.

8.9.3 I find that both B & BL and Mr Brent Balemi were negligent in relation to the way in which the tops of these columns, and the junctions with the pergola beams, were not waterproofed.

8.10 **Solid Balustrades around Decks**

8.10.1 I have found that the main cause of leaks into these balustrades is the fixing points of the handrail support posts. There is also evidence of some leaks through the cracks in the tops of the balustrades, and at the junctions with the external walls of the house.

8.10.2 The handrail support posts have been glued into holes drilled through the plaster balustrade capping and into the timber framing beneath. I am told by the experts that this was a detail that was commonly used in 1997-98. Even Mr Jim Morrison, an architect called by the Owners, agreed that this was so. It was commonly believed that if the holes made by the placing of these supports, were well surrounded with sealant at the time of fixing the handrail, it would prevent water from leaking into the handrail structure. It appears that sealant was used when fixing the handrail posts, and I find that it was not negligent of the Builder to approve this method of construction.

8.10.3 The Builder constructed the tops of the balustrades in a similar manner to that recommended by BRANZ in its *Good Stucco Practice* booklet. However, it appears that no effective saddle flashings were installed at the ends of these balustrades, where they abutted the walls of the house. The carpenters, or the tradesmen who fixed the backing board and building paper, would normally have installed these flashings. It was Mr Balemi's job to ensure that the saddle flashings were installed.

8.10.4 I find that both B & BL and Mr Brent Balemi were negligent in relation to the absence of the saddle flashings, but not negligent in the way that the rest of the solid balustrades, or the handrail fixings, were constructed. I assess that the absence of saddle flashings would constitute about 10% of the damage to the solid balustrades.

8.11 **Retaining Walls**

8.11.1 I have found that the leaks on the inside of the rear wall are not caused by problems with the retaining wall tanking, but come from the parapets or cracks in the solid plaster cladding. I do not need to consider the claims against the Builder any further.

8.12 **Conclusion**

8.12.1 In conclusion, I find that both B & BL and Mr Balemi were negligent in the following matters, and thereby were in breach of the duty to take care that they both owed to the Owners. Their negligence led to water penetration and resultant damage, and they are both separately liable to the Owners for the following damages:

• External windows and doors;		104,580
• Parapets at roof level;		92,718
• Eyebrows above windows;		20,588
• Beam to column junctions in pergola;		29,251
• Solid balustrades around decks;	10%	3,755
• Lost rental;		20,800
TOTAL Cost of Repairs		$ 271,692

9. THE ARCHITECT

9.1 **The Duty of Care**

9.1.1 The claims by the Owners against the Architect are based in negligence. They say that the Architect owed all subsequent purchasers of this property a non-delegable duty to exercise reasonable care and skill in the design of this dwelling. They say that the Architect was in breach of that duty, in that the building does not

comply with the provisions of the Building Code and is not weather-tight.

9.1.2 It is submitted by Mr Rainey, on behalf of the Owners, that it is well established law in New Zealand that an architect is subject to a duty to use reasonable care to prevent damage to persons whom the architect should reasonably expect to be affected by his work, and I am referred to the words of Richmond P in ***Bowen v Paramount Builders (Hamilton) Ltd*** [1977] 1 NZLR 394.

> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty to the owner. Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties. As regards this latter point it is, for example, obvious that a builder who agreed to build a house in a manner which he knows or ought to know will prove a source of danger to third parties cannot say, in answer to a claim by third parties, that he did all that the owner of the land required him to do. Nevertheless the nature of the contractual duties may have considerable relevance in deciding whether or not the builder was negligent. In relation to a claim made against an architect, Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 put the matter in the following way:
>
> "… neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it" (ibid, 85).

9.1.3 Mr Bierre, on behalf of the Architect, submits that it is not that clear cut. He refers me to some other words of Richmond P in the ***Bowen*** case, on page 413;

> In other words, I take the view that the duty of the builder is *not* owed to anyone who purchases a building with actual knowledge of the defect or in

> circumstances where he ought to have used his opportunity of inspection in a way which would have given him warning of that defect

9.1.4 Whilst he accepts that cases in New Zealand involving architects have proceeded on the un-argued basis that a duty is owed to subsequent purchasers, Mr Bierre suggests that it is not to be taken as a foregone conclusion in every case. He submits that the second limb formulated in ***Anns v Merton London Borough Council*** [1978] AC 728 requires the decision to be made as to whether a duty should be imposed as a matter of policy. He draws my attention to the recent case of ***Three Mead Street Ltd v Rotorua District Council*** [2005] 1 NZLR 504 in which the Court pointed out that vulnerability to risk is a relevant consideration in determining whether, as a matter of policy, a duty should be imposed.

9.1.5 As Mr Bierre points out, ***Three Mead Street*** dealt with a commercial property, whilst in this case we are dealing with a domestic or residential property. However, he submits, the reasons for imposing a duty relates not to the type of building or its use, but to the type of person who purchases the building. He points out that the Owners are experienced buyers and sellers of residential properties; that they entered into an elaborate scheme that involved buying the house through Mrs Hartley's father, to avoid paying agents' fees; that they owned three other properties, which means that they had the financial resources to take steps to protect themselves; that these were people who knew how to protect themselves, and had the knowledge, expertise and the means to do so. He submits that this is one of those situations where the Architect should not owe them any duty of care, for public policy reasons.

9.1.6 In response, Mr Rainey says that it is settled law that the Architect owes the Owners a duty of care. This is not a new or novel case, and even if it were, he says, the duty is owed to a category of persons, and would not be negated simply because the Owners were perhaps more experienced than your normal house purchaser.

9.1.7 I think that Mr Rainey is correct. I have heard nothing that causes me to consider altering the accepted legal position, and I find that the Architect does owe a duty to take care to the Owners. The matters raised by Mr Bierre about the Owners experience and ability to protect themselves, should be considered when I address the issue of contributory negligence.

9.2 **The Standard of Care**

9.2.1 It is submitted by Mr Rainey that the standard of care required of an architect in performing his services, is the care reasonably to be expected of a skilled and informed member of his profession judged at the time the work was done. However, he says that there are two exceptions to this general rule, which I will need to consider.

9.2.2 Mr Bierre does not appear to disagree with that general description, but does emphasize that the standard is that of an ordinarily competent and skilled architect. He quotes Lord Bingham in ***Eckersley v Binnie & Partners*** [1955-1995] PNLR 348,

> The standard is that of the reasonably average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.

9.2.3 In the Owners' summary of claims, they say that the Architect breached the duty of care in respect of seven individual matters. I do not propose to go through this list at this stage, because I think that it will be more relevant to consider the allegations in respect of each area of leaks. In other words, the first allegation is that the design did not incorporate soffits that would have provided adequate protection for the external cladding from the weather. I see no future in considering that allegation, as there has been no evidence that the lack of soffits has directly led to any damage. Therefore I will consider the Architects' liability for each of the areas of leaks.

9.2.4 There are allegations that the drawings and specifications did not provide sufficient detail to show how rainheads, parapets, handrail

penetrations and other weather-tightness weak points should be handled by the builder. These allegations were modified when the claims were explained at the Hearing, and summarized in Mr Rainey's closing submissions. He submits that the Architect was performing his services in the context of the system of building controls established under the Building Act 1991. Therefore, he says, the statutory standards established by this Act and the associated Building Code accordingly form part of the standard by which the Architect's conduct must be measured.

9.2.5 The Architect was contracted to prepare a set of plans and specifications for the purpose of obtaining a Building Consent under the Building Act 1991. Mr Rainey says that if the plans and specifications were not sufficient to meet the statutory standard required for the Consent, then the Architect should be adjudged to have fallen below the required standard of care. He submits that, pursuant to s.34(3) of the Building Act 1991, the plans and specifications must be prepared to such a standard that if the building work is completed properly in accordance with these plans and specifications, then the provisions of the Building Act will be met.

9.2.6 I generally agree with these submissions, and I am satisfied that the Architect should have provided documentation to that standard. However, s.34(3) does not specify the detail of the information that is required, only that "..the territorial authority shall grant the consent if it is 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 applications." The underlining is mine, because I think that they are the most important words in the sentence. It is not a case of absolutes, but a case of reasonableness under the particular circumstances.

9.2.7 The other submission that Mr Rainey makes in relation to the required standard of care, is that it may not be an adequate defence for the

Architect to show that he complied with the general practice standards of the time. He says that the Court retains the freedom to hold that general practice standards may fall below the standard of care required by the law, so that compliance with contemporary professional standards may still amount to negligence. He cites ***McLaren Maycroft & Co v Fletcher Development Co Ltd*** [1973] 2 NZLR 100, and ***Sulco Ltd v E S Redit & Co Ltd*** [1959] NZLR 45 in support of this submission. There was no opposition to this proposition, and I would accept that it is correct.

9.3 **External Windows and Doors**

9.3.1 In Section 5.5 of this Determination I found that the primary cause of the leaks around the windows was the way that the plaster had finished over the flashings, particularly at the sills. The Architect provided a "Typical Sill" detail on sheet A4 01 of the drawings. This detail appears to have been followed by the Builder on site, except that the plaster has been taken further up the window flange. All of the experts agree that this detail would not be considered acceptable in 2005, but several of the experts told me that the detail was considered adequate in 1996.

9.3.2 Mr Kamermans drew my attention to Fig. 30 (b) in the Hardibacker technical manual, which shows a sill fully embedded in plaster, and the plaster taken up against the window flange. He says that the detail on sheet A4 01 is very similar. I do not agree. The detail in the Hardibacker manual shows a polythene sheet backing taken up and over the sill framing, as an extension to the building paper backing. Furthermore, the Hardibacker manual states, on page 2, that James Hardie's expertise does not extend to solid plastering and Section 3 (in which Fig 30(b) appears) only outlines solid plastering practice as advised by Able Building Consultants. Section 3 includes the comment that "… solid plaster must be finished and detailed to be waterproof. Useful guidance can be found in BS 5262:1991 and BRANZ *Good Stucco Practice* (Feb 1996)". The BRANZ booklet recommends sill

flashings for all windows, and Figure 5 in that booklet shows the sill flashing extending over the top of the plaster.

9.3.3 I accept that the BRANZ *Good Stucco Practice* booklet provides a good and reliable summary of details that were considered acceptable in 1996. The Architect referred to this publication on sheet A4 03 of the drawings for this house. Mr Kaukas, whom I accept is an experienced plasterer, told me that he questioned the wisdom of this sill detail with the Builder at the time of construction. Therefore, I conclude that the Architect's detail showing a buried sill flashing was incorrect and has led to many of the leaking problems around the windows.

9.4 **Parapets at Roof Level**

9.4.1 The detail for the parapets was drawn by the Architect as detail 3, on sheet A-18. This showed a Nuraply membrane roof, lapped up and over the raised parapet frame, and down over the face of the building paper on the walls. As already mentioned, the parapets were constructed in a different manner. The main differences were that:

(a) the roof membrane was changed from a sheet membrane to a liquid membrane; and

(b) this membrane was dressed down on the inside face of the building paper; and

(c) some of the parapets were built higher than shown, and did not have a triangular fillet at the change of direction; and

(d) an aluminium angle was fixed along the inside edge of the plaster.

9.4.2 The Owners are claiming that the Architect failed to draw a full protective parapet cap that would have prevented water entering the parapets. I accept the expert evidence that says that parapet caps where not considered necessary in 1996. The BRANZ *Good Stucco*

Practice booklet does not recommend over-capping as being essential, provided that there is a good slope to the parapet tops. In this case a waterproof under-capping was provided, which should have been adequate if properly installed.

9.4.3 I have found that the main cause of the leaks from these parapets was the water entering through the numerous cracks, and then being directed down behind the building paper. If the Architect's detail had been followed, then this situation should not have arisen. It has happened because of (b) above, and would possibly not have occurred if the sheet membrane roofing had been used (see (a) above). Therefore, I find that the Architect should not have any liability to the Owners for the leaks from the parapets.

9.5 **Solid Plaster Generally**

9.5.1 I have found that the remedial costs for repairing the widespread cracking and the recladding of this dwelling should be allocated to the causes of the primary leaks. Therefore, there is no purpose in considering the liability of the Architect for the general cracking in the plaster.

9.6 **Eyebrows above Windows**

9.6.1 The eyebrows are shown on the plans and elevations in outline form only. There are no construction details, or descriptions of the materials to be used. Mr Bierre says that they are an ornamental feature, and that there was no requirement or necessity to provide further details for Building Consent purposes. I agree. It may have been desirable and helpful if the Architect had given some construction details, but it was not negligent not to do so.

9.7 **Beam to Column Junctions (pergola)**

9.7.1 The Architect's drawings show the main pergola beams as being 350mm diameter recycled hardwood power poles, fixed to the tops of the plastered columns. There are no details showing how the connections were to be achieved. I think that it would be reasonable

to assume that the exposed tops of the columns must be waterproofed in some way, although it does not say so on the drawings.

9.7.2 None of the experts considered that the Architect had to provide the fixing details for these connections as a part of the application for a Building Consent. Most of them considered that it would have been desirable to provide a detail to assist the Builder when he came to construct the pergolas. I find that the Architect was not negligent in this matter.

9.8 **Solid Balustrades around Decks**

9.8.1 The drawings include a detail of the solid balustrade construction, and the method of fixing the handrail supports. The balustrade has been built slightly differently, but I do not see the changes as being a causation of the leaks.

9.8.2 The Architect drew the balustrades with a slight slope of about 5° across the top. The slope that is recommended by BRANZ *Good Stucco Practice* booklet is 30° for heavily textured plaster, and 15° for smooth plaster. The Builder has constructed the top of the balustrades with a slightly curved top, which sheds the water to both sides. This is probably an improvement. However, I have found that the main problem with the solid balustrades is the fixing of the handrail supports. These are shown on the drawings as 20dia PC MS (20mm diameter powder coated mild steel) up-stands epoxy glued. Although no destructive testing has been carried out, it would appear that the Builder has followed these details. The supports (or upstands) have been glued into holes drilled through the plaster capping, and into the timber framing beneath.

9.8.3 I am told by the experts that this was a detail that was commonly used in 1997-98. Even Mr Jim Morrison, an architect called by the Owners, agreed that this was so. It was commonly believed that if the holes made by the placing of these supports was well surrounded with sealant at the time of fixing the handrail, it would prevent water from

leaking into the handrail structure. Therefore, I find that the Architect was not negligent in the way that he designed and detailed the solid balustrades, or the handrails.

9.9 **Retaining Walls**

9.9.1 I have found that the leaks on the inside of the rear wall are not caused by problems with the retaining wall tanking, but come from the parapets or cracks in the solid plaster cladding. I do not need to consider the claims against the Architect any further.

9.10 **Conclusion**

9.10.1 In conclusion, I find that the Architect was negligent in the following matters, and thereby was in breach of the duty to take care that he owed to the Owners. His negligence led to water penetration and resultant damage, and he is liable to the Owners for the following damages:

• External windows and doors;	104,580
• Lost rental	20,800
TOTAL	$ 125,380

10. THE PLASTERER

10.1 The Owners are claiming that Mr Kaukas, the plasterer, owed a duty of care to all subsequent purchasers of the property, in the same way that the Builder did. They say that Mr Kaukas had a duty to exercise reasonable skill and care when carrying out his work on the construction of this house, and they say that he breached that duty by failing to properly carry out his plastering work.

10.2 It is accepted by Mr Kaukas that he owed a duty of care to the Owners, specifically to exercise reasonable skill and care in his workmanship, consistent with the standards of the time. However, it is submitted by Mr Manning, on behalf of Mr Kaukas, that no evidence was called as to the standards of workmanship reasonably to be expected of plasterers doing residential work in 1998. He submits, as an example, that there was no evidence led to show that plasterers in the Auckland region generally

complied with the recommendations of BRANZ in the *Good Stucco Practice* booklet, for the spacing of control joints.

10.3 I do not accept that this alleged paucity of evidence will provide a particularly strong defence for Mr Kaukas. I was given evidence about common practices and standards applying in the building industry at the time that this house was built. Much of this evidence was provided during cross-examination, and in answer to some of my own questions. It was reasonably clear from the combined evidence of the experts that the BRANZ booklet was well known by tradesman and experts in the residential building industry in mid 1998. Mr Kaukas, himself, admitted that he was familiar with the booklet, and with the recommendations for the spacing of control joints. He also admitted that he was aware of the requirements of ES2 of the Building Code, which states that buildings must be built so as not to allow moisture to penetrate the external cladding. I found Mr Kaukas to be a careful witness, and his evidence to be very helpful and reliable.

10.4 It is submitted by Mr Rainey that Mr Kaukas cannot defend this action for negligence on the grounds that he was working to the instructions of the Builder, or that he had complied with the terms of his contract with the Builder (or developer). He says that these reasons may be used in claims for contribution from the Builder, but cannot be used as a defense against the claims being made by the Owners. I think that Mr Rainey is right.

10.5 **External Windows and Doors**

10.5.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.5 above), and the Architect (see paragraph 9.3 above). I have found that the Architect's sill detail was incorrect, and that the Builder was negligent in allowing the as-built detail to proceed. For similar reasons, I would find that the plasterer was negligent in building to this detail, when a reasonably skilled and experienced plasterer should know that the detail would probably fail.

10.5.2 Mr Kaukas told me that he had questioned the wisdom of this sill detail with Mr Brent Balemi at the time of construction. He was told to finish his plaster in accordance with the Architect's detail. His experience told him that it was not a good detail, and that it could cause problems later on. He was right. He should have refused to build it in a way that he knew would probably cause future problems. He may well be entitled to receive some indemnity from the Builder, or from the Architect, but that does not alter his liability to the Owners.

10.5.3 I find that Mr Kaukas was negligent in relation to the way in which he finished the plaster up to and around the window and door frames.

10.6 **Parapets at Roof Level**

10.6.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.6 above), and the Architect (see paragraph 9.4 above). I have found that the Builder was negligent in allowing the parapets to be constructed and finished in the way that they were constructed and finished.

10.6.2 Mr Kaukas told me that he discussed with Mr Balemi, the manner in which the plaster should be finished at the parapets. They agreed to add the aluminium edging angle. I do not find that Mr Kaukas was negligent in the way he plastered or finished the parapets. The leaks were not caused by anything that he did or that he should have done.

10.7 **Solid Plaster Generally**

10.7.1 I have found that the remedial costs for repairing the widespread cracking, and the costs of the re-cladding of this dwelling, should be allocated to the causes of the primary leaks. Therefore, there is no purpose in considering the liability of Mr Kaukas for the general cracking in the plaster.

10.8 **Eyebrows over Windows**

10.8.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.8 above), and the Architect

(see paragraph 9.6 above). I have found that the Builder was negligent in allowing the eyebrows to be finished without a waterproofing membrane on top, and without a back flashing.

10.8.2 Mr Kaukas says that he discussed the need to waterproof the tops of the eyebrows with Mr Balemi, but was told to proceed with the plastering without any waterproofing. Mr Kaukas is an experienced plasterer, and realized that the plaster on these eyebrows would probably crack and allow water to penetrate to the building paper beneath. The top of the eyebrows had either no fall, or a minimal fall, which would exacerbate this problem, as water will lie on the tops of the eyebrows until it evaporates. Mr Kaukas knew that this was unsatisfactory, and should have realised that it would lead to leaking problems. He should have refused to build it in a way that would cause future problems. He may well be entitled to receive some indemnity from the Builder, but that does not alter his liability to the Owners.

10.8.3 I find that Mr Kaukas was negligent in relation to the way in which he plastered over the window eyebrows which had not been properly waterproofed.

10.9 **Beam to Column Junctions (pergola)**

10.9.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.9 above), and the Architect (see paragraph 9.7 above). I have found that the Builder was negligent in relation to the way in which the tops of these columns and the junctions with the pergola beams were not waterproofed.

10.9.2 The situation with regard to these problems is very similar to the situation of the eyebrows. Mr Kaukas should not have plastered over the tops of these columns without insisting that a waterproof membrane had been properly installed to prevent the almost inevitable leaks. As with the eyebrows, he may well be entitled to receive some

indemnity from the Builder, but that does not alter his liability to the Owners.

10.9.3 I find that Mr Kaukas was negligent in relation to the way in which he the plastered over the tops of these columns, which had not been properly waterproofed.

10.10 **Solid Baulstrades around Decks**

10.10.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.10 above), and the Architect (see paragraph 9.8 above). I have found that the Builder was negligent in relation to the absence of saddle flashings, but neither the Builder nor the Architect was negligent in relation to the handrail fixings.

10.10.2 It was not Mr Kaukas' job to install the saddle flashings, and I would not consider that it was his job to check every aspect of the carpenters' work, including whether the saddle flashings were in place. I will dismiss the claims against Mr Kaukas in relation to the solid balustrades around the decks.

10.11 **Retaining Walls**

10.11.1 I have found that the leaks on the inside of the rear wall are not caused by problems with the retaining wall tanking, but come from the parapets or cracks in the solid plaster cladding. I do not need to consider the claims against Mr Kaukas any further.

10.12 **Conclusion**

10.12.1 In conclusion, I find that Mr Kaukas was negligent in the following matters, and thereby was in breach of the duty to take care that he owed to the Owners. His negligence led to water penetration and resultant damage, and he is liable to the Owners for the following damages:

• External windows and doors;	104,580
• Eyebrows above windows;	20,588
• Beam to column junctions in pergola;	29,251
• Lost rental;	20,800
TOTAL Cost of Repairs	$ 175,219

11. MANUKAU CITY COUNCIL

11.1 The claims by the Owners against the Council are based in negligence. They say that the Council was under a duty to all subsequent purchasers of the property to exercise reasonable care and skill in the exercise of its building control functions in relation to the design and construction of the property. In particular they say, that this duty required the Council to exercise reasonable care and skill in;

(a) considering whether to issue a building consent on the basis of the plans and specifications submitted by the applicant;

(b) carrying out inspections of the property during the course of construction;

(c) considering whether to issue a final Code Compliance Certificate for the building work.

11.2 It is submitted by Mr Rainey, on behalf of the Owners, that it is well-established law in New Zealand that territorial authorities owe a duty of care to subsequent owners of residential properties. He relies upon the Privy Council case in ***Invercargill City Council v Hamlin*** [1996] 1 NZLR 513, and refers me to the words of Gault J at page 534 of the Court of Appeal judgment ([1994] 3 NZLR 513),

> I am entirely satisfied that in this country the degree of reliance by house owners on local authorities to inspect buildings in the course of construction and ensure compliance of the Building Codes and the full recognition of that by local authorities results in a relationship necessarily incorporating a duty of care.

11.3 Mr Heaney, on behalf of the Council, responded to these claims in a number of ways, and I will consider each of these defences in the following order:

(1) No liability, on the grounds that they knew, or should have known about the building's problems, and thus are the authors of their own misfortune;

(2) No duty/no causation/voluntarily assumed risk;

(3) No duty – not a Hamlin type owner;

(4) No liability flows from the issuing of a Code Compliance Certificate;

(5) No breach, in that the Council carried out reasonable inspections;

(6) Quantum is excessive, and includes betterment;

(7) Contributory negligence by the Owners;

(8) The other respondents should bear the majority share of any liability.

11.4 **Factual Findings.** I will now review some of the evidence and make some factual findings that are relevant to the determination of the defences raised by the Council.

Cavity behind the solid plaster

11.4.1 Mr Hartley is a builder, who has completed an apprenticeship, and has worked in the building industry for sixteen years. In answers to questions from Mr Heaney, he said that he had been taught that there was no need to have a cavity behind solid plaster, as the water had to get through three coats of plaster and paint. He had never worked on a job which had included a cavity until after he had purchased this house.

11.4.2 Mrs Hartley, who had been a real estate agent for eight years at the time they purchased this property, told me that she was aware of the problems with "leaky homes", and she was aware of the considerable publicity about these problems towards the end of 2002 and at the beginning of 2003. She thought that they were more to do with Harditex or polystyrene clad houses, and she said that she did not associate solid plaster homes with the leaky home problems. However, in answer to questions from Mr Heaney, she said that she was aware that solid plaster houses should have had a cavity as they provided "somewhere for the water to go". Not only was she aware that it was desirable for solid plaster houses to have cavities, but she told me that it was in order to check whether this house had a cavity that was the main reason why she wanted to have a pre-purchase inspection.

11.4.3 When Mr Hartley was asked about the cavity, he said that he had not discussed the need for a cavity with his wife until after they were living in the house. He said that he had noticed that there was a cavity behind the solid plaster, because he had seen it mentioned in a pre-purchase report shown to him by the vendor, but this was not discussed with Mrs Hartley at the time. However, he did not agree with his wife when she had said that they both were keen to ensure that there was a cavity in this house. When he learned that the house had a cavity, he considered that to be a bonus, not a necessity. It is my conclusion that both Mr and Mrs Hartley have become confused about how much they knew about cavities and how much they discussed cavities, in March 2003.

Pre-Purchase Report

11.4.4 In her brief of evidence, Mrs Hartley referred to a pre-purchase report prepared by Mr Brent Lee of Brent Lee House Check Ltd. She had this to say about this report:

> 4. At this time Grace [Ms Mak] gave us a building report. She told us she had had it prepared for her when she purchased the house. Grace did not give us a valuation. I remember this because our bank required us to obtain a valuation

> of the property and I had arranged for Seagar & Partners to value the property for us. A copy of this valuation is included in the bundle of documents as document K.
>
> 5. Brent Lee … prepared the building report. I had dealt with Brent Lee on a number of occasions, had recommended him to a number of my real estate clients and was happy with the thorough nature of his inspections. Dave and I have never purchased a property without a pre-purchase inspection and were happy that Grace was able to supply us with an inspection report. We handed the report back to Grace and didn't keep a copy.
>
> 6. Dave and I were both happy with the report and we decided to make an offer.

11.4.5 Both Mr and Mrs Hartley say that they saw this pre-purchase report prepared by Mr Brent Lee. This report, they say, was addressed to Mrs Mak, and was dated March 1999. In answer to a question from myself, Mrs Hartley told me that if they had not been shown the Lee report, then they would have gone to him, or a person who did that sort of work, to obtain a pre-purchase report. However, in answer to questions from Mr Manning, she said that they had owned four houses prior to purchasing this property, they had never commissioned a pre-purchase report, and that they would not have sought a pre-purchase report on this property if the vendor had not offered it to them. These answers do not sit comfortably with the wording of her brief, or the answers to the earlier questions.

11.4.6 Mr Hartley, in his brief of evidence, said this about the Lee report;

> 4. Before we made an offer we visited Grace and inspected the house. Grace gave us a copy of a house check prepared by Brent Lee for her when she purchased the house and a copy of the Code Compliance Certificate for the house. It was obvious to me that the house had been clad in solid plaster. I was concerned about whether [the] house was weathertight. Brent Lee's report stated that the house incorporated a 20mm cavity system. Brent Lee's report reassured that the house was weathertight and as a result we decided to make Grace an offer. We left the report with Grace and didn't retain a copy.

11.4.7 He told me that the first time he saw the Lee report was at the Open Day, which was their first visit and inspection of this house. I am

satisfied from other evidence that Ms Mak was not present on that occasion, so Ms Mak could not have given them the report. Mrs Hartley says that she first saw the report on their second visit, and told me that the real estate agent showed them the Lee report. In response to a question from Mr Manning, Mr Hartley said that he had asked Ms Mak (on their third visit) if he could see the Lee report again. He wanted to make sure that "it was a good house; that there was anything [in the report] that might have made me think something might have been done wrong; just wanted to re-read the report."

11.4.8 Mr Lee gave evidence at the hearing. He was reasonably emphatic that neither he nor his company had ever visited this property, or prepared any sort of report on the house. Ms Mak also gave evidence, and told me that she was one hundred percent certain that Brent Lee was never engaged to do any report on her house whilst she was involved with the property. She did recall that she had given her agent a copy of a valuation report dated June 1999, but she did not know if this valuation had been passed on to the Owners.

11.4.9 In 1999 Ms Mak was buying a brand new house. It was not completely finished at the time she agreed to buy the property. The Sale and Purchase Agreement included for the usual warranties as to quality (such as clause 6.1(8)), and a 60 day maintenance period. She says that she did not consider it necessary to obtain any pre-purchase inspections or reports.

11.4.10 Without the Lee report being produced in evidence, it is difficult to decide whether the report exists but has been lost, or whether the Owners have become confused as to what they were shown. Having carefully considered all of the evidence, I prefer the evidence of Mr Lee and Ms Mak on this particular matter, which means that I will find that the Owners were not shown a pre-purchase inspection report, but may well have been shown a valuation report.

Inspections by the Owners

11.4.11 The Owners made several inspections of this property at the time that they purchased it. As there were some discrepancies in the evidence, I find that these inspections were as follows:

1. The first visit was at one of the Open Days, either in December 2002, or in January 2003. The real estate agent from Harcourts was on site. They both stayed for about one hour, and had a reasonably good look around.

2. The second visit was about 3 days after the Open Day, by arrangement with the Harcourts agent. Both of the Owners were present, and the inspection was for between 30 and 40 minutes.

3. Their third visit was at the auction on 8 February 2003, when they both had a further look around for about 20 minutes prior to the start of the auction.

4. The next visit was about 3 weeks after the auction, when they visited Ms Mak at the house, and discussed a possible agreement. Both Owners were present and their meeting with Ms Mak lasted about 40 minutes.

5. Their final visit was at a pre-settlement inspection, about a week before settlement. Both Owners and Ms Mak were present. The meeting lasted between 20 and 30 minutes.

11.5 **No Duty / No Causation / Voluntarily Assumed Risk**

11.5.1 It is submitted by Mr Heaney that the Owners cannot recover for patent defects that existed at the date of the Owners' purchase of the property and that the Owners knew about prior to deciding to make the purchase. In addition to negating any duty of care that the Council may have had, the chain of causation is broken, because knowledge of

the risk is sufficient to enable the Owners to take steps to avoid the danger. The situation is that the Owners have caused their own loss.

11.5.2 I have been referred to ***Grant v Australia Knitting Mills*** [1936] AC 85, where Lord Wright said (at p.105):

> The principle of Donoghue's case can only be applied where the defect is hidden and unknown to the customer, otherwise the directness of cause and effect is absent; the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

11.5.3 This was taken a step further by Lord Keith in ***Murphy v Brentwood District Council*** [1991] 1 AC 398, at p.465:

> However, an essential feature of the species of liability in negligence established by *Donoghue v Stevenson* was that the carelessly manufactured product should be intended to reach the consumer in the same state as that in which it was put up with no reasonable prospect of immediate examination; see per Lord Atkin at page 599; also *Grant v Australia Knitting Mills Ltd* [1936] AC 85, 103-105 per Lord Wright. It is the latency of the defect which constitutes the mischief. There may be room for disputation as to whether the likelihood of an intermediate examination and consequential actual discovery of the defect has the effect of negativing a duty of care or breaking the chain of causation (compare *Farr v Butters Brothers & Co* [1932] 2 KB 606 with *Denny v Supplies & Transport Co Ltd* [1950] 2 KB 374). But there can be no doubt that, whatever the rationale, a person who is injured through consuming or using a product of the defective nature of which he is well aware has no remedy against the manufacturer. In the case of a building, it is right to accept that a careless builder is liable, on the principle of *Donoghue v Stevenson*, where a latent defect results in physical injury to anyone, whether owner, occupier, visitor or passer by or to the property of any such person.

11.5.4 And confirmed by Sir Donald Nicholls V-C in ***Targett v Torfaen Borough Council*** [1992] 3 All ER 27, on p.37:

> The general principle is, indeed, that such a person cannot recover compensation, because in the ordinary way his knowledge of the existence of the dangerous defect, at any rate in the case of goods, will suffice to enable him to avoid the danger. If he finds there is a decomposed snail in his ginger

> beer he will not drink it. He does not use underwear which he knows contains a mischievous chemical.

11.5.5 Mr Heaney has also referred me to ***Curran v Greater Taree City Council*** (1992) Aust Torts Reports 81-152 (NSW CA), per Samuels JA,

> His Honour's second and third reasons, which really go to embellish his first, were that to rely merely upon a belief that the plans had been approved by the council without making any enquiries when she knew that the house was built over a boxed culvert, was, as His Honour put it "the height of folly"" (61,162).
>
> In this case the plaintiff purchased a cottage constructed over a culvert. The foundations were inadequate to bridge the culvert and settlement subsequently occurred causing damage to the cottage. The plaintiff sued the council alleging negligence in the approval of the plans. The council argued that no duty of care arose. The plaintiff acknowledged that prior to purchasing the property she had been advised by her solicitor that the cottage had been built over a culvert. The Court concluded that it was not reasonable for the plaintiff to rely on the council. The plaintiff was unsuccessful and on appeal was also unsuccessful. The appeal Judge commented that the Judge was perfectly entitled to come to the conclusion that a reasonable person in the plaintiff's position would have obtained the opinion of an experienced builder, or architect or engineer as to the adequacy of the foundations and their design at paragraph 61,162.

11.5.6 And the final reference was to David Steel J in ***Baxall Securities Ltd v Sheard Walshaw Partnership*** [2002] Lloyd's Rep PN 231 (CA),

> In my judgment the judge's analysis (at first instance) is correct. Actual knowledge of the defect, or alternatively a reasonable opportunity for inspection that would unearth the defect, will usually negative the duty of care or at least break the chain of causation unless (as it is suggested in the present case) it is reasonable for the claimant not to remove the danger posed by the defect and to run the risk of injury; see *Targett* case.

11.5.7 Mr Heaney submits that the experts all agree that the building would have been exhibiting signs of cracking at the time when the Owners purchased, in March 2003. He says that these were patent defects which were, or should have been, observed by the Owners at the time of purchase.

11.5.8 I have already reviewed this matter in section 5.7 of this Determination. I have generally accepted the evidence of the Owners on this issue, and decided that the cracking was either predominantly concealed by the paint in March 2003, or was not anywhere near as serious in March 2003 as it was sixteen months later, in August 2004. Therefore the defects were not patent, to the extent that a normal observer would not notice them, or consider that they were abnormal. I am not convinced that the Owners knew that they were purchasing a building that was seriously cracked or leaked. They knew the house was nearly five years old, but still looked in excellent condition. This is not the same as drinking a bottle of ginger ale in the knowledge that there was a decomposing snail in the bottle. It is not the same as buying underwear knowing that it contained an irritant chemical.

11.5.9 The defective construction work was not patent, and if the building was leaking in March 2003, the leaks were not noticed by the Owners or Ms Mak. However, Mr Heaney submits that if the Owners had not noticed the cracks or leaks, then this was because they did not carry out a proper and full inspection of the house. He submits that there will seldom be cases as strong as this for negating causation. He says that the Owners were an experienced real estate agent fully aware of the need for pre-purchase inspections, and an experienced builder who was familiar with the problems associated with leaky buildings.

11.5.10 I do not accept this submission for the following reasons. The evidence shows that the Owners undertook a reasonably careful inspection of this house before they committed to making an offer. They did not fail to conduct a pre-purchase inspection. The fact that Mr Hartley undertook the inspection himself is quite reasonable. He is a builder. I find that the defects were not patent, so he would have needed to undertake some destructive testing if he was to have unearthed the defects. It is not normal for a prospective purchaser to start cutting holes in the external plaster, or into the internal linings, just to see if there are some problems. This is raising the threshold too high, and would be unreasonable. I am not satisfied that the

knowledge that the Owners had acquired at the time of purchase is sufficient to negate any duty of care that the Council may be found to owe to the Owners.

11.5.11 For similar reasons, I am not satisfied that the chain of causation has been broken under these circumstances. The cause of the Owners' losses is the defects in the work that caused the house to leak. The Owners, not being aware of the defects, have not caused their own losses. There may well be a case for contributory negligence, and I will consider that matter later in this Determination.

11.6 **No duty – Not a *Hamlin*-type Homeowner**

11.6.1 Mr Heaney has raised a number of issues that he says must cause some caution to be adopted before presuming that the Council does, in fact, owe a duty of care to these Owners. He submits that the principles laid down in the ***Hamlin*** decisions do not sit easily with the approach that has generally and more recently been taken by the New Zealand Courts in the imposition of tortuous duties. He says that the facts of this case are not close enough to ***Hamlin*** to allow a simple transposition of duty principles.

11.6.2 I have read and considered the submissions made by Mr Heaney on this important and fundamental issue. As I mentioned at the hearing, I had received similar submissions from Mr Harrison QC and Ms Rice in the Ponsonby Gardens adjudications. I do not intend to repeat much of my reasoning in those Determinations, but I have not been persuaded by Mr Heaney that ***Hamlin*** should not apply to this present case. A summary of my reasons follows.

11.6.3 Mr Heaney says that the Owners' house was not constructed, nor was it purchased under a regime of government support and funding. I can see nowhere in the ***Hamlin*** decision that the homeowners reliance on the local authority to exercise reasonable care was caused by the presence of government support, or was restricted to houses that had government funding.

11.6.4 The next matter of differentiation cited by Mr Heaney was that Mr Hamlin was vulnerable and unable to protect himself contractually, whereas the Owners in this case were able to, and did, insert terms into their agreement for their protection. However, as I understand it, Mr Hamlin purchased the land as a separate exercise to the contract to build his house. I see no reason why Mr Hamlin could not have inserted (and in fact may have inserted) maintenance or warranty clauses in his building contract.

11.6.5 Mr Heaney says that, in this case, the Owners relied upon either an old pre-purchase report, or on their own pre-purchase inspections. They did not rely upon the Council. This should be contrasted with Mr Hamlin's situation, says Mr Heaney, as Mr Hamlin did not obtain a pre-purchase report, as these were not generally available at the time, or it was not commonplace to obtain them. Whilst it may not have been usual to obtain such reports when Mr Hamlin made his purchase, it should be remembered that he was buying a new building. The Owners in this case were purchasing an existing house. However, I have already considered the impact of the pre-purchase report earlier in this Determination, and found that this does not negate the Council's duty of care to the Owners. I may also need to consider it when I review claims for contributory negligence.

11.6.6 It is submitted that the Owners placed no reliance on the Council, but relied on their own judgement and the advice that they were given by others. I do not accept that this was borne out by the evidence. Mr Hartley told me that he had checked that the Council had issued a Code Compliance Certificate, which he considered to be confirmation that the house had been built in accordance with the Building Code. Mr Hartley told me that, being a builder, he was aware that Council sends its building inspectors to building sites to check that the work has been properly done. It seems quite clear that the Owners did place reliance upon the Council.

11.7 **Issue of Code Compliance Certificate**

11.7.1 It is submitted that the New Zealand Courts have shown an unwillingness to impose responsibility for economic loss upon an authority created by statute for issuing certificates relating to property, when such certificates relate to health and safety.

11.7.2 I have been referred to an unreported Court of Appeal case of ***Attorney-General v N Carter & Anor*** (CA 72/02, 74/02; Gault P, Blanchard and Tipping JJ; 13 March 2003). I believe that this is the judgment that was reported in [2003] 2 NZLR 160. It was held, in this case, that the purpose of the certificate issued by the Ministry of Transport was the safety and seaworthiness of ships, and that there was nothing in the legislative scheme suggesting that the survey certificates were intended to be used, or relied upon, for economic purposes.

11.7.3 Mr Heaney has also referred me to the decision of Venning J in ***Three Meade Street Ltd v Rotorua District Council*** (unreported judgment of Venning J, Auckland High Court, M37/02, 11 June 2004). Once again, it appears that Counsel has overlooked that this judgment has been reported as [2005] 1 NZLR 504.

11.7.4 He says that in that case the Council made submissions to the Court that there were no obligations owed by the Council to the plaintiffs on the issue of the Code Compliance Certificate ("CCC") for a number of reasons, which were largely adopted by Justice Venning. I have been referred to the following extracts from the judgment;

> The purpose of the building code is to prescribe functional requirements to ensure compliance with the purposes of the Building Act. The purposes of the Act are to ensure buildings are safe and sanitary and provide means of escape from fire (s.6 of the Act). The particulars supplied in support of the allegation of breach in issuing the certificate are effectively particulars in support of an allegation of negligence to support the plaintiff's claim for damages for economic loss. I do not consider that Parliament intended that to be a purpose of a code compliance certificate or s.43 of the Building Act. [Paragraphs 61 & 62.]

And after considering the case of ***Attorney-General v Carter***, and the purposes of the survey certificate,

> Similarly, in the present case, it is not part of the statutory scheme 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. [Paragraph 64.]

11.7.5 Mr Heaney concludes by submitting that there was no attempt by Justice Venning to restrict his views on civil liability flowing from the issue of a CCC to commercial buildings alone. He says that, if the judge had considered that such a distinction was necessary, he would have done so, as he did in relation to the issue of whether councils owe subsequent commercial property owners duties of care.

11.7.6 I would accept that Justice Venning raises some fundamental points about the application of ***Hamlin***. I think that it is quite clear from the reading of his judgment that the question that he was being asked to answer in the ***Three Meade Street*** case was whether the Council owed a duty of care to a commercial property owner to protect them against financial loss. Venning J makes this apparent in paragraphs 22 and 30, and his wording in that latter paragraph seems to acknowledge that ***Hamlin*** was strong authority that a duty of care was automatically owed by Councils to residential homeowners. He summarises his views on page 513, as follows:

> [39] 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.

11.7.7 This does not directly address the submission that the Owners cannot succeed against the Council by claiming that the CCC was negligently

issued. It is my understanding that the Owners, as an alternative to relying on the liability that may rest upon the issue of the CCC, are claiming that the Council was negligent in the manner in which it conducted its inspections. As a consequence of this negligence, the Council would have issued the CCC.

11.7.8 It is my conclusion that the Owners' claims that the CCC was negligently issued may not be successful if their claims relate solely to economic loss. However, in cases where the negligence leads to safety or health issues, and leaks can often cause the growth of spores that are likely to affect the health of the house occupants, then there could well be found that the Council would have a liability to the occupants or owners. In this case I do not need to make a finding as to whether there have be any dangers to health or safety, as the Owners can recover economic losses arising out of any defects caused by the Council's negligence in the course of the building inspection process.

11.8 **No Breach of Obligations**

11.8.1 Mr Heaney submits that the Council must be judged against the standards of the time. In other words, the standards that it could reasonably apply to other prudent territorial authorities in New Zealand in 1998-99. The standard against which the conduct of a council inspector should be measured is well established. It is the standard that a reasonably skilled and experienced person carrying out building inspections would have exercised at the time that the work was undertaken. In this case, it is the standards generally accepted in 1998 to early 1999.

11.8.2 It was the responsibility of the Council to carry out inspections of the work in progress, so that at the end of the construction work it was in a position to issue a Code Compliance Certificate. The Council is not expected to carry out the function of a clerk of works or a quality control supervisor, and in the words of Henry J in ***Lacey v Davidson*** (Auckland High Court, A.546/65, 15 May 1986):

> The duty is to take reasonable care in carrying out inspections of building work. It is important to bear in mind that the Council is neither a guarantor of the builder nor an insurer of the owner or occupier, the main purpose of the Council's power of control being to ensure the structural stability of the building. The duty cannot be elevated to that required, for example, of a supervising architect.

11.8.3 A territorial authority will not be held to be negligent if it carries out its inspections at such times, and with due diligence, so that it can say that it has reasonable grounds to conclude that the work that has been done has complied with the Building Code. It is not a matter of strict liability.

11.8.4 **The Building Consent** The Owners have levelled a number of criticisms against the Council, relating to the documentation upon which the building consent was issued. These criticisms were of a general nature in the Statement of Claim, but were spelt out in more detail as the hearing progressed, and were summarised by Mr Rainey in his closing submissions.

11.8.5 The main question that I do need to answer is whether the Council should have issued a building consent on this set of drawings and specifications.

11.8.6 In 1997-98, the Building Act required all applications for building consents to be accompanied by "such plans and specifications and other information as the Council reasonably requires". S.34 of the Building Act 1991 says that "… the [Council] shall grant the consent if it is 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". Therefore, if the Owners are to succeed in their claim, then the Owners will have to prove that no reasonable Council could have been satisfied that the provisions of the building code would be met.

11.8.7 To prove that the Council had been negligent in issuing a building consent on the basis of the drawings and specifications that were provided would require clear evidence of inadequacy as measured against the standards of the time. Several experts gave me their views on whether the Council should have been satisfied with the plans and specifications submitted by the Builder for the building consent. These opinions were not improved by the fact that some of the experts were not aware of the full extent of the drawings made available to the Council at the time the consent was issued.

11.8.8 I have considered all of these opinions, and I am not persuaded that the Council was in error in issuing the building consent. The level of documentation provided was typical, and probably better than the normal level of information and documentation that was provided to councils in 1997-98 by applicants. I am not satisfied that the Council has been shown to have been negligent in its issuing of the building consent for this dwelling.

11.9 **External Windows and Doors**

11.9.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.5 above), and the Architect (see paragraph 9.3 above). I have found that the Architect's sill detail was incorrect, and that the Builder was negligent in allowing the as-built detail to proceed. For similar reasons, I found that the plasterer was negligent in building to this detail, when a reasonably skilled and experienced plasterer should know that the detail would probably fail.

11.9.2 This was a matter that was shown on the drawings, and the way that the plaster had been finished was clearly visible at completion. I do not accept that this was a problem that would not have been visible to the Council's inspector. It should have been noticed, and the inspector should have realised that the provisions of the building code were likely not to be met, because it was likely that water would leak in around the windows. I would conclude that it was negligent not to have noticed this defect.

11.10 **Parapets at Roof Level**

11.10.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.6 above), and the Architect (see paragraph 9.4 above). I have found that the Builder was negligent in allowing the parapets to be constructed and finished in the way in which they were constructed and finished.

11.10.2 I have found that the detail on the building consent drawings was adequate, and that the claims against the Architect must fail. For the same reasons, any claims against the Council for wrongly issuing a building consent must also fail.

11.10.3 I have found that the main cause of the leaks from these parapets was the water entering through the numerous cracks, and then being directed down behind the building paper. I am sure that, if a building inspector had noticed this error, then he would have drawn it to the attention of the Builder. However, it is not a matter that I would have expected the building inspector to have specifically checked, and I think that it would be unreasonable to expect him to go out of his way to make sure that the building paper was properly aligned. I find that the Council was not negligent in that it failed to notice this defect.

11.11 **Solid Plaster Generally**

11.11.1 I have found that the remedial costs for repairing the widespread cracking and the re-cladding of this dwelling should be allocated to the causes of the primary leaks. Therefore, there is no purpose in considering the liability of the Council for the general cracking in the plaster.

11.12 **Eyebrows above Windows**

11.12.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.8 above), and the Architect (see paragraph 9.6 above). I have found that the Builder was negligent in allowing the eyebrows to be finished without a

waterproofing membrane on top, and without a back flashing, and that the plasterer should not have plastered over the tops of these eyebrows, that had not been properly waterproofed.

11.12.2 Mr Heaney says that, as the Council did not carry out a special stucco inspection, then there was no way that the inspector could identify whether there was a problem with these features. I would disagree. The tops of these eyebrows are about 300mm wide, and are virtually flat. The slope that is recommended by BRANZ *Good Stucco Practice* booklet is 30° for heavily textured plaster, and 15° for smooth plaster.

11.12.3 A reasonably prudent building inspector in 1998 should have realized that this was a potential problem, and should have made enquiries to ascertain whether proper steps had been taken to waterproof these vulnerable surfaces. I find that the Council was negligent not to have noticed this problem, and not to have taken steps to have the defect corrected.

11.13 **Beam to Column Junctions (pergola)**

11.13.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.9 above), and the Architect (see paragraph 9.7 above). I have found that both the Builder and the plasterer were negligent in relation to the way in which the tops of these columns, and the junctions with the pergola beams, were not waterproofed.

11.13.2 The situation with regard to these problems is very similar to the situation regarding the eyebrows. The building inspector would have needed to check the structural connection between the beams and columns, so that it would not be correct to suggest that the inspector would have no knowledge of how these junctions were made and finished. Mr Heaney says that there was not sufficient knowledge of weather-tightness issues in 1998 to enable building inspectors to check these aspects of construction. I think that this is not correct. It is certainly true that the building industry, since 1998, has become

much more aware of the need for better detailing and workmanship in relation to making buildings weather-tight. However, solid plastered houses have been around for at least 70 years, and this has been ample time for the industry to gain sufficient knowledge on how to build them so that they are reasonably weatherproofed.

11.13.3 I do not accept that this defect should have escaped the notice of the building inspector. It was negligent not to have noticed the lack of flashing or waterproofing.

11.14 **Solid Balustrades around Decks**

11.14.1 I have already reviewed the details of this issue when considering the liability of the Builder (see paragraph 8.10 above), and the Architect (see paragraph 9.8 above). I have found that the Builder was negligent in relation to the absence of saddle flashings, but neither the Builder, plasterer nor the Architect were negligent in relation to the handrail fixings.

11.14.2 I have accepted that it was commonly believed, in 1998, that if the holes made by the placing of these supports, were well surrounded with sealant at the time of fixing the handrail, it would prevent water from leaking into the handrail structure. Therefore it was not negligent of the Council to approve this method of fixing the handrails.

11.14.3 The saddle flashings, which should have been installed at the ends of the solid balustrades, would not necessarily have been visible when the plastering had been finished, as these flashings are sometimes placed behind the plaster. Furthermore, I accept the evidence that these flashings were not considered to essential, in 1998. Therefore, I am satisfied that the Council was not negligent when it failed to notice that these flashings were missing.

11.15 **Retaining Walls**

11.15.1 I have found that the leaks on the inside of the rear wall are not caused by problems with the retaining wall tanking, but come from the

parapets or cracks in the solid plaster cladding. I do not need to consider the claims against the Council any further.

11.16 **Conclusion**

11.16.1 In conclusion, I find that the Council was negligent in the following matters, and thereby was in breach of the duty to take care that it owed to the Owners. Its negligence led to water penetration and resultant damage, and it is liable to the Owners for the following damages:

• External windows and doors;	104,580
• Eyebrows above windows;	20,588
• Beam to column junctions in pergola;	29,251
• Lost rental;	20,800
TOTAL Cost of Repairs	$ 175,219

12. CONTRIBUTORY NEGLIGENCE

12.1 All of the respondents have made submissions on the affirmative defence of contributory negligence in respect of all, or part of the Owners' claims.

12.2 Some of the background factual details have already been provided in section 11.4 of this Determination. The respondents submit that the Owners failed in a number of ways which are as follows;

1. Relying on a four year old inspection report; or

2. Failing to obtain a pre-purchase inspection report from a professional building surveyor; or

3. Failing to carry out a proper inspection of the property prior to purchase; and

4. Failing to undertake any remedial work.

12.3 It is submitted that by failing to do either of 1, 2 or 3 above, the Owners have contributed to their own damages, in that a proper up-to-date inspection would probably have detected the defects and leaks, thus allowing the Owners to avoid the purchase – or at least would have allowed them the opportunity to negotiate a suitable reduction in the price. It is also submitted that by failing to do 4 above, the Owners have allowed the property to deteriorate and thus greatly increase the extent of the remedial work.

12.4 This defence relies upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1) which states:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> Provided that –
>
> (a) This subsection shall not operate to defeat any defence arising under a contract:
>
> (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

"Fault" is defined in s.2 in this way:

> Fault means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

12.5 I have already considered the claim by the Owners that they were shown, and relied upon, a pre-purchase report prepared by Mr Lee for Ms Mak in 1999. In paragraph 11.4.10 of this Determination, I decided that the Owners were mistaken. I found that the Owners were not shown a pre-purchase inspection report, but may well have been shown a valuation report. Therefore, I have decided that the Owners did not rely upon a 1999 report, and the first point raised by the respondents as a defence cannot succeed.

12.6 Mr Heaney has referred me to previous decisions where the claimants failed to obtain pre-purchase inspections. I will briefly traverse these cases. The first one is ***Peters v Muir*** [1996] DCR 205, where it is submitted that Judge Ryan reduced the damages awarded against the Council by one third, on the grounds that the purchaser failed to arrange for a pre-purchase inspection.

12.7 I am familiar with this case, which concerned a house built by a Mr Muir in 1978 in Tekapo. Miss Peters purchased the property in 1992, and then after she had moved in she applied for a building consent to install a new potbelly stove. As a result of a visit by a building inspector, the building was found to be so badly built that it was structurally unsound, and was leaking badly. On the matter of contributory negligence, the Judge said:

> The council has pleaded contributory negligence and in support of that Mr James pointed to a number of matters. Miss Peters acknowledged that she had set out to become very familiar with the Tekapo property market. She inspected a number of properties, approximately 17. She has owned houses previously. She first made an offer to buy 33 Murray Place in or about May of 1991. At that time, although the asking price was $98,000, Miss Peter's offer was $60,000. She made further offers at that figure during the latter part of 1991. In early 1992, when the property was still listed at $98,000, she offered $65,000. Miss Peters had apparently heard a rumour in Tekapo that Mr and Mrs Muir were likely to accept an offer much lower than their stated asking price. All this goes to show that Miss Peters was not a naïve purchaser. She was well familiar with the property and she knew that it was going to require further work to be done to complete it. She had no reason to suppose, nor did she in fact believe, that she was purchasing a property which she should be entitled to regard as well finished and complete in all respects. Against this background it is urged for the council that so many of the defects were so obvious that even to a person not experienced in building there was sufficient to put them on notice and prompt further inquiry. It is clear that Miss Peters did not seek advice from any person competent to assess the actual soundness of the building. While I doubt if an aspiring purchaser could be said to be negligent in failing to make inquiry as to the state of foundations, such are the defects in, for example, the block-work, there are obvious gaps which one can see through at some points, lintels were sagging and bowing, a timber joist supporting the first floor structure, which joist is not covered up had been sawn part way through and consequently split along part of its length. This and so many other features were there to be seen. It is not that I take the view that Miss Peters, or any other purchaser not experienced in building work, should be able to reach particular conclusions as to all the defects, and it may have been that Miss Peters simply regarded these as being matters incidental to the fact that the basement area had never been finished. But at the very least the defects were sufficiently numerous

> and obvious as to, in my judgment, put a reasonable person upon inquiry. In failing to look further into the matters which must have been so obvious, then in my view Miss Peters has contributed in some degree to her own loss.

12.8 I do not find that this judgment is supportive of a general proposition that purchasers should have obtained pre-purchase inspection reports in 1992. Clearly, Miss Peters should have been alerted by what she saw, but I see little parallel with the house at 34B Oakwood Grove. All of the evidence given to me shows that there were no obvious signs of leaks into this house in 2003, such as to put an ordinary layperson on notice that further inspections or enquiries should be undertaken. It was not a new house, but it was only four years old. However, I do accept that the knowledge and public awareness about building defects in 1992 was not the same as it was in 2003.

12.9 The other case to which I was referred by Mr Heaney was ***Cinderella Holdings Ltd v Housing Corporation of New Zealand***, [1998] DCR 406, in which the court found that a purchaser failed to take the steps which a reasonably prudent purchaser would have been expected to have taken, and reduced the damages by 85%.

12.10 The case involved the purchase of a commercial office building in Napier, which was later discovered by the purchaser to have a highly toxic substance in some of the light fittings. It cost $94,000 to replace the light fittings. The possible danger to life arising out of the presence of the toxic substance was remote, and a danger only arose in the event of a fire. The key finding was that the purchaser did not take the steps that a reasonably prudent purchaser of a valuable building could have taken.

12.11 I am not persuaded that either of these cases is authority for the proposition that a purchaser of a four year old house in 2003 should have obtained a pre-purchase inspection report. They do support the argument that a purchaser should take reasonable steps to check what they are buying, but no more than that. However, Mr Heaney has also referred me to one of my own recent decisions in ***Hay v Dodds & Ors*** (WHRS Claim 1917, 10 November 2005). This considered the situation of a purchaser in 2001. Although I did not find that it was essential for prospective purchasers of existing houses to

obtain pre-purchase inspection reports in 2001, I did conclude that they must take the steps that a reasonably prudent purchaser would have been expected to have taken, under all the circumstances.

12.12 It is common ground that the Owners did not commission a building surveyor to undertake a pre-purchase inspection on their behalf. Mr Hartley undertook the inspection himself. The respondents say that the Owners should have been aware of the problems with plastered houses by the time that they purchased this house, and that the inspections that they undertook were inadequate under these circumstances.

12.13 I have already mentioned that Mr Hartley is a builder with 16 years experience, and that Mrs Hartley had been operating as a real estate agent for 8 years in the eastern suburbs of Auckland. I think that they both understated their personal knowledge and awareness of the problems about leaky homes in March 2003. If what they told me was accurate, and they did not really appreciate the extent of the problems, then I would conclude that they should have engaged a professional building surveyor to check the house over. That is what a reasonably prudent purchaser of a plastered house should have done in March 2003. However, as I have mentioned, I think that they have understated their knowledge and awareness, and they did realise that this house needed to be looked at very carefully. This is why they visited the house on at least three occasions before deciding to buy it, and again before settlement took place.

12.14 I have come to the conclusion that the Owners have become confused about their evidence about cavities. I do not accept that they mentioned the subject of cavities to anyone prior to them having purchased this house. I do not think that they discussed cavities between themselves until after these problems had arisen. I am satisfied that Mr Hartley did not know, in March 2003, whether houses should have had cavities, and did not know how to tell whether there was a cavity or not.

12.15 I have already expressed my concern about the apparent conflict in the evidence about when this external plasterwork started to crack. The Owners

and Ms Mak tell me that there were only a few small cracks visible in early 2003. I accept their evidence, because there is no evidence to the contrary, and it is supported by other evidence including photographs. I do not detect a conspiracy. By August 2004 there was widespread cracking with virtually not a wall that was crack-free. The question that I must ask myself, is whether a professional building surveyor, if he had inspected this house in March 2003, would have seen and found something more than the Owners and the vendor saw?

12.16 The evidence about the source of the leaks strongly indicates that this building had been quietly leaking for a considerable time. Ms Mak did admit to have had some problems with leaks, but these were when water was seen inside the house. A normal house owner does not always detect minor leaks that only occur spasmodically, and under certain weather conditions. The damp patch on the wall maybe hidden from view behind some furniture, and the damp carpet may be assumed to have been the result of an accidentally left-open window. A professional building surveyor in 2003 would have usually used a moisture detection meter, which would be used to check in areas of high risk – such as at the bottom corners of windows, and I would expect a professional surveyor to have known what signs to look for.

12.17 Mr Hartley's own evidence raises some questions as to whether he carried out a thorough inspection, or whether he was looking for the right signs. In his brief of evidence he said;

> About two weeks after we moved into the property there was a heavy rainstorm. I was sitting in the lounge and noticed that water was pouring through the top of the bifold doors. I went downstairs to get a bucket and towels to clean up the water. When I turned on the light in the garage I noticed that water was pouring through the light socket above my wife's car. I decided to look around the bottom level of the house for other leaks and found water running down the garage wall.
>
> I went back to the lounge to find my wife trying to soak up the water. My wife had pulled the curtains back and I noticed that the carpet had started rotting and that rust stains had come through the carpet's smooth-edge. I then went through the rest of the house finding further leaks, damaged carpet, repainted walls and repainted ceilings. The damaged walls and carpet in the master bedroom and the water-

> damaged carpet in the lounge had been hidden by furniture when we inspected the house prior to making an offer.

12.18 I was shown a number of photographs that had been taken by Ms Mak when she had put her house on the market. They were taken for use in promotional leaflets by the real estate agents. These photographs include some of the inside of the house, and give a good idea of how the house was furnished at this time. They do not support Mr Hartley's comments that the damaged areas were hidden by furniture. I am drawn to the conclusion that if Mr Hartley could see all this evidence of damaged carpet, repainted walls and repainted ceilings only two weeks after moving in, then he should have been able to see these telltale signs prior to purchasing the property.

12.19 I think that it is probable that a surveyor, with the correct inspection equipment, would have detected damp areas within this house. This would have alerted the Owners to the possibility that there were leaking problems with the building. They may have then chosen to ask permission to carry out further tests, or to negotiate over the asking price, or to walk away.

12.20 This is, in my view, a case where the Owners have failed to take the steps which should have been taken by reasonably prudent prospective purchasers. They were aware of the risks associated with monolithic-clad houses. They chose not to engage a professional surveyor to inspect the house, believing that they were quite capable of doing this for themselves. They were mistaken. Mr Hartley did not carry out an adequate inspection. He failed to notice the areas that must have been damp, or would have displayed evidence of dampness, because they had been leaking for some time.

12.21 I am satisfied that this is a case where the Owners have made a contribution towards the situation in which they now find themselves. Although it is not certain that a building surveyor would have been able to alert them to the full extent of the weather-tightness problems of this house, I think that it is likely that the building surveyor would have warned them about problems with moisture ingress.

12.22 The other defence that was raised by the respondents, and articulated by Mr Manning, was the failure by the Owners to undertake any remedial work. The Owners were both asked why they had not carried any remedial work, and Mr Hartley's first response was that they could not afford it. He then said that he did think about it, but wanted to have the house checked out before trying to do any repairs because he did not want to trap in, or cover up, any rotted areas. Later, he did tell me that he did not really know what work should be done.

12.23 Mrs Hartley was more circumspect with her answers. When she was asked whether they had made any attempts, or intended to attempt to repair the leaks, she answered in the negative. When asked whether they were in a financial position to do the repairs, she said that they were not able to afford to do the work after she had given up work to have their first child, but did not claim that lack of finance was the main reason for not doing any repair or remedial work. She admitted that the house would continue to deteriorate until the leaks are stopped.

12.24 The Owners' evidence is that there were no leaks or cracks in the plaster when they purchased the house in March 2003. However, two weeks after moving in (April 2003) leaks were found in the lounge, garage and master bedroom, but no cracks were detected in the exterior plasterwork. These leaks continued and worsened until, in September 2003, when the Owners made an application to WHRS, the house was leaking "quite badly". During the early months of 2004, it was noticed that cracks were appearing in the exterior of the solid plaster cladding, which continued to worsen. The WHRS assessor was not able to inspect the house until August 2004, and filed his report in September 2004. He concluded that the claim was eligible, and the repair costs would be in the order of $153,000. The Owners eventually did seek an opinion from a professional consultant (in November 2004), who recommended extensive repair work, estimated as costing about $190,000.

12.25 I am not satisfied that the Owners were prevented from carrying out some remedial work due to a lack of finance. Whilst I accept that they may not have been in a position to find $153,000, they were in a position to take some

steps to prevent the ongoing leaks. Up until Mrs Hartley stopped working to give birth to their first child, in January 2005, they had two incomes. And yet, although it must have been clear that the leaks were getting worse, and they knew that their house was deteriorating, they took no steps to try and stop the leaks. Mr Hartley is a builder, who would be expected to have some ideas on how to stop the leaks. If he did not know, then more reason for them to seek outside professional assistance. A consultant, such as Mr Smith, could have quickly advised them on what steps they should take to minimise the damage caused by the ongoing leaks.

12.26 This is a case in which the Owners have not taken reasonable steps to mitigate their losses. I am not suggesting that they should have arranged for the leaks to be fixed immediately, without carefully considering the causes of the leaks, and their options. The evidence is that their virtually watched their house slowly deteriorating around them, without taking reasonable steps to protect their investment.

12.27 The respondents are all calling for a contribution from the Owners. The Builder says it should be at least 75%; the Architect says at least 80%; whilst the Council suggests that at least 75%, or even 85%. After considering all of the evidence and circumstances, I find that the Owners should bear a substantial contribution of the damages. I would assess that the remedial work has probably increased by between 25% and 50%, due to the failure to take steps to prevent ongoing damage. The amount of contribution due to their failure to undertake a proper pre-purchase inspection is more difficult to assess, but I would think that it should be in the order of between 30% and 40%. Overall I will set the amount of the contribution as a total of two thirds of the damages, which is a finding that the defence of contributory negligence will succeed to the amount of $66^{2/3}$% of the damages suffered by the Owners.

13. CONTRIBUTION BETWEEN RESPONDENTS

13.1 I must now turn to the complex problem of considering the liability between respondents. I say that this is a complex problem, but only from the arithmetical point of view, and not for any other reason.

13.2 Our law does allow one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

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

13.3 The approach to be taken in assessing a claim for contribution is provided in s.17(2) of the Law Reform Act 1936. It says in essence that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage. What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.

External Windows and Doors

13.4 I have found that the main cause of leaks around the windows and doors was the detail at the sill. This was initiated by the Architects' detail, which was followed by the Builder, challenged by the plasterer (who was overruled), and passed by the building inspector. There are other minor causes that have probably contributed to the cracking and leaks around the windows, but they will not make a real impact on the allocation of responsibility for the leaks around windows and doors.

13.5 The main burden of responsibility for these problems must lie with the Architect, followed closely by those who carried out the work (the Builder and Mr Kaukas), in the proportion of 5:4. The Council, whose inspector should have picked up these erroneous details on site, should accept responsibility at about half of that allocated to the Architect. Mr Kaukas should be entitled to some indemnity from the Builder, on the grounds that he did express his concerns, but was overruled, so that I will set his contribution as 20% of the Builders allocation.

13.6 I was not addressed as to whether Mr Brent Balemi should in any way indemnify the company, B & BL; or vice versa. Therefore, where I have found that they have a joint and several liability for a problem, then I will allocate the responsibility on a 50/50 basis.

13.7 Therefore, the damages relating to the exterior windows and doors will be paid by the respondents to the Owners as follows:

Total cost of remedial work		$ 104,580.00
Less 2/3rd contribution by Owners		69,720.00
		$ 34,860.00
Balemi & Balemi Ltd	13.9%	$ 4,850.00
Brent Balemi	13.9%	4,850.00
Frans Kamermans Architects Ltd	43.5%	15,157.00
Joe Kaukas	7.0%	2,425.00
Manukau City Council	21.8%	7,578.00
		$ 34,860.00

Parapets at Roof level

13.8 I have found that Mr Brent Balemi and B & BL should both be held responsible for leaks from the parapets. Therefore, the damages relating to these parapets will be paid by the respondents to the Owners as follows:

Total cost of remedial work		$ 92,718.00
Less 2/3rd contribution by Owners		61,812.00
		$ 30,906.00
Balemi & Balemi Ltd	50.0%	$ 15,453.00
Brent Balemi	50.0%	15,453.00
		$ 30,906.00

Eyebrows above Windows

13.9 The leaks from around the eyebrows above the windows are probably caused by the failure to waterproof the top surface, and a failure to install flashings

at the back. The Builder should bear the main burden for these problems as he was in charge of the workforce that should have done this work. Mr Brent Balemi was made aware that the tops were not waterproofed. The Council's building inspector should have noticed this problem, and I will set the Council's contribution in the proportion of 1:3 with the Builder.

13.10 I have also found that Mr Kaukas, even though he knew that the tops of the eyebrows should have been waterproofed to prevent leaking, went ahead and plastered the eyebrows. He must accept responsibility for these leaks, although he is entitled to some indemnity from the Builder on the grounds that he did express his concerns to Mr Balemi, but was overruled. I will set his contribution at 20% of the Builder's allocation.

13.11 Therefore, the damages relating to the eyebrows above the windows will be paid by the respondents to the Owners as follows:

Total cost of remedial work		$ 20,588.00
Less 2/3rd contribution by Owners		13,725.00
		$ 6,863.00
Balemi & Balemi Ltd	30.0%	$ 2,059.00
Brent Balemi	30.0%	2,059.00
Joe Kaukas	15.0%	1,029.00
Manukau City Council	25.0%	1,716.00
		$ 6,863.00

Beam to Column Junctions (pergola)

13.12 The situation with these problems at the beam to column junctions is very similar to the situation of the eyebrows over the windows. The Builder must bear the main brunt of the responsibility. The Council's building inspector should have noticed the problems. Mr Kaukas should not have plastered over the tops of these columns without insisting that a waterproof membrane had been properly installed. For the same reasons, I find that the allocation of responsibility should be the same as for the eyebrows.

13.13 Therefore, the damages relating to the beam to column junctions of the pergola will be paid by the respondents to the Owners as follows:

Total cost of remedial work		$ 29,251.00
Less 2/3rd contribution by Owners		19,501.00
		$ 9,750.00
Balemi & Balemi Ltd	30.0%	$ 2,925.00
Brent Balemi	30.0%	2,925.00
Joe Kaukas	15.0%	1,462.00
Manukau City Council	25.0%	2,438.00
		$ 9,750.00

Solid Balustrades around Decks

13.14 I have found that the Builder must take responsibility for the absence of saddle flashings at the top of the balustrades where they adjoined the house, and that the cost of the associated remedial work would be about 10% of the remedial costs of the solid balustrades. Therefore, the damages relating to this item will be paid by the respondents to the Owners as follows:

Total cost of remedial work to balustrades		$ 37,548.00
Assessed cost of saddle flashings at 10%		3,755.00
Less 2/3rd contribution by Owners		2,503.00
		$ 1,252.00
Balemi & Balemi Ltd	50.0%	$ 626.00
Brent Balemi	50.0%	626.00
		$ 1,252.00

Lost Rental

13.15 The contributions towards the amount of lost rental will be allocated in the proportions of the individuals financial liability as calculated in the preceding paragraphs, and will be paid by the respondents to the Owners as follows:

Total amount of lost rental	$ 20,800.00
Less 2/3rd contribution by Owners	13,867.00
	$ 6,933.00

Balemi & Balemi Ltd	30.98%	$ 2,148.00
Brent Balemi	30.98%	2,148.00
Frans Kamermans Architects Ltd	18.12%	1,257.00
Joe Kaukas	5.88%	407.00
Manukau City Council	14.02%	973.00
		$ 6,933.00

Summary

13.16 In the event of all respondents meeting their obligations as ordered in this Determination, then the amounts that they will pay to the Owners will be as follows;

Balemi & Balemi Ltd

External windows and doors	$ 4,850.00
Parapets at roof level	15,453.00
Eyebrows above windows	2,059.00
Beams to column junctions in pergola	2,925.00
Solid balustrades around decks	626.00
Lost rental	2,148.00
	$ 28,061.00

Mr Brent Balemi

External windows and doors	$ 4,850.00
Parapets at roof level	15,453.00
Eyebrows above windows	2,059.00
Beams to column junctions in pergola	2,925.00
Solid balustrades around decks	626.00
Lost rental	2,148.00
	$ 28,061.00

Frans Kamermans Architects Ltd

External windows and doors	$ 15,157.00
Lost rental	1,257.00
	$ 16,414.00

Mr Joe Kaukas

External windows and doors	$ 2,425.00
Eyebrows above windows	1,029.00
Beams to column junctions in pergola	1,462.00
Lost rental	407.00
	$ 5,323.00

Manukau City Council

External windows and doors	$ 7,578.00
Eyebrows above windows	1,716.00
Beams to column junctions in pergola	2,438.00
Lost rental	973.00
	$ 12,705.00

14. COSTS

14.1 It is normal in adjudication proceedings under the WHRS Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s.43(1) of the WHRS Act, an adjudicator may make a costs order under certain circumstances. Section 43 reads:

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

14.2 None of the parties in this adjudication have made claims for the recovery of their costs, and I do not think that there are any particular circumstances

that would justify an award of costs. Therefore, I will make no orders as to costs.

15. ORDERS

15.1 For the reasons set out in this Determination, I make the following orders.

15.2 Balemi & Balemi Ltd is ordered to pay to the Owners the amount of $90,564.00. Balemi & Balemi Ltd is entitled to recover a contribution of up to $28,061.00 from Mr Brent Balemi, and/or a contribution of up to $16,414.00 from Frans Kamermans Architects Ltd, and/or a contribution of up to $5,323.00 from Mr Joe Kaukas, and/or a contribution of up to $12,705.00 from the Manukau City Council, for any amount that it has paid in excess of $28,061.00 to the Owners.

15.3 Mr Brent Balemi is ordered to pay to the Owners the amount of $90,564.00. Mr Brent Balemi is entitled to recover a contribution of up to $28,061.00 from Balemi & Balemi Ltd, and/or a contribution of up to $16,414.00 from Frans Kamermans Architects Ltd, and/or a contribution of up to $5,323.00 from Mr Joe Kaukas, and/or a contribution of up to $12,705.00 from the Manukau City Council, for any amount that it has paid in excess of $28,061.00 to the Owners.

15.4 Frans Kamermans Architects Ltd is ordered to pay to the Owners the amount of $41,793.00. Frans Kamermans Architects Ltd is entitled to recover a contribution of up to $28,061.00 from Balemi & Balemi Ltd, and/or a contribution of up to $28,061.00 from Mr Brent Balemi, and/or a contribution of up to $5,323.00 from Mr Joe Kaukas, and/or a contribution of up to $12,705.00 from the Manukau City Council, for any amount that it has paid in excess of $16,414.00 to the Owners.

15.5 Mr Joe Kaukas is ordered to pay to the Owners the amount of $58,406.00. Mr Joe Kaukas is entitled to recover a contribution of up to $28,061.00 from Balemi & Balemi Ltd, and/or a contribution of up to $28,061.00 from Mr Brent Balemi, and/or a contribution of up to $16,414.00 from Frans Kamermans Architects Ltd, and/or a contribution of up to $12,705.00 from

the Manukau City Council, for any amount that it has paid in excess of $5,323.00 to the Owners.

15.6 The Manukau City Council is ordered to pay to the Owners the amount of $58,406.00. The Manukau City Council is entitled to recover a contribution of up to $28,061.00 from Balemi & Balemi Ltd, and/or a contribution of up to $28,061.00 from Mr Brent Balemi, and/or a contribution of up to $16,414.00 from Frans Kamermans Architects Ltd, and/or a contribution of up to $5,323.00 from Mr Joe Kaukas, for any amount that it has paid in excess of $12,705.00 to the Owners.

15.7 As clarification of the above orders, if all respondents meet their obligations contained in these orders, it will result in the following payments by the respondents to the Owners;

From Balemi & Balemi Ltd	$ 28,061.00
From Mr Brent Balemi	28,061.00
From Frans Kamermans Architects Ltd	16,414.00
From Mr Joe Kaukas	5,323.00
From the Manukau City Council	12,705.00
	$ 90,564.00

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

Notice

Pursuant to s.41(1)(b)(iii) of the Weathertight Homes Resolution Services Act 2002 the statement is made 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.

Dated this 11th day of April 2006

A M R DEAN
Adjudicator