CLAIM NO: 01917

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **JOHN CEDRIC HAY** and **MARJORY YOLANDE HAY**

Claimants

AND **ALISTAIR MURRAY DODDS** trading as Dodds Design

First Respondent

AND **MELVYN VINCENT LEE**

Second Respondent

AND **KRISTOPHER LEE SUNDE**

Third Respondent

AND **NORTH SHORE CITY COUNCIL**

Fourth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 10 November 2005)

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 2 May 20045

1.2 I was assigned the role of adjudicator to act for this claim, and a preliminary conference was arranged and held in the Weathertight Homes Resolution Service ("WHRS") meeting rooms in Auckland on 26 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 five Procedural Orders to assist in the preparations for the Hearing, and to monitor the progress of these preparations. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the matters covered by these Orders will need to be referred to in this Determination.

1.4 The hearing was held on 23 and 24 August 2005 in the WHRS meeting rooms in Auckland Central. The Claimants were represented by Mr Don Bidwell (an architect); Mr Dodds represented himself; Mr Lee was represented by Mr Michael Black, barrister; Mr Sunde represented himself; and the North Shore City Council was represented by Ms Helen Rice of Heaney & Co.

1.5 I conducted a site inspection of the property on 26 August 2005 in the presence of Mr Hay.

1.6 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:

- Mr Cedric Hay, one of the Claimants;
- Mr Don Bidwell, an architect, called by the Claimants;
- Mr Alan Light, the WHRS Assessor, called by the adjudicator;

- Mr Lee Strickland, an architect, called upon witness summons by the Council;
- Mr Alistair Dodds, the first respondent;
- Mr Melvyn Lee, the second respondent;
- Mr Kristopher Sunde, the third respondent;
- Mr Morris Jones, a building inspector and consultant, called by the Council.

1.7 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 4.00 pm on Friday 26 August, and written replies by 4.00 pm on Monday 29 August 2005.

2. THE PARTIES

2.1 The Claimants in this case are Mr and Mrs Hay. I am going to refer to them as "the Owners". They purchased the house and property at 4B Belmont Terrace, Milford, in October 2001, from a Mr and Mrs Aldridge. The Owners are the fourth owners of this house.

2.2 The First Respondent is Mr Dodds, the architect who designed the house in late 1993, and prepared the documents for the building consent which was issued in January 1994. Mr Dodds did not supervise the construction work.

2.3 The Second Respondent is Mr Lee, who it is alleged was the person responsible for the development and construction of the dwelling. It appears that the property may have initially been owned by a company (Discovery 4 Ltd) in which Mr Lee was a director and shareholder. However, the records show that Mr and Mrs Lee were the owners of the property when the design and construction of the two townhouses took place, and when the subdivision of the property took place in June 1994. In September 1994 the property was sold to a Mr and Mrs James.

2.4 The Fourth Respondent is Mr Sunde, who was the labour-only builder who built the dwelling.

2.5 The Fifth Respondent is the North Shore City Council ("the Council"), which is the territorial authority responsible for the administration of the Building Act in the area. The Council reviewed the application for a building consent, issued the consent, and carried out the inspections during construction prior to issuing the Code Compliance Certificate.

3. CHRONOLOGY

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

- 28 September 1993 Application for Building Consent;
- 25 January 1994 Building Consent issued;
- 23 June 1994 Substantial completion of building work;
- 27 August 1994 Issue of new subdivided title;
- 27 September 1994 Transfer to Mr and Mrs James;
- 29 September 1994 Council accept that work completed (except flooring in bathrooms);
- 02 May 1995 Transfer to Mr and Mrs Aldridge;
- 13 March 1997 Code Compliance Certificate issued by Council;
- 30 October 2001 Transfer to Mr and Mrs Hay;
- June 2002 Leak noticed in NW corner of Lounge;
- 14 April 2003 Further leak above front door;
- 09 May 2003 First report by Bidwell;
- 25 September 2003 Owners commence remedial work;
- 20 November 2003 Second report by Bidwell;
- 26 November 2003 Owners file claim with WHRS;
- 29 July 2004 WHRS Assessor visited property;
- 03 August 2004 WHRS Assessor's report;
- 02 May 2005 Owners file Notice of Adjudication.

4. THE CLAIMS

4.1 Thee claims being made by the Owners include for the remedial work that they have already carried out, as well as for the work that still needs to be done to repair the damage caused by the leaks.

4.2 The original amount being claimed in the Notice of Adjudication was $43,650.00, being the estimated costs included by the WHRS Assessor's report. These claims increased to a total of $86,451.03 when the Owners filed the full details of their claims and supporting documentation.

4.3 After the WHRS Assessor was asked some questions about his estimates, it became apparent that the Owners had misunderstood some of the Assessor's figures, and this resulted in the Owners filing an amended statement of claim in the week before the hearing. Therefore, when the hearing started, the Owners' claims were as follows:

Incurred Costs

JC McCall Plumbing		$ 269.51
Robson Plumber		140.63
Robert Rowe (insurance excess)		100.00
Auckland Savings Bank		
Mortgage fees	220.00	
Interest	744.43	964.43
Gulf Design (D S Bidwell)		2,160.00
Bob Duncan Scaffolding	1,495.46	
	299.09	
	3,795.11	
	797.58	6,387.24
Wall Board Plastering		580.00
B Jordan Building Contractors		13,685.54
Tile Warehouse		128.00
D Rosewell Tiler		385.00
Rosco Bins	110.00	
	120.00	
	90.00	320.00
Clive Hutley – painter		695.00
Steve Thompson – carpet		100.00
Baccus Consultancy Ltd		672.19
Thermoclad Coatings Ltd		19,603.12
		$ 46,190.66

Estimated Costs to complete		
Remove parapets	8,149.00	
Extend fascias	9,816.00	
Cap to screen wall	78.10	
Replace post at Front Entry	771.00	18,814.10
		$ 65,004.76

4.4 The claims against Mr Dodds are in tort and based on allegations of negligence. The Owners say that the drawings prepared for the building consent were inadequate, and that the specification of materials failed to provide proper instructions in the supply, handling and installation of materials.

4.5 The claims against Mr Lee and Mr Sunde are similar. The Owners say that Mr Lee was negligent in changing the approved design details without proper approval; negligent in failing to employ adequately skilled tradespeople, and failing to supervise their work. They say that Mr Sunde was responsible for the poor workmanship that resulted in the leaks.

4.6 The claims against the Council are also based upon allegations of negligence. The Owners say that the Council should never have issued a building consent on the drawings and specifications that were submitted, and should never have issued a Code Compliance Certificate when the house was not built in accordance with the requirements of the Building Code.

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 considering 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 identified in his report that he considered that moisture was entering the dwelling at the following points or areas:

- Roof parapets;
- Top or ends of fascia boards;
- Screen wall at main entry;
- Head flashings to windows;
- 400 x 400 column at front entry.

5.4 **Roof Parapets**

5.4.1 In May 2003 Mr Bidwell inspected the exterior of the dwelling and was critical of the finish at the roof parapets. In his view the vertical end faces of all parapets abutting roofs needed to be flashed with galvanised steel folded flashings, and the cut ends of the roofing needed to be folded to discharge water, with over-flashings to protect the adjacent surfaces.

5.4.2 The WHRS Assessor visited the property after the remedial work had been completed. He reviewed the photographs that had been taken by the Owners and all the relevant documentations. In his view there were leaks in and around the parapets as a result of the lack, or ineffectiveness, of flashings to the parapet ends, and junctions with the roof.

5.4.3 Mr Jones, the expert called by the Council agreed that some of the photographs appeared to show inadequate flashings, but would not

accept that there was any evidence of leaks. In his view the claim was not valid.

5.4.4 Whilst the remedial work was underway, Mr Sansom visited the property to inspect the timber framing and take moisture content readings. Mr Sansom is a very experienced consultant who specialises in leaks and water penetration problems. Unfortunately, I was not provided with a comprehensive schedule of his readings or observations, and have only been given a generalised report of readings in the range of 20% to 60%.

5.4.5 Having considered the evidence, I am satisfied that the Assessor's conclusions are to be preferred. There were leaks in and around the parapets, and the remedial work carried out by the Owners has rectified most of the problems. There is still some work to be done.

5.4.6 Mr Bidwell says that the work still needing to be done is the removal of the parapets. The Assessor says that further flashings are needed to the parapet ends. Mr Bidwell's option may well be a better long-term solution, but this would involve modifications that go beyond the work needed to repair the leaks. To remove the parapets would amount to an improvement or betterment, because it would remove an area of risk that the Owners acquired when they purchased this house. Therefore, I would allow the further repairs as outlined by the Assessor.

5.5 **Fascia Boards**

5.5.1 In May 2003 Mr Bidwell inspected the exterior of the dwelling and considered that the fascia around the building were not adequately protected or flashed over to prevent water ingress at the ends exposed beyond the roofing. In his opinion the flashing needed to be extended from the roof to adequately protect the back of the fascia boards.

5.5.2 The WHRS Assessor's report considers the protection of the exposed fascia boards as being closely associated with the parapet flashing

problems. He accepts that there have been leaks as a result of the absence of flashings at these points. He says that the exposed upper surfaces of the fascia (and barge) boards require flashing to direct water away from the timber and cladding junctions and over the exterior face of the fascia board.

5.5.3 However, the Assessor could not detect any wet or damp areas around the fascia boards except in the vicinity of the roof parapets. I am not convinced that the top of the fascia boards are the source of any leaks, except at the ends, and I would accept that limited further remedial work is needed.

5.6 **Screen Wall at Main Entry**

5.6.1 Mr Bidwell made no comment about this screen wall in May 2003, although he commented on the many cracks in the exterior plaster, and considered the whole of the building exterior to be in poor condition.

5.6.2 It would appear that the problems with this screen wall were not appreciated until the other remedial work was underway. The evidence is that the bottom plate was buried beneath the surrounding ground levels. The Owners have poured a new concrete nib and rebuilt the screen wall so that the timber framing is above the surrounding paved levels.

5.6.3 This screen wall leaked in two areas. Firstly, the moisture that travelled down from the parapet leak, and, probably, further leaks at the junctions of the capping; and secondly, from ground level wicking up through the bottom plate. The damage necessitated the reconstruction of this screen wall.

5.7 **Head Flashings to Windows**

5.7.1 In May 2003 Mr Bidwell inspected the exterior of the dwelling but made no criticisms about the head flashings of the windows.

5.7.2 The WHRS Assessor noted, in his report, that there appeared to be occasional defects in the existing head flashings, and ingress paths for gravity leaks. However, he found no evidence of moisture ingress around the heads of the windows. Later in his report he states that this is an ongoing maintenance issue to ensure continuing weathertightness.

5.7.3 Although the Owners have raised the issue of head flashings, and in particular the method of finishing the ends of head flashings over curved-head windows, there do not appear to be any claims for repair costs.

5.8 **Column at Front Entry**

5.8.1 The Owners are claiming that the column at the front entry has been built without the 100 x 100 structural post (shown on the consent drawings), and the framing has been buried in the ground.

5.8.2 Several of the Respondents questioned whether the structural post had, in fact, been left out or whether it had not been detected. When I visited the property I was able to look through the small access hole with a torch, and also able to put my hand through the hole to feel for the post. There is no 100 x 100 post in this column. I am satisfied that the 400 x 400 column has been framed up from 75 x 50 gauged framing, and this framing rests on a concrete pad some 200mm below the top of the porch slab. It would appear that the column had been framed up and clad with Harditex, prior to the porch slab being poured.

5.8.3 The timber framing has completely rotted away at the base and it seems that the Harditex is taking most of the weight from above. This is, therefore, a structural column that has been damaged as a result of leaks. It needs to be rebuilt with a raised foundation pad.

6. REPAIR COSTS

6.1 In section 4 of this Determination I listed the claims being made by the Owners, which included the repair costs. These were a total of $46,190.66 for actual costs spent to date, and a further $18,814.10 estimated costs to complete the remedial work, making a total claim o0f $65,004.76.

6.2 The WHRS Assessor provided his own estimate of costs. These estimates were $37,562.50 for actual work done to date, and a further $6,087.50 to complete the remedial work, making a total of $43,650.00 for both the work already done, and the work yet to be completed. However, there are a number of costs included in the claims but not included in the Assessor's totals that prevent a direct comparison being made. The Assessor did not make any allowance in his estimates for:

• Robson Plumber – repairs for an earlier leak in April 2003	$ 140.63
• Robert Rowe – insurance excess	100.00
• ASB – mortgage fees and interest	964.43
• Gulf Design – professional fees	2,160.00
• Tile Warehouse – floor tiling	128.00
• D Rosewell – floor tilling	385.00
• Baccus Consultancy – professional fees	672.19
	$ 4,550.25

6.3 If these items are deducted from the actual costs claimed by the Owners, then the Assessor's estimate of costs to carry out the remedial work that has already been completed by the Owners is $37,562.50 ($43,650.00 less $6,087.50 = $37,562.50); as compared with the Owners' actual costs of $41,640.41 ($46,190.66 less $4,550.25 = $41,640.41).

6.4 The Assessor told me at the hearing that he did his own estimates as a check against the Owners' costs. He considered that his estimates confirmed that the actual costs incurred by the Owners were about right, indicating that they had carried out a realistic scope of work, and had been charged reasonable rates by the contractors. As there was no evidence to the contrary, I will accept the Owners' actual costs as being reasonable.

6.5 I will now consider some challenges to individual costs that have been raised by Respondents.

(a) Robert Rowe – insurance excess - $100.00; alleged that no documentation has been provided by the Owners; I find that Document C.197 is an invoice from this builder and, in my opinion, is adequate to support this claim; I will allow this cost of $100.00.

(b) ASB – mortgage charges - $964.63; alleged that no documentation has been provided by the Owners; I find that Documents C.227 to 231 are the ASB mortgage documents, which show the terms and conditions of the mortgage; I am prepared to accept the claim for interest as this is compensation for the cost of raising finance for the remedial work – see section 7 for the consideration of interest.

(c) Gulf Design – D S Bidwell - $2,160.00; alleged that this fee has not been paid by the Owners; Mr Bidwell is Mrs Hay's brother – he is a retired architect who has assisted the Claimants from the time that the leaks started to appear – he did not raise this invoice until June 2005, although it is for work done between April and November 2003. I am satisfied that Mr Bidwell would not normally send his brother-in-law an invoice for services rendered, unless he thought that someone else may pay the bill, but that does not mean that his professional advice was unnecessary or should be free. It is reasonable for the Owners to seek professional advice to ascertain the cause and extent of the problem. The amount of $2,160.00 is reasonable, and I will allow this claim.

(d) Tile Warehouse – supply of tiles - $128.00; alleged that there was no remedial work needed to any tiled floors; I find that these tiles replaced damaged carpet in the house and, as such, it is a proper part of the remedial work. I will allow this cost of $128.00.

(e) D Rosewell – tiler - $385.00; same as previous item; I will allow this cost of $385.00.

(f) Rosco Bins – bin hire - $90.00; alleged that no documentation has been provided by the Owners; the Owners told me that they had incurred the cost of a third bin and I accept their evidence; I will allow this cost of $90.00.

(g) Clive Hutley – painter - $695.00; alleged that no documentation has been provided by the Owners; I am satisfied that there would have been some internal repainting to make good after the remedial work – Owners told me that they paid this bill for painting, and I accept their evidence; I will allow this cost of $695.00.

(h) Steve Thompson – carpet - $100.00; alleged that no documentation has been provided by the Owners; I find that the carpet needed to be lifted and re-laid in several areas – Owners told me that they had paid for this work, and I accept their evidence; I will allow this cost of $100.00.

6.6 Mr Jones has raised the issue of betterment in relation to the interior and exterior redecoration costs. He says that as the paintwork was some eleven years old, it would have reached the end of its maintenance life and require repainting. Therefore, he says all the redecoration should not be recovered by the Claimants. At the hearing I suggested that the method of calculation betterment on exterior painting that I had adopted in the Ponsonby Gardens adjudications (WHRS Claim 27; *Gray v Lay & Ors*; 11 March 2005) would be appropriate in this case. I received no objections to that suggestion.

6.7 The issue of betterment is often raised in building disputes and WHRS adjudications. The arguments from both sides are often finely balanced, and I believe have been excellently outlined in the judgment of Fisher J in *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99. After covering the authorities, he concluded on page 108:

> I accept the logic of an approach which makes a deduction for betterment only after allowance for any disadvantages associated with the involuntary nature of the plaintiff's investment eg interest on the premature use of capital to replace a wasting asset which would at some stage have required replacement in any event.

6.8 I propose to adopt the logic of Fisher J and apply it, as best as I can, to the situation on this dwelling. The total cost of the external painting was $6,875.00 plus GST. From the photographs taken during the remedial work I would assess that approximately 50% of the external painting work was on areas that were not affected by the remedial work. Therefore, 50% of $6,875.00 + GST ($3,867.19) are the painting costs that are directly associated with the remedial work, and are recoverable by the Owners as a part of the remedial work.

6.9 When the Owners purchased this house in 2001 they thought that the house looked in good condition. Mr Strickland, an experienced architect who inspected the house in 2001, remembers that it looked good, and appeared to be in good condition. He thought that it may have been "dressed up" to give a good impression to prospective purchasers.

6.10 However, when Mr Bidwell prepared his first report in May 2003 (only 18 months later) he observed that "many cracks appear in exterior plaster. Some have already been filled with a sealant and some painted over…. The paintwork of the whole of the building exterior is in poor condition and not conducive to weathertightness of the plaster cladding."

6.11 We do not know if the exterior of the dwelling had been repainted since it was built in June 1994. It does appear that it had probably been "touched up", but I am satisfied that it was approaching the end of its economic life when the Owners purchased it in October 2001. In Ponsonby Gardens I concluded that exterior painting is normally expected to last about 7-8 years for acrylic paint, and 9-10 years for hi-build paint. From this evidence I will conclude that the repainting of the unaffected areas cannot be recovered by the Owners as a part of the remedial work, as it was work that they would have had to carry out as a part of normal house maintenance. Therefore, I find that the Owners cannot recover $3,867.19 of the repainting costs.

6.12 Therefore, I find that the actual remedial costs to stop the leaks, and repair the consequential damage caused by the leaks, are as follows:

J C McCall Plumbing	$ 269.51
Robson Plumber	140.63
Robert Rowe (insurance excess)	100.00
Gulf Design	2,160.00
Bob Duncan Scaffolding	6,387.24
Wall Board Plastering	580.00
B Jordan Building Contractors	13,685.54
Tile Warehouse	128.00
D Rosewell Tiler	385.00
Rosco Bins	320.00
Clive Hutley – painter	695.00
Steve Thompson – carpet	100.00
Baccus Consultancy Ltd	672.19
Thermoclad Coatings Ltd	19,603.12
	$45,226.23
Less betterment in exterior painting costs	3,867.19
	$41,359.04

6.13 I will now return to the second part of the remedial costs, which is for the work that has not yet been completed. The Owners say that their future costs will be $18,814.20, whereas the Assessor estimates that these costs will be $6,087.50.

6.14 I have already mentioned that there is a difference between the scope of work that the Owners are claiming, and the scope of work anticipated by the Assessor. I have already decided that the scope of work anticipated by the Assessor for the parapets is the correct scope to be used in the assessment of repair costs, and for similar reasons I would prefer the scope as assessed by the Assessor for the fascias, the screen wall, and the column by the front entry.

6.15 Therefore, I find the estimated future remedial costs to stop the leaks, and repair the consequential damage caused by the leaks, to be as follows:

Repair parapets and fascias	$ 4,737.50
Replace columns at front entry	1,350.00
	$ 6,087.50

This means that the total repair costs are $41,359.04 (actual) plus $6,087.50 (future) or a total of $47,446.54.

6.16 It is probable that I will need to assess the repair costs for each area of point of leak. In paragraph 5.3 I set out the points or areas identified by the WHRS Assessor, and then decided that leaks had been confirmed in:

1. Roof parapets;
2. Ends of fascia boards;
3. Screen wall at main entry;
4. Column at front entry.

6.17 A substantial amount of the damage, and the repair costs, must be attributed to the roof parapets. The damage caused by the moisture ingress at the ends of the fascia boards is almost impossible to separate from the damage caused at the parapet ends, but as it has been shown that the damage caused by the fascia problems is relatively small, I think that I can safely assess the extent of this damage would be no more than $1,500.00.

6.18 The repair costs to the column at the front entry have been isolated already, so that these costs can be set at $1,350.00.

6.19 The cost to rebuild the screen wall at the main entry will need to be assessed as best I can from the details given to me about the total repair costs. I would assess that it cost approximately $4,200.00 to carry out this work.

6.20 Therefore, the cost to repair the various leaks was:

1.	Roof parapets	$ 40,396.54
2.	Ends of fascia boards	1,500.00
3.	Screen wall at main entry	4,200.00
4.	Column at front entry	1,350.00
		$ 47,446.54

7. INTEREST

7.1 As mentioned in the previous section of this Determination, the Owners have claimed the costs of raising additional mortgage monies to finance the cost of the remedial work.

7.2 An adjudicator has the power to award interest pursuant to clause 15 in the Schedule to the WHRS Act, which reads:

> (1) Subject to subclause (2), in any adjudication for the recovery of any money, the adjudicator may, if he or she thinks fit, order the inclusion, in the sum for which a determination is given, of interest, at such rate, not exceeding the 90-day bill rate plus 2%, as the adjudicator thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.
>
> (2) Subclause (1) does not authorise the giving of interest upon interest.

7.3 I can exercise my discretion as to the rate and the period in accordance with the normal accepted principles. The majority of the Owners' costs for which they are claiming reimbursement had been incurred prior to October 2003. I do not think that there will be any injustice in setting 1 November 2003 as an appropriate starting date. The 90-day bank bill rate has varied over the period from November 2003 to the present from 5.22% to 7.41% and I set the rate of interest at an average of 8.0% per annum simple.

7.4 Interest will be allowed on all accepted remedial costs that have been paid by the Owners, which are the $41,359.04 shown in paragraph 6.12 above, less the invoice from Gulf Design of $2,160.00 (which has not yet been paid), or a total of $39,199.04.

7.5 I have calculated the interest that is due up to the date of publication of this Determination, which is 10 November 2005, as being a total of $6,357.76. This interest will continue to accrue up to the date of payment.

8. NO LIABILITY DEFENCES

8.1 It is submitted by Ms Rice, on behalf of the Council, that the Owners were aware of the defects that existed at the time of purchase, and this must negate any duty of care, or break the chain of causation. I have been referred to *Grant v Australia Knitting Mills* [1936] AC 86, 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.

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

> 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.

8.3 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.

8.4 When the Owners entered into the Sale & Purchase Agreement with Mr and Mrs Aldridge on 15 August 2001 they wrote in two special conditions, which were:

1. That this agreement is approved by the purchasers' solicitor within 2 days of signing.

2. The house is accepted by an architect's inspection within 2 days of signing.

8.5 The Owners then contacted a Mr Lee Strickland, an experienced registered architect whom they had met socially. Mr Strickland visited the house with Mr Hay within a day or two of being asked, and gave Mr Hay a verbal report as to his professional opinion of the house. Mr Strickland told me about the inspection, and showed me a letter that he had written to the Owners in June 2005 about his visit. This letter is important and deserves to be quoted in full:

> Dear Cedric
> This is a short note outlining my recollection of my visit to the house that you were considering buying and which you now own and occupy. Around September 2001 you asked me as a favour, through my wife Merilyn, to come to the house in Belmont Terrace, Milford that you and Marjory were considering and provide some comment on my impressions of its design and construction. I called by on a fine day around late morning or so and looked around the interior and the exterior for approximately twenty minutes.
>
> The observation was a cursory one and my limited comments were in two parts. I commented favourably on the flat and accessible site which gave good access and a warm north facing patio. In the interior I commented on the attractive 'flow of space' from the entrance lobby, through the lounge and on to the dining area. The circulation area and bedrooms upstairs seemed to be sunny and pleasant.
>
> The exterior of the building, however, displayed features which I considered needed close scrutiny. I noted the apparent lack of clear sill flashings around all four sides in a way that prevented rain water, once it has penetrated the wall framing, from escaping easily. The building featured parapets and concealed gutters, which, prone as they are

> to poor rain water clearance, I considered undesirable features in Auckland's wet climate. Finally, I drew these points together by saying that, while following that brief and limited observation of the house there were no obvious signs of deterioration through the failure of the weathering systems, the building was finished with an acrylic or similar coating over fibre cement sheet or exterior insulated panels. These systems, I said, were fraught with difficulties of design, detailing and construction and that I wouldn't buy a house that featured them and nor would I recommend them to anyone else. If, however, you were to remain interested in buying my advice was that you would be wise to arrange for an established building inspection service to prepare a condition report.
>
> With the brief discussion over, we talked for a short while about other matters and then I left and returned to work.

8.6 Mr Hay agreed with Mr Strickland's recollection of their meeting so that there was no conflict of testimony regarding the inspection, nor the advice that Mr Strickland gave to the Owners. There are two important features about Mr Strickland's evidence.

1. He could see no signs of deterioration or failure of the exterior cladding system. He noticed some cracks at the bottom corners of windows, but he saw no signs that this particular building had any of the problems about which he was so cautious and nervous.

2. He did not recommend that the Owners should not buy the house, but he could not recommend that they buy it without having a building surveyor's report.

8.7 It is clear that the Owners were made aware of the risks of this type of construction and exterior cladding system. Having heard Mr Strickland give evidence, I am left in no doubt that he would have conveyed his views to Mr Hay with clarity and certainty. Does that mean that the Owners knew that they were buying a "leaky building"? I do not think so. There is no evidence to show that the building was leaking at this time, and the first time the Owners noticed any water ingress was in June 2002 after what they described as a "weatherbomb of a storm".

8.8 One of the other authorities that Ms Rice has referred me to is *Baxall Securities v Sheard Walshaw Partnership* [2002] Lloyd's Rep PN 231, in which Justice David Steel said:

> 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 is not 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 v Torfaen BC* [1992] 3 All ER 27 per Sir Donald Nicholls V-C at p.37 (para 54).

8.9 I am not convinced that the Owners knew that they were purchasing a building that leaked. They knew that they were purchasing a house that included design features and materials that were prone to problems. They knew the house was eight years old, but still looked in good 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.

8.10 The defective construction work was not patent, and if the building was leaking in October 2001, the leaks were not noticed by the Owners or the experienced Mr Strickland. Therefore, the design style and cladding materials may have been visible, but the defects were latent. 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 any of the Respondents may be found to owe to the Owners.

8.11 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.

8.12 Mr Black, in his submissions for Mr Lee, submits that the Respondents all have a substantive defence based upon the maxim of *volenti non fit injuria* or "he who consents [to what happens to him] suffers no wrong". For this

defence to succeed, the Respondents must prove that the Owners had full knowledge and appreciation of the nature and extent of the danger (or defects), and that they freely and voluntarily accepted all the risks that would normally be expected to accompany the danger.

8.13 As I have already observed, I am not convinced that the Owners knew that the defects existed. They were made aware of the risk that the defects may have existed. It is rather like saying that if I elect to travel by air knowing that there is a risk that the aeroplane will crash, then I cannot blame anyone else if there is a crash. This is quite different, in my mind, to electing to travel by air when you have been told on good authority that the aeroplane will crash.

9. THE DESIGNER – MR DODDS

9.1 The Owners are claiming that Mr Dodds was the designer of this house, and was working under the trading name of Dodds Design. Their allegations against Mr Dodds are that:

- He failed to provide sufficient and necessary details and notes on the drawings, his preferred source of information, to adequately describe the works, materials and methods to achieve weathertightness.

- He failed to follow manufacturers' recommendations where available.

- He neglected to specify or describe materials actually used in this construction, and did include many that were not.

- He visited the site during construction, and failed to notice variations to his design.

9.2 In response to these allegations, Mr Dodds' main defence is that his work on this construction project finished in September 1993, which is more than ten years before the Owners commenced these proceedings with WHRS. I think that I should consider this main defence, before considering the detailed claims against Mr Dodds.

9.3 The limitation defence is based upon s.91 of the Building Act 1991, or s.393 of the Building Act 2004. These sections state that civil proceedings may not be brought against a person after ten years or more from the date of the act or omission on which the proceedings are based. In this case, the Owners filed these proceedings on 26 November 2003.

9.4 Mr Dodds has already made an application to be removed from this adjudication on the grounds of his limitation defence. I considered his application in my Procedural Order No 4 on 30 July 2005. I declined his application because there were conflicts in the information being given to me by the parties. Now that I have had the opportunity to hear all of the evidence, I can make findings of certain factual matters.

(a) The drawings and specifications had been completed by Mr Dodds in September 1993, and were submitted to the Council on 28 September 1993 for a building consent.

(b) Mr Dodds provided information to the Council on 10 January 1994, in response to a request from the Town Planning Department, and relevant to the Resource Consent application for the two new townhouses.

(c) Mr Dodds was not involved in the non-notified application to infringe the height to boundary control for unit 2, which was granted by the Council in August 1994. This application was handled by Mr Lee or his company.

(d) Mr Dodds was not retained to observe or supervise the construction work. There is insufficient evidence to find that Mr Dodds actually visited this site whilst construction was underway, and if he did visit the site, it was to speak to Mr Sunde about matters that did not relate to this project.

9.5 I am satisfied that Mr Dodds had no involvement in the construction of this house after he had completed the drawings and specifications in September 1993. His discussions with the Town Planners in January 1994 were about the issue of a Resource Consent. There are no claims against Mr Dodds for his work in connection with the Resource Consent.

9.6 The evidence about his possible visits to the construction site in 1994 is vague and unspecific. It is certainly not proven that he visited the site to inspect, supervise or monitor the construction work. The claims that Mr Dodds was in breach of his duty to subsequent purchasers to check the construction work under these circumstances must fail. The claims that Mr Dodds was in breach of his duty to subsequent purchasers for his design work must fail on the grounds of the limitation defence.

10. THE DEVELOPER – MR LEE

10.1 The Owners are claiming that Mr Lee was the owner of this property at the time the dwelling was constructed, and that Mr Lee organised and managed the development, construction and subdivision of the property. Their particular claims are that:

- Mr Lee failed to provide a building complying with the Building Act, Building Code and relevant NZ Standards;
- Mr Lee, being responsible for the development and construction, owes a duty of care to subsequent owners for any defects in the construction;
- Mr Lee was negligent in modifying the approved design without the consent of the designer or Territorial Authority;
- Mr Lee was negligent in failing to employ or supervise adequately skilled tradespeople, and must accept responsibility for any of the failings of Mr Sunde and others.

10.2 In response to this claim, Mr Lee denies that he carried out any of the actual building work, and denies that he has any liability to the Owners in his

capacity as the director of Discovery 4 Ltd, the company which owned the land and was responsible for the development and construction work.

10.3 The first matters that I need to decide are what roles Mr Lee played in this development. He says that not only was the land owned by Discovery 4 Ltd, but that company also was responsible for the development and construction.

10.4 As I have already mentioned, the records show that Mr Lee and his wife were the registered proprietors of this property when the two houses were built, and when the property was subdivided in June 1994. Mr Lee told me that as far as he could remember the company was always used for the residential development work that they did in Auckland. He told me that Discovery 4 Ltd was originally incorporated in order to purchase an existing guest lodge on Mt Ruapehu, and it owned and operated that lodge from 1983 to 1992. Mr and Mrs Lee decided to use this company for residential development, and it undertook three or four developments between 1992 and 1995 on Auckland's North Shore. The company was eventually removed from the Companies Register at the end of 1997.

10.5 Although Mr Lee was under the impression that Discovery 4 Ltd owned this property, the documentary evidence that was shown to me confirms that "Melvyn Vincent Lee of Auckland company director and Judith Mae Lee his wife" were the registered owners at all times until September 1994.

10.6 The records of the Council are inconsistent. The application for Resource Consent in June 1994 was in the names of Mr and Mrs Lee, although Council's correspondence is sometimes addressed to Mr Lee, sometimes to Discovery 4, and sometimes to Discovery 4 Ltd. The application for the Building Consent (28 September 1993) was in the name of Discovery 4 Ltd and signed by Mel Lee as a director. The Council refunded the street crossing bond of $1,500.00 to this company in March 1997, and most of the building inspection and consent documentation was in the name of the company.

10.7 It is my finding that the property was owned at all material times by Mr and Mrs Lee. They were the owners of the property when it was developed as two

houses and then subdivided. Therefore it was the responsibility of Mr and Mrs Lee to ensure that any building work complied with the minimum standard set down by the Building Act 1991. They owed a duty of care to the subsequent owners to take reasonable steps to ensure that these standards were met.

10.8 The Building Act requires all work to comply with the New Zealand Building Code, which is found in the first Schedule to the Building Regulations 1992. The Building Code contains mandatory provisions for meeting the purposes of the Act, and is performance-based. That means it says only what is to be achieved, and not how to achieve it.

10.9 I do not think that it is necessary to repeat in detail all of the provisions in the Building Code, and so will simply summarise by saying that water ingress or leaks into a building contravene parts of E2, E3, B1 and B2 of the Code.

10.10 I also find that the actual design and construction work was organised and managed by Mr Lee in his capacity as a director of Discovery 4 Ltd. I accept Mr Lee's evidence when he says that he did not physically carry out any of the building work. However, I am satisfied that he orchestrated and managed the design and construction of the houses. He contracted out the various tasks to others. Mr Dodds provided design input, and prepared the drawings and specifications for the building consent. Mr Sunde (the third respondent) was the labour-only builder on site. Other contractors installed the plumbing, drainage and electrical installations.

10.11 The Owners are claiming that Mr Lee, whether he was acting as an employee or director of Discovery 4 Ltd, was so personally involved with the design and building work that he must be personally liable to the Owners for his negligence.

10.12 The response to these claims by Mr Black, who made the submissions on behalf of Mr Lee, was that firstly he was not negligent in any of his actions and, secondly, he has no personal liability as he was acting as a director of the company. It is accepted that Discovery 4 Ltd may well have some liability to the Owners, but not Mr Lee.

10.13 As I have already found that Mr Lee owned a duty of care to the Owners in his capacity as the owner of the property at the time construction took place, I do not really need to decide the claims against Mr Lee as a director of the company. However, for the sake of completion I will consider the claims. I have been referred to *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA). The headnote of this reported case reads:

> **Held:** An officer or servant of a company, no matter his status in the company, might in the course of activities on behalf of the company come under a personal duty to a third party, breach of which might entail personal liability. The test as to whether that liability had been incurred was whether there had been an assumption of a duty of care, actual or imputed. Liability depended on the facts, on the degree of implicit assumption of personal responsibility and the balancing of policy considerations. On the formation of his company, Mr Ivory had made it plain to all the world that limited liability was intended. His object would be undermined by imposing personal liability. There was no just and reasonable policy consideration for imposing an additional duty of care. Mr Ivory was not personally liable.
>
> ……..
>
> [list of cited cases]
>
> ……..
>
> *Observations*: (i) (per Cooke P) Where damage to property or other economic loss is the basis of a claim it may be possible to sheet home personal responsibility for an intentional tort such as deceit or knowing conversion, and the individual defendant who is placed in a fiduciary position towards the plaintiff will be personally liable for the breach of that duty (see p 524 line 14).
>
> (ii) In relation to an obligation to give careful and skilful advice, the owner of a one-person company might assume personal responsibility. Something special was required to justify putting a case in that class. To attempt to define in advance what might be sufficiently special would be a contradiction in terms (see p 524 line 35).

10.14 On the other hand, Ms Rice submitted (on behalf of the Council) that our Courts have held that the actual tortfeasor can be responsible for losses suffered by subsequent owners independent or additional to the liability of the company that employed that tortfeasor. She referred me to two cases that address this issue:

- Hardie Boys J in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, p 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.

- Speight J in *Callaghan v Robert Ronayne Ltd (1979)* 1 NZCPR 98, p 105:

> Perhaps because the plaintiff was apprehensive of the financial position of the first defendant (the building company), the second defendants have all been sued, they being the sole directors and sole shareholders of the company. As I understand the pleading it is suggested that these persons are individually liable by virtue of the same acts or omissions (and they are principally omissions) as involved the first defendant. The position is that an employer is liable to a plaintiff in tort on the basis of *respondeat superior* for the tortious acts of employees. Obviously the employee can be personally liable though in practice it is more worthwhile to sue the employer. There is no reason why the same principle should not apply with respect to directors who, in the course of acting on behalf of the company, have personally breached a duty of care owed by them to other persons by virtue of their own personal activity. It is not, however, by virtue of their status as directors but by virtue of their personal actions that such situations arise.

10.15 In the *Morton* case the directors were found to be liable in negligence in respect of certain matters in which they had been personally involved. The case was mentioned in *Trevor Ivory*, when both Cooke P and Hardie Boys J commented that *Morton* was a case where there had been an assumption of responsibility by the directors, which was quite consistent with their findings in *Trevor Ivory.*

10.16 I am not persuaded that I should move away from the clear findings of the Court of Appeal in *Trevor Ivory*. Mr Lee would be entitled to succeed in his defence that he generally has no personal liability when acting as a director of Discovery 4 Ltd, unless it can be shown that there was an assumption of responsibility after a thorough examination of the facts of each particular situation.

10.17 In this project Mr Lee was closely involved in all aspects of this building work. He applied for the building consent and resource consents. He selected all the contractors, and suppliers for the building work. He negotiated the scope of work for all contractors, and the prices. He determined the final choice of materials, he decided when payments should be made. The Claimants say that Mr Lee was the builder and, as such, owed subsequent purchasers a duty of care, and he breached that duty by his negligence.

10.18 The existence of a duty of care has been clearly established in New Zealand in such cases, and I will refer 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 as [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.
>
> The council's position can be more simply stated, again without prejudice to the scope of its duty of care in the present case. Subject to further discussion of that point the legal principles applying are:

1. A council through its building inspector owes a duty of care in tort to future owners.

2. For present purposes that duty is to exercise reasonable care when inspecting the structure to ensure that it complies with the permit and all relevant provisions of the building code and bylaws.

10.19 Mr Lee says that neither he, nor his company, was the builder. He tells me that Mr Sunde was the "builder". Whilst I accept that the meaning of the word "builder" may be difficult to define with precision, I believe that he is saying that a builder is the person who actually builds the house. Traditionally, a builder is the person or organisation who builds houses, but in the modern construction environment houses are built by a variety of different trades under the supervision and management of a building contractor or, sometimes, a project manager.

10.20 Having listened carefully to the evidence, I am satisfied that Mr Sunde was a labour-only contractor whose job was limited to providing labour for the tasks that are normally done by the carpentry trade. Because Mr Sunde would be on the site for much of the building period, he probably assisted Mr Lee (or his company) in the organisation of the subcontractors on the site. This is quite common for labour-only contractors on residential work.

10.21 This leads me to conclude that Discovery 4 Ltd was the real "builder" on this site, and Mr Lee was the only employee or executive director of this company. Mr Lee may not have wielded a hammer or skilsaw, but he was very much involved with the construction work. He made all the important decisions about who to employ and what materials to use. I think that his situation is similar to that of George and Douglas Parker in the *Morton* case, where it was found that they had personal liability where their negligent decisions resulted in defects in the work.

10.22 Was Mr Lee negligent and, if so, did his negligence cause defects in the building work? To answer that question I need to review each of the areas of leak, and will address them in the order in which the WHRS Assessor provided them (refer to paragraph 6.16 above).

10.23 **Roof Parapets** These were not well built in their detail rather than in their structure. The decision to raise the gable walls into gable parapets was a design choice that was either suggested, or at least approved by Mr Lee. It was not a mistake to adopt gable parapets, but it would require more care when building to ensure that the difficult junctions were properly waterproofed. In my view, Mr Lee was required to take steps to make sure that the workmen and subcontractors did this work properly.

10.24 Based on the evidence given to me, I would conclude that these areas of the building have probably leaked, to some extent, from the day when the work was completed. Certain weather conditions, such as heavy rain with the wind from a particular direction, would have caused leaks that may not have been visible from the inside, but certainly would have wetted the timber structure. This would cause swelling of the timber and cause or increase the cracks in the exterior cladding. These cracks allow more water to penetrate the framing – and so the damage caused by a relatively minor defect can escalate.

10.25 Mr Lee says that he had no involvement in the construction or cladding of the parapet walls. He told me that was Mr Sunde's job, or the subcontractors. I do not accept that Mr Lee can successfully delegate his responsibility so easily. He was, in effect, the person in charge of the building work. It seems to me that he took no steps to make sure that these parapets were built properly. They were not built badly, but they were not built properly. I find that Mr Lee was negligent in that he did not take appropriate steps or precautions to ensure that these parapets were built properly.

10.26 **Fascia Boards** This defect is very similar to the roof parapets. There was a design decision to reduce the overhang at the eaves to a minimum dimension. There is, in fact, no eaves to mention. The fascia board is planted directly onto the face of the external cladding. This was not a design "defect" – but a choice to do away with the traditional overhang at the eaves. One of the consequences of this choice was that there has to be special care taken to ensure that water does not get around the back of the fascia board.

10.27 The tradesmen who did this work did not take that special care. As a result water penetrated around the ends of the fascia board, and worked its way into the backing board and, eventually, the timber structure. As with the parapets, it was Mr Lee's responsibility to take reasonable steps to ensure that the fascia was fixed, or flashed, properly. I find that Mr Lee was negligent in that he did not take appropriate steps, or precautions, to ensure that this work was done properly.

10.28 **Screen Wall** There were two problems with the screen wall. Firstly, there was no concrete nib or foundation wall at the bottom to raise the timber bottom plate above the surrounding ground. That is an inexcusable defect which should never have been allowed to happen. Secondly, moisture was getting into the timber framing from above, either from the parapet leaks, or from leaks around the capping to the screen wall.

10.29 Both of these problems should have been avoided if Mr Lee had been doing his job with a reasonable amount of care. It must have been obvious that the nib wall was missing during construction. This should have been picked up by the 'builder' very quickly, and it would be a simple case of negligence to have not noticed the omission. Mr Lee was negligent to have allowed this screen wall to have been constructed in this way.

10.30 **Column at Entry** This is similar to the missing concrete nib wall under the screen wall. A structural post was left out, and replaced by the decorative column. The timber framing was taken about 200mm below ground level, which was so obviously wrong that I am surprised that any tradesman would allow his standards to drop so far. Mr Lee did not notice this or, if he did, he did nothing to correct the situation. I have no hesitation in finding that Mr Lee was negligent in this matter.

10.31 **Conclusion** I find that Mr Lee was negligent in his organisation and management of the building work, and thereby was in breach of his duty of care that he owed to the Owners. His negligence or breach led to water penetration and resultant damage. Therefore, he is liable to the Owners for

the full amount of the damages assessed in paragraph 6.20 above, a total of $47,446.54, plus the interest calculated in paragraph 7.5 above, which is:

Damages – as para 6.20	$ 47,446.54
Interest – as para 7.5	6,357.76
	$ 53,804.30

11. THE BUILDER - MR SUNDE

11.1 The Owners are claiming that Mr Sunde was the builder of this house, and that he was responsible for supervising all work done on the site. Therefore, he must be responsible for all of the defects.

11.2 Mr Sunde says that he was not the "builder" of this house, but was a labour-only builder for the main contract trades. He told me that he was not employed or paid to supervise the other trades, or to act as a project manager. He did not arrange for Council's inspections, did not arrange or co-ordinate the other trades, did not arrange material supplies, nor did he pay other trades or material suppliers. Most of this evidence was not refuted by the Owners or the other respondents.

11.3 His situation was not unusual in the residential construction industry in the 1990's. He was a self-employed carpenter, who was under a fixed-price contract to provide the labour to erect the carpentry components of the house. He cannot be held responsible for the building materials that were supplied to him by Mr Lee. He cannot be held responsible for the work done by the other trades. He can only be responsible for his own work and his own workmanship.

11.4 Mr Sunde did not claim that he operated as a director or employee of a company. He did not attempt to hide from being responsible for his own work. Therefore, I need to decide the extent of his work, and whether his negligence has contributed or caused any of the leaks.

11.5 **Roof Parapets** Mr Sunde would have constructed the timber framing at the parapets and he would have fixed the building paper over the framing. He

fixed the windows in place, and it was my understanding from the evidence that the textured coating and its backing boards were installed by another contractor. The problems at the parapet were due to the harditex not being properly flashed or sealed, and defects at the junctions. Mr Sunde did not do this work, and had no responsibility to ensure that the other contractors did their work satisfactorily.

11.6 **Fascia Boards** Although no-one actually asked Mr Sunde, I would presume that he installed the fascia boards. The flashing or protection of the backs and ends should have been done when the boards were being fixed. I find that Mr Sunde was negligent when he installed the fascia without proper protection.

11.7 **Screen Wall** I have already detailed the problems with this screen wall. Mr Sunde constructed the timber framework, and he must have realised that the bottom plate would be buried below the surrounding paving. He should have constructed a concrete nib to raise the timber framing out of harm's way. He was negligent not to do so.

11.8 **Column at Entry** The situation is similar to the screen wall. Mr Sunde must have known that the post was not there, and he then proceeded to construct the column as a support to the beam above. He must have realised that the framing would be buried below the surrounding paving. He was negligent to have constructed this column in this manner.

11.9 **Conclusion** I find that Mr Sunde was negligent in the manner in which he carried out some of his work, and thereby was in breach of his duty of care that he owed to the Owners. His negligence has led to water penetration and resultant damage to the following extent:

Ends of fascia boards	$ 1,500.00
Screen wall at entry	4,200.00
Column at front entry	1,350.00
Interest – proportional	944.69
	$ 7,994,69

12. THE NORTH SHORE CITY COUNCIL

12.1 The Owners are claiming that the Council was negligent in the issuing of the building consent, and failed to carry out appropriate inspections during construction prior to issuing the Code Compliance Certificate.

12.2 It was my understanding that it was now well established in New Zealand that both those who build houses, and those who inspect the building work, have a duty of care to both the building owners and to subsequent purchasers.

12.3 This has been established, not only by the cases that I have mentioned when considering Mr Lee's liability (see paragraph 10.18 above), but also by court cases such as:

- Cooke P in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, at p 519

  A main point is that, whatever may be the position in the United Kingdom, homeowners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the byelaws. Casey J illuminates this aspect in his judgment in this case. The linked concepts of reliance and control have underlain New Zealand case law in this field from *Bowen* onwards.

- Greig J in *Stieller v Porirua City Council* [1983] NZLR 628, at p 635

  The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonable, prudent Council will do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect which can cause very substantial damage to a building. This as I have said is not a question of foundations but rather of the exterior finishing and materials.

Does *Hamlin* Apply?

12.4 Ms Rice has raised a number of issues that she says must put serious question marks over the presumption that the Council does, in fact, owe a duty of care to the Owners. She submits that the Owners are not "*Hamlin*-

type" homeowners, and that they cannot receive the protection afforded by the *Hamlin* decisions.

12.5 I have read and considered the submissions made by Ms Rice on this important and fundamental issue. As I mentioned at the hearing, I 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 Ms Rice that *Hamllin* should not apply to this present case. A summary of my reasons follows.

12.6 Ms Rice says that the Owners' house in Belmont Terrace 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.

12.7 The next matter of differentiation cited by Ms Rice was that Mr Hamlin was unable to protect himself contractually by virtue of the sale and purchase agreement; whereas the Owners in this case were able to 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.

12.8 Ms Rice says that, in this case, the Claimants obtained a pre-purchase report from an architect prior to committing themselves to the purchase. Mr Hamlin did not obtain a pre-purchase report, but as has been mentioned elsewhere, it was not usual to obtain such reports when Mr Hamlin made his purchase, and he was buying a new building. However, I have already considered the impact of the pre-purchase report in the section entitled "No Liability Defences' and may also need to consider it when I review claims for contributory negligence.

12.9 It is submitted that the Claimants 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 Hay told me that he took comfort from the fact that the Council had issued a Code Compliance Certificate. It seems quite clear that the Claimants did place reliance upon the Council.

Three Meade Street

12.10 Ms Rice referred me to the recent decision of Venning J in *Three Meade Street Ltd v Rotorua District Council* [2005) 1 NZLR 504, in which the Court warned that *Hamlin* would not apply to all situations, and said (at p 510)

> [24] In choosing to follow its earlier decisions and affirming that councils owed a duty of care to house owners and subsequent owners and, if negligent, were liable for defects caused or contributed to by their officers' negligence, the Court of Appeal confirmed the particular social and historical context of home ownership in New Zealand. Richardson J (as he then was) in particular referred to the following long-standing features of the New Zealand housing scene during the 1970s and 1980s which had led the Courts to consistently uphold duties of care on the part of local authorities:
>
> - The high proportion of occupier-owned housing.
> - Much housing construction including low-cost housing was undertaken by small-scale cottage builders for individual purchasers.
> - The nature and extent of government support for private home building and ownership.
> - The surge in house building construction in the buoyant economy of the 1950s and 1960s.
> - The wider central and local government support for private home building, principally the standard model building bylaw.
> - It had never been a common practice for new house buyers, including those contracting with builders, to commission engineering or architectural examinations or surveys of the building or proposed building.

12.11 And further, at p 513:

> [40] However, nor can it be said that under no circumstances will a council owe a duty to commercial and/or industrial property owners. That is so, because the different types of commercial/industrial property, both buildings and ownership structures, are almost limitless. There are a myriad of situations that may arise. A 30-floor high-rise office complex will involve different considerations to the construction of a corner dairy, yet on

> one view both are commercial in nature. A number of "commercial" buildings may have dual use. A commercial block of shops may have flats above them providing residence for owner/occupiers of the units. A multi-storey apartment may be a commercial development but provide for residential use. The value of the property in issue may vary widely. A commercial warehouse in Timaru might be worth $100,000 as opposed to an architecturally designed home in Auckland worth $5m.

12.12 Whilst I would accept that Venning J 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.

12.13 It would be my conclusion that the *Three Meade Street* case must be distinguished from the situation in this adjudication.

12.14 I have also been referred to the High Court of Australia's decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 205 ALR, in which it was held that a design engineer should not be held liable to subsequent owners for structural defects in the foundation design of a commercial property. It is submitted by Ms Rice that this is another clear indication that Australasian Courts are beginning to question their earlier decisions in relation to the existence and extent of duties owed by those involved in the original construction of dwellings to subsequent owners.

12.15 I do not see that the *Woolcock* decision is justification for me to depart from the principles enunciated in *Hamlin*. *Woolcock* involved a commercial building, and it concerned the potential liability of an engineer. Whilst it does indicate an ongoing debate about the extent of the duty of care in relation to the building defects, it can easily be distinguished from the situation that I am considering in this adjudication.

The Building Consent

12.16 The Owners have levelled a number of criticisms against both the Designer and 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, so that I told Mr Bidwell at the beginning of the hearing that if his clients wanted to maintain these claims then details and particulars of the alleged inadequacies in the documents must be produced.

12.17 As a result of this, Mr Bidwell did produce a hand-written list of the matters that were either missed off the drawings, or inadequately shown on the drawings, which he says have contributed to the weathertightness problems on this building. I do not propose to make findings on each and every matter raised by Mr Bidwell, because I do not see that as being a particularly productive method of resolving this issue. 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.

12.18 In 1994, 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 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.

12.19 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. Mr Jones, the expect called by the Council, considered the documentation provided was typical of the level of information and documentation that was provided to Councils in 1993/94 by developers and builders, as well as individual homeowners. In his opinion the drawings and specifications were quite adequate, and the Council acted appropriately in issuing a building consent enabling the works to proceed.

12.20 On balance, I do prefer the view of Mr Jones on this matter. Mr Bidwell's list generally covers matters that would have been helpful if they had been included on the drawings, but not essential for the issuing of a building consent. I am not satisfied that the Council has been shown to have been negligent in its issuing of the building consent for this dwelling.

Duty to Inspect

12.21 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.

12.22 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.

12.23 Ms Rice made submissions on whether an independent duty of care should be found to be owed by the Council to subsequent purchasers arising out of the issue of the Code Compliance Certificate. It is my understanding that the Owners were not raising such a claim, and were relying on the claim that the Council was negligent in its inspections of the construction work.

12.24 I will now turn to consider whether the Council's building inspectors should have noticed the defects that have been found to exist in the house. I was given evidence by Mr Jones and Mr Light as to whether they thought these defects should have been detected, and have carefully considered this, and the other evidence.

12.25 **Roof Parapets** The finished appearance of the parapets, with metal cap flashings and abutment flashings, would not give any indication that the work had been inadequately done, or that it would leak. The top surface of the parapets was sloping (to promote the discharge of water), and there was no widespread knowledge in 1994 that this type of construction should be treated as "high risk" and thus need special inspections or attention.

12.26 I do not think that it is reasonable to expect a building inspector in 1994 to have noticed that these parapets were not built properly. I find that the Council was not negligent in that it failed to notice these defects.

12.27 **Fascia Boards** The method by which the fascia was fixed directly to the backing boards would have been obvious at any time, and the poorly detailed exposed ends of the fascias could be seen at final inspection time. A reasonably prudent building inspector should have realised that there was a high probability that it would leak. I would conclude that it was negligent not to have noticed this problem.

12.28 **Screen Wall** The problems with the capping to this wall are similar to some of the problems with the parapet cappings. I would not have expected the building inspector to have noticed the defects. However, the inspector should have noticed that the bottom timber plate was buried beneath the

surrounding ground levels. This could have been noticed when the foundations were poured – there was no nib poured at that time.

12.29 It has been suggested that this was a minor defect, and related to a non-load-bearing wall. It has also been suggested that the ground levels and/or concrete porch slab were poured (or raised) after the Council had completed its final inspection. I do not accept that either of these reasons justifies the Council's failure to notice this glaringly obvious defect. I find that the building inspector was negligent in failing to see this defect.

12.30 **Column at Entry** This is similar to the missing concrete nib under the screen wall. Mr Jones says that the inspector would have assumed that the column was decorative, and that it concealed the structural post. It would be a part of the inspector's job to check that the structure was properly built. He obviously did not check this support post. I find that the building inspector was negligent in this respect.

12.31 **Conclusion** I find that the Council was negligent in the carrying out of its duties to inspect as more fully explained in the preceding paragraphs, and thereby in breach of the duty to take care that it owed to the Owners. This negligence has led to water penetration and damage, to the extent that it is liable to the Owners for,

Ends of fascia boards	$ 1,500.00
Screen wall at entry	4,200.00
Column at front entry	1,350.00
Interest – proportional	944.69
	$ 7,994.69

13. CONTRIBUTORY NEGLIGENCE

13.1 Both Ms Rice and Mr Black have made submissions on the affirmative defence of contributory negligence in respect of all, or part of the Owners' claims.

13.2 The background details have already been provided in section 8 of this Determination. The Respondents submit that the Owners failed to obtain a pre-purchase inspection by a professional building surveyor, and this 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.

13.3 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.

13.4 As I have already noted, the Owners were advised by Mr Strickland to obtain a report from an established building inspection service. They chose not to act upon that advice. It is likely that a building surveyor would have detected some areas of moisture ingress at the ends of the parapets, or at some of the difficult junctions between differing materials. I say likely, but not certainly.

13.5 Ms Rice has referred me to previous decisions where the claimants failed to obtain pre-purchase inspections. These were referred to me in one of my earlier Ponsonby Gardens adjudications (*Shepherd v Lay & Ors* – WHRS Claim

939, 11 March 2005). I am satisfied that there have been cases where the Courts have reduced the amount of damages on the grounds that purchasers have failed to obtain pre-purchase inspections, or failed to take the steps which a reasonably prudent purchaser would have been expected to have taken.

13.6 This is, in my view, a case where the Owners have failed to take the steps which were recommended by an experienced professional adviser. Mr Strickland told Mr Hay to obtain a building surveyor's report on the house. This was sound advice. Mr Hay elected not to take that advice, as he decided that, on balance, the house was what he and his wife wanted, despite the fact that it may have had some problems. He decided not to find out whether it had problems, or the size and extent of any problems.

13.7 It is submitted by Ms Rice that, as Mr Hay admitted to being a regular reader of the *NZ Herald,* then it was likely that he had read many of the ten articles published in the *Herald* prior to October 2001. These articles warned about the growing number of rotting houses in New Zealand. However, when asked about his awareness of the publicity on leaky homes, Mr Hay told me that he did not become consciously aware of these sorts of problems until he found problems with his own house. I accept this evidence from Mr Hay and do not find that the Owners were particularly aware of the "leaky homes" problems at the time they purchased this property.

13.8 However, I am satisfied that this is a case where the Owners have made a considerable 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 weathertightness problems of this house, I think that it is likely that the building surveyor would have warned them about problems on the near horizon. They may have been able to avoid the purchase. They may have been able to renegotiate the purchase price.

13.9 After considering all of the evidence and circumstances, I find that the Owners should bear 75% of the damages, which is a finding that the defence

of contributory negligence will succeed to the amount of 75% of the damages suffered by the Owners.

14. CONTRIBUTION BETWEEN RESPONDENTS

14.1 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.

14.2 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 …

14.3 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.

Roof Parapets

14.4 I have found that the only party who has any responsibility for these defects, and the resultant damage, is Mr Lee. Therefore, the damages relating to the roof parapets will be paid to the Owners as follows:

Mr Lee - 100%	$ 45,809.61
Less 75% Contribution by Owners	34,357.21
	$ 11,452.40

Fascia Boards

14.5 The main burden of responsibility for the problems around the fascia boards must be borne by those who failed to carry out this work properly. This must mean that Mr Lee and Mr Sunde will shoulder the main proportion of the responsibility, and I would assess their contributions as being equal. When setting these contributions I have carefully reviewed the influence that each party had, or should have had, on the performance of the work; and the contribution that each party made towards the defects that unfortunately occurred. It is a process of reducing levels of responsibility to a statistical formula. There is some case law that considers and sets percentage contributions between builder, engineer and territorial authorities, but there is not much case law that compares site developers, supervisors, labour-only builders or the like.

14.6 These defects were clearly visible at the time the Council carried out its inspections, and particularly the final inspection. It should not have been missed. I will set the Council's level of responsibility at no less than half of that allocated to the other two respondents.

14.7 Therefore, the damages relating to the fascia boards will be paid by the respondents to the Owners as follows:

Total cost of remedial work		$ 1,500.00
Add proportion of interest		201.00
Less 75% Contribution by Owners		- 1,275.75
		$ 425.25
Mr Lee	40%	$ 170.10
Mr Sunde	40%	170.10
The Council	20%	85.05
		$ 425.25

Screen Wall

14.8 None of the respondents can offer a reasonable excuse or reason for this serious defect, although it is fortunate that it only affected a relatively small

amount of the work. I have some difficulty in finding that any of them should bear more responsibility than the others. Therefore, I think that it is reasonable for the three respondents to make equal contributions for this damage.

14.9 Therefore, the damages relating to the screen wall will be paid by the respondents to the Owners as follows:

Total cost of remedial work	$ 4,200.00
Add proportion of interest	562.80
Less 75% Contribution by Owners	- 3,572.10
	$ 1,190.70
Mr Lee	$ 396.90
Mr Sunde	396.90
The Council	396.90
	$ 1,190.70

Column at Entry

14.10 This matter is similar to the screen wall in terms of the allocation of contributions. For the same reasons, I find that the three respondents will make equal contributions for this damage.

14.11 Therefore, the damages relating to the column at the front entry will be paid by the respondents to the Owners as follows:

Total cost of remedial work	$ 1,350.00
Add proportion of interest	180.90
Less 75% Contribution by Owners	- 1,148.19
	$ 382.71
Mr Lee	$ 127.57
Mr Sunde	127.57
The Council	127.57
	$ 382.71

Summary

14.12 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:

Mr Lee

Roof parapets	$ 11,452.20
Fascia boards	170.10
Screen wall at entry	396.90
Column at front entry	127.57
	$ 12,146.97

Mr Sunde

Fascia boards	$ 170.10
Screen wall at entry	396.90
Column at front entry	127.57
	$ 694.57

The Council

Fascia boards	$ 85.05
Screen wall at entry	396.90
Column at front entry	127.57
	$ 609.52

15. COSTS

15.1 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.

15.2 Mr Dodds is claiming costs of $2,244.37 on the grounds that he should have been removed when he made his application for removal. He was obliged to remain as a party because the Claimants alleged that he had been involved with the construction work. I have found, after considering all the evidence, that Mr Dodds was correct.

15.3 Mr Dodds had applied to be removed from this adjudication, and I considered his application in Procedural Order No 4 on 30 July 2005. The reason why I did not remove him was because there was a conflict in the evidence that I was to hear. Having now heard the evidence, I am of the opinion that the claim, that Mr Dodds was materially involved with the design and construction work after 26 November 1994, was without substantial merit. He should not have been put to the trouble and expense of attending the hearing.

15.4 Mr Dodds was not represented at the hearing by his lawyer, as he told me that he was trying to keep his costs to a minimum. However, he did incur legal fees of $2,244.37 for advice and guidance throughout this adjudication. He is entitled to recover some of these costs from the Claimants, and I will direct the Claimants to pay to Mr Dodds an amount of $800.00 as a contribution towards his costs.

16. ORDERS

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

16.2 Mr Lee is ordered to pay to the Owners the amount of $13,451.08. Mr Lee is entitled to recover a contribution of up to $694.57 from Mr Sunde, and/or a contribution of up to $609.52 from the North Shore City Council, for any amount that he has paid in excess of $12,146.97 of the amount of $13,451.08 to the Owners.

16.3 Mr Sunde is ordered to pay to the Owners the amount of $1,998.67. Mr Sunde is entitled to recover a contribution of up to $1,304.10 from Mr Lee, and/or a contribution of up to $609.52 from the North Shore City Council, for any amount that he has paid in excess of $694.57 of the amount of $1,998.67 to the Owners.

16.4 North Shore City Council is ordered to pay to the Owners the amount of $1,998.67. The Council is entitled to recover a contribution of up to $1,389.15 from Mr Lee, and/or a contribution of up to $694.57 from Mr Sunde, for any amount that it has paid in excess of $609.52 of the amount of $1998.67 to the Owners.

16.5 As a clarification of the above orders, if all Respondents meet their obligations contained in these orders, it will result in the following payments to the Owners:

From Mr Lee	$ 12,146.97
From Mr Sunde	694.57
From the Council	609.52
	$ 13,451.06

16.6 The Owners are ordered to pay to Mr Dodds the amount of $800.00 as a contribution towards his costs in this adjudication.

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

NOTICE

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

Dated this 10th day of November 2005.

A M R DEAN
Adjudicator